Hearing Date: October 27, 2011
J:\MANDATES\2003\TC\03-tc-14 (TB Control)\TC\TOC.doc

ITEM 5

TEST CLAIM

FINAL STAFF ANALYSIS

AND

PROPOSED STATEMENT OF DECISION

Health and Safety Code Sections 121361, 121362, 121363, 121364, 121365, 121366, 121367, 121368, and 121369, as added or amended by Statutes 1993, Chapter 676; Statutes 1994, Chapter 685; Statutes 1997, Chapters 116 and 294; and Statutes 2002, Chapter 763

Tuberculosis Control
03-TC-14

County of Santa Clara, Claimant

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Exhibit J

EXHIBIT A

Sheet2

State of California
COMMISSION ON STATE MANDATES
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562
CSM 1 (2 91)

TEST CLAIM FORM

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Claim No. 03-TC-14

Local Agency or School District Submitting Claim

County of Santa Clara

Contact Person

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Representative Organization to be Notified

California State Association of Counties

This test claim alleges the existence of a reimbursable state mandated program within the meaning of section 17514 of the Government Code and section 6, article XIIIB of the California Constitution. This test claim is filed pursuant to section 17551(a) of the Government Code.

Identify specific section(s) of the chaptered bill or executive order alleged to contain a mandate, including the particular statutory code section(s) within the chaptered bill, if applicable.

Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997 and Chapter 763, Statutes of 2002

IMPORTANT: PLEASE SEE INSTRUCTIONS AND FILING REQUIREMENTS FOR COMPLETING A TEST CLAIM ON THE REVERSE SIDE.

Name and Title of Authorized Representative

Dave Elledge, Controller-Treasurer

Telephone No.

(408) 299-5200

Signature of Authorized Representative

David D. Elledge

Date

9/23/03

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
The County of Santa Clara

Tuberculosis Control

Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, Chapter 116, Statutes of 1997; and Chapter 763, Statutes of 2002

STATEMENT OF THE CLAIM

A. MANDATE SUMMARY

During the 1993-1994 session, two bills were passed that substantially changed the manner that Tuberculosis (TB) cases were handled. The first of the two, Chapter 676, empowered local health officers and allowed greater control over those infected or believed to be infected with TB. Upon the issuance of an order from a local health officer, an individual infected with TB or suspected of having TB must submit to an examination, be admitted to a health facility, complete a prescribed course of medication, follow a course of directly observed therapy, not be allowed into the workplace or isolated at home. In addition, an individual infected with TB or reasonably believed to have TB cannot be discharged, released, or transferred from health facilities or penal institutions without noticing the local health officer and creating a treatment plan which the local health officer must review. Health officers are required to provide notice regarding parolees with TB. Finally, local health officers are empowered to detain individuals with TB in a treatment facility upon issuance of a health officer order with specified notice requirements for up to 60 days subject to a court hearing process which involves the patient's right to counsel.

The second bill, Chapter 685, made small changes to clarify the statutes created by Chapter 676. This Chapter ensures that the health officer have the ability to delegate his duties to the head of medical services in penal institutions in addition to his deputies. This Chapter also provides that the health officer review treatment plans connected with the discharge, release or transfer of an individual infected with TB out of a hospital of penal institution within a 24 hour period.

Health and Safety Code §121357 (former §3279.3)[1] places the state department as the lead agency for TB control and prevention. Section 121358, added by Chapter 294, Statutes of 1997, sets forth that correctional facilities shall not be used to house individuals detained as part of TB control and provides for co-operation between state and local health jurisdictions in obtaining appropriate places for such housing. Section 121360.5, added by Chapter 763, Statutes of 2002, sets forth an optional program for certification of tuberculin skin test technicians.

Health and Safety Code §121361 (former §3281) currently reads:

> (a)(1) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:
> (A) A person known to have active tuberculosis disease.
> (B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.
> (2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 121362 is approved by a local health officer of the jurisdiction in which the health facility is located. Any treatment plan submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of the receipt of that plan.
> (3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges in this paragraph shall occur only after the notification and treatment plan required by Section 121362 have been received by the local health officer.
> (4) This subdivision shall not apply to any transfer within the state correctional system or to any interfacility transfer occurring within a local detention facility system.
> (b) No health facility shall, without first complying with subdivision (e), transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility. This subdivision shall not apply to any transfer within the state correctional system or to any

[1] In 1995, the Health and Safety Code was updated and code sections renumbered. The code sections quoted reflect these changes.

interfacility transfer occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) Any discharge, release, or transfer described in subdivision (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 121362 has been received by the local health officer. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution, the notification and treatment plan shall be submitted within 24 hours of discharge, release or transfer.

(2) When a person described in paragraph (1) of subdivision (a) is released on parole from a state correctional institution, the notification and written treatment plan specified in the subdivision shall be provided to both the local health officer for the county in which the parolee intends to reside and to the local health officer for the county in which the state correctional institution is located.

(3) Notwithstanding any other provision of law, the Department of Corrections shall inform the parole agent, and other parole officials as necessary, that the person described in paragraph (1) of subdivision (a) has active or suspected active tuberculosis disease and provide information regarding the need for evaluation or treatment. The parole agent and other parole officials shall coordinate with the local health officer in supervising the person's compliance with medical evaluation or treatment related to tuberculosis, and shall notify the local health officer if the person's parole is suspended as a result of being absconded from supervision.

(f) No health facility that declines to discharge, release, or transfer a person pursuant to this section shall be civilly or criminally liable or subject to administrative sanction therefor. This subdivision shall apply only if the health facility complies with this section in good faith.
(g) Nothing in this section shall relieve a local health officer of any other duty imposed by this chapter.

Section 121362 (former §3282) currently reads:

Each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease shall promptly report to the health officer at the times that the health officer requires, but no less frequently that when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or discontinues care. The initial disease notification report shall include an individual treatment plan that includes the patient's name, address, date of birth, tuberculin skin test results, pertinent radiologic, microbiologic, and pathologic reports whether final or pending, and any other information required by the local health officer. Subsequent reports shall provide updated clinical status and laboratory results, assessment of treatment adherence, name of current care provider if the patient transfers care, and any other information required by the local health officer. A facility discharge, release, or transfer report shall include all pertinent and updated information required by the local health officer not previously reported on any initial or subsequent report, and shall specifically include a verified patient address, the name of the medical provider who has specifically agreed to provide medical care, clinical information used to assess the current infectious state, and any other information required by the local health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plan. Nothing in this section shall authorize the

> disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 7 (commencing with Section 120975 of, Chapter 8 (commencing with Section 121025) of, and Chapter 10 (commencing with Section 121075) of Part 4 of Division 105.
> In the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the assigned parole agent, when known, or the regional parole administrator, when there are reasonable grounds to believe the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the local health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

These sections mandate communication between local health officers, their staff, detention facility staff and/or detention facility medical staff, and others. A treatment plan must be created by medical staff of the detention facility prior to discharge, release, or transfer of a person infected with TB. This treatment plan must be transmitted to and reviewed by the health officer and/or staff via telephone, facsimile, courier or other means. The health officer and staff are also charged with the communication with and review of treatment plans created by medical providers and hospital staff. This information exchange will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for local health officers, their staff, detention facility staff and/or detention facility medical staff, and others.

Section 121363 (former §3283) currently reads:

> Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to the health officer for examination. Each health care provider shall promptly notify the local health officer of the referral. When required by the local health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the local health officer or designee. If any abnormality consistent with tuberculosis disease is found, steps satisfactory to the local health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment. Contacts shall be reexamined at times and in a manner as the local health officer may require. When requested by the local health officer, a

> health care provider shall report the results of any examination related to tuberculosis of a contact.

This section acts a safety net mandating that the health officer examine contacts of an individual known to have TB when a health care provider will not do so. The health officer is also required to maintain oversight of the case to ensure that contacts are reexamined properly which means increased communication as discussed above between the health officer and health care providers.

Section 121364 (former §3284) currently reads:

> (a) Within the territory under his or her jurisdiction, each local health officer may order examinations for tuberculosis infection for the purposes of directing preventative measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the local health officer has reasonable grounds to determined are at heightened risk of tuberculosis exposure.
> (b) An order for examination pursuant to this section shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

This is the first of several sections that deal with the health officer order. This section addresses the order for examination and requires that health officer orders for examination be in writing.

Section 121365 (former §3285) currently reads:

> Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections. In carrying out the investigations, each local health officer shall follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department. If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer may issue any orders he or she deems necessary to protect the public health or the health of any other person, and may make application to a court for enforcement of the orders. Upon the receipt of information that any order has been violated,

the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof.

The orders may include, but shall not be limited to, any of the following:

(a) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility for the appropriate examination for active tuberculosis disease of a person who is known to have active tuberculosis disease, or a person for who there are reasonable grounds to believe that the per has active tuberculosis disease and who is unable or unwilling voluntarily to submit to the examination by a physician or by the local health officer. Any person whom the health officer determines should have an examination for tuberculosis disease may have the examination made by a physician and surgeon of his or her own choice who is licensed to practice medicine under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code under terms and conditions as the local health officer shall determine on reasonable grounds to be necessary to protect the public health. This section does not authorize the local health officer to mandate involuntary anergy testing.

(b) An order requiring a person who has active tuberculosis disease to complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, to follow required infectious control precautions for tuberculosis disease. This subdivision does not allow forcible or involuntary administration of medication.

(c) An order requiring a person who has active tuberculosis disease and who is unable or unwilling otherwise to complete an appropriate prescribed course of medication for tuberculosis disease to follow a course of directly observed therapy. This subdivision does not allow forcible or involuntary administration of medication.

(d) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has infectious tuberculosis disease, or who presents a substantial likelihood of having infectious tuberculosis disease, based on proven epidemiologic evidence, clinical evidence, X-ray readings, or tuberculosis laboratory test results.

(2) The local health officer finds, based on recognized infection control principles, that there is a substantial likelihood the person may transmit tuberculosis to others because of his or her inadequate separation from others.

(e) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has active tuberculosis disease, or has been reported to the health officer as having active tuberculosis disease with no subsequent report to the health officer of the completion of an appropriate prescribed course of medication for tuberculosis disease.

(2) There is a substantial likelihood, based on the person's past or present behavior, that he or she cannot be relied upon to participate in or complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, follow required infectious control precautions for tuberculosis disease. The behavior may include, but is not limited to, refusal or failure to take medication for tuberculosis disease, refusal or failure to keep appointments or treatment for tuberculosis disease, refusal or failure to complete the treatment for tuberculosis disease, or disregard for infection control precautions for active tuberculosis disease.

(f) An order for exclusion from attendance at the workplace for persons with infectious tuberculosis disease. The order may, also, exclude the person from any place when the local health officer determines that the place cannot be maintained in a manner adequate to protect others against the spread of tuberculosis disease.

(g) An order for isolation of persons with infectious tuberculosis disease to their place of residence until the local health officer has determined that they no longer have infectious tuberculosis disease.

(h) This section shall apply to all persons except those incarcerated in a state correctional institution.

(i) This section shall not be construed to require a private hospital or other private treatment facility to accept any patient without a payment source, including county responsibilities under Section 17000 of the Welfare and Institutions Code, except as required by Sections 1317 et seq. or by federal law.

This section expands on the health officer order of §121364 describing the types of health officer orders available to control the spread of TB. They include: order to detain for purposes of examination, order to complete medication, order for direct observed therapy,

order to detain to prevent spread of TB, order to detain to ensure compliance with medication regimen, order to exclude presence at work, and order to isolate at home. These orders will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for local health officers, their staff and others. To carry out the orders will necessitate the use of staff time to locate and detain individuals by transporting them to and from places for examination and/or housing, to ensure the individual remains at home or is excluded from the workplace as well as the costs related to the detention itself including, but not limited to, housing and use of security or law enforcement personnel.

Section 121366 (former §3285.1) currently reads:

> The local health officer may detain in a hospital or other appropriate place for examination or treatment, a person who is the subject of an order of detention issued pursuant to subdivision (a), (d) or (e) of Section 121365 without prior court order except that when a person detained pursuant to subdivision (a), (d) or (e) of Section 121365 has requested release, the local health officer shall make an application for a court order authorizing the continued detention within 72 hours after the request or, if the 72-hour period ends on a Saturday, Sunday, or legal holiday, by the end of the first business day following the Saturday, Sunday, or legal holiday, which application shall include a request for a expedited hearing. After the request for release, detention shall not continue for more than five business days in the absence of a court order authorizing detention. However, in no event shall any person be detained for more than 60 days without a court order authorizing the detention. The local health officer shall seek further court review of the detention within 90 days following the initial court order authorizing detention and thereafter within 90 days of each subsequent court review. In any court proceeding to enforce a local health officer's order for the removal or detention of a person, the local health officer shall prove the particularized circumstances constituting the necessity for the detention by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by counsel and upon the request of the person, counsel shall be provided.

This section sets forth the procedure by which a individual detained pursuant to a health officer order obtains court review. The responsibility for bringing the matter before the court is not on the shoulders of the detainee but rather on the health officer. The detainee need only request release to trigger a carefully timed procedure which, if not followed

precisely, will result in his automatic release. Incumbent within the procedure is the health officer's need for counsel to put forth the case in court, the detainee's right to counsel and that counsel shall be provided upon request. This court process will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for local health officers, their staff, their counsel, counsel's staff as well as counsel for the detainee such as the public defender, public defender staff and others. Hearings will necessitate the following be done on an expedited hearing calendar: preparation of declarations, review of records, preparation of witnesses, assembling evidence, exchange of discovery, drafting of pleadings, and any other procedures necessary to ensure the matter is well-prepared, placed on calendar and heard timely. Also necessary is the attendance at the hearing of counsel for both sides as well as witnesses from the health officer's staff, and the detainee. Other costs include, but are not limited to, transportation of the detainee to and from court, security costs, copy costs, witness fees, and filing fees.

Section 121367 (former §3285.2) currently reads:

> (a) An order of a local health officer pursuant to Section 121365 shall set forth all of the following:
> (1) The legal authority under which the order is issued, including the particular sections of state law or regulations.
> (2) An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order.
> (3) The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected.
> (4) The orders shall be in writing, and shall include the name of the person, the period of time during which the order shall remain effective, the location, payer source if known, and other terms and conditions as may be necessary to protect the public health. Upon issuing an order, a copy of the order shall be served upon the person named in the order.
> (b) An order for the detention of a person shall do all of the following:
> (1) Include the purpose of the detention.
> (2) Advise the person being detained that he or she has the right to request release from detention by contacting a person designated on the local health officer's order at the telephone number stated on the order and that the detention shall not continue for more that five business days after the request for release, in the absence of a court order authorizing the detention.

(3) Advise the person being detained that, whether or not he or she requests release from detention, the local health officer is required to obtain a court order authorizing detention within 60 days following the commencement of detention and thereafter shall further seek court review of the detention within 90 days of the court order and within 90 days of each subsequent court review.
(4) Advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.
(5) Be accompanied by a separate notice that shall include, but not be limited to, all of the following additional information:
(A) That the person being detained has the right to request release from detention by contacting a person designated on the local health officer's order at a telephone number stated on the order, and that the detention shall not continue for more that five business days after the request in the absence of a court order authorizing the detention.
(B) That he or she has the right to arrange to be advised and represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.
(C) That he or she may supply the addresses or telephone numbers of not more than two individuals to receive notification of the person's detention, and that the local health officer shall, at the patient's request, provide notice within the limits of reasonable diligence to those people that the person is being detained.

This section sets forth the requirements for the issuance of a health officer order. Health officer staff must ensure that the order in writing and that it include information regarding the reasons for detention, the right to counsel and the right to request release from detention. In addition to the health officer order, this section requires the preparation of a separate notice on the issues of right to counsel, the right to request release and the ability to have others noticed of the detention. Incumbent in that notice is that health officer staff will make reasonable efforts to contact the persons designated by the detainee. Finally, a copy of the health officer order must be served on the person to be detained. This section will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them, especially training on the proper service of legal documents, for local health officers, their staff, their counsel, counsel's staff and others.

Section 121368 (former §3285.3) currently reads:

> Notwithstanding any inconsistent provision of Section 121365, 121366 or 121367, all of the following shall apply:
> (a) A person who is detained solely pursuant to subdivision (a) of Section 121365 shall not continue to be detained beyond the minimum period of time required, with the exercise of all due diligence, to make a medical determination of whether a person who is suspected of having tuberculosis disease, has active tuberculosis or whether a person who has active tuberculosis disease has infectious tuberculosis disease. Further detention of the person shall be authorized only upon the issuance of a local health officer's order pursuant to subdivision (d) or (e) of Section 121365.
> (b) A person who is detained solely for the reasons described in subdivision (d) of Section 121365 shall not continue to be detained after he or she ceases to be infectious or after the local health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis disease after his or her release from detention.
> (c) A person who is detained for the reasons described in subdivision (e) of Section 121365 shall not continue to be detained after he or she has completed an appropriate prescribed course of medication.

This section sets forth the situations that trigger a release from detention which include those situations where the public health is no longer in danger. This section will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for local health officers, their staff, and others.

Section 121369 (former §3285.4) currently reads:

> For purposes of Sections 121365, 121366, and 121367, all of the following shall apply:
> (a) If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law.
> (b) Nothing in those sections shall be construed to permit or require the forcible administration of any medication without prior court order.

> (c) Any and all orders authorized under those sections shall be made by the local health officer. His or her authority to make the orders may be delegated to the person in charge of medical treatment of inmates in penal institutions within the local health officer's jurisdiction, or pursuant to Section 7. The local health officer shall not make any orders incorporating by reference any other rules or regulations.

This section requires the use of interpreters when necessary and allows the health officer to delegate his duties to the head of medical treatment in penal institutions. The use of interpreters and the delegation of authority will necessitate the drafting, review and establishment of policies, procedures, forms and protocols and the training to implement them for local health officers, their staff, detention facility staff and/or detention facility medical staff, and others.

The net effect of this legislation is to cause an increase in the paperwork that must be reviewed, created, drafted, transmitted, maintained, and in the case of a health officer order to detain, served by the health officer and staff. In addition, the health officer and staff must prepare for and appear at hearings to obtain court orders to detain. The local detention facilities are also burdened by an increase in paperwork that must be created, drafted, transmitted and maintained for purposes of releasing or transferring individuals infected with TB. Costs are incurred by housing, detaining, transporting, and following up on individuals infected with TB. The legislation necessitates that counsel to the health officer, be it county counsel, city attorney or district attorney, review legal forms, serve documents, and prepare for and appear at hearings for court orders for detention. The local public defender, private defender or conflicts attorney, when counsel is requested by the detainee, must also prepare for and appear at hearings. Finally, a program of this magnitude and complexity requires the drafting, review and establishment of policies, procedures, forms and protocols as well as training to accomplish the above-stated requirements in compliance with law. Thus, the total costs of this program are reimbursable.

The County of Santa Clara does not have complete estimates on the cost of discharging this program, but estimates that the costs will exceed $1000.00 per year.

B. LEGISLATIVE HISTORY PRIOR TO 1975

There was no requirement prior to 1975, nor in any of the intervening years, until the passage of Chapter 676, Statutes of 1993, and Chapter 685, Statutes of 1994, filed on October 4, 1993, and September 21, 1994, respectively, which mandated the use of health officer orders, notices and hearings and the creation and review of discharge, release or transfer and initial disease notification reports.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

As related above, the mandated activities are contained in Health and Safety Code §§121361, 121362, 121363, 121364, 121365, 121366, 121367, 121368, and 121369. These sections directly relate to the reimbursable provisions of this test claim.

D. COST ESTIMATES

The County of Santa Clara does not have complete estimates on the cost of discharging this program, but estimates that the costs exceed $1000.00 per year.

E. REIMBURSABLE COSTS MANDATED BY THE STATE

The costs incurred by the County of Santa Clara as a result of the statute on which this test claim is based are all reimbursable costs as such costs are "costs mandated by the State" under Article XIII B (6) of the California Constitution, and Government Code §17500 *et seq.* of the Government Code. Section 17514 of the Government Code defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975."

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by this statute clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The sections of the law claimed involve local health officers, their departments, local detention facility staff and medical staff, local government counsel and public defenders. Only local government employs health officers and staff for the control of disease and promotion of health within the jurisdiction. And, only governmental entities maintain facilities for the incarceration of individuals.

Finally, only local government employs county counsels, city attorneys, district attorneys and public defenders for equal representation of parties in an adjudication of legal cases. Thus, this requirement is unique to government.

Mandate Carries Out a State Policy

From the legislation, it is clear that the Legislature wishes carry out its charge to protect the public health through expansion and definition of the powers of the local health officer to contain the spread of TB and through mandating communication between health officers and medical personnel in hospitals, treatment facilities and detention facilities. In addition, this legislation carries out the constitutional policy of an individual's right to be heard, right to counsel and equal access to the courts by ensuring that the individual who has been detained to prevent the spread of TB has counsel and an opportunity to challenge the detention.

In summary, these statutes mandate that local government bear the burden of the increase in paperwork, the requirement of increased communication, the use of health officer orders, the hearing process to challenge health officer orders, and the requirement of counsel in putting such court cases forward. The County of Santa Clara believes that the TB control program as set forth above satisfies the constitutional requirements for a mandate.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code §17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code §17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the above disclaimers have any application to the test claim herein stated by the County of Santa Clara.

CONCLUSION

The enactment of Chapter 676, Statutes of 1993 and Chapter 685, Statutes of 1994 imposed a new state mandated program and cost on the County of Santa Clara by establishing a program for the control of TB which resulted in additional burdens on local health officers, local government attorneys, and local detention facility staff. The mandated program meets all of the criteria and tests for the Commission on State Mandates to find a reimbursable state mandated program. None of the so-called disclaimers or other statutory or constitutional provisions that would relieve the State from its constitutional obligation to provide reimbursement have any application to this claim.

G. CLAIM REQUIREMENTS

The following elements of this test claim are provided pursuant to Section 1183, Title 2, of the California Code of Regulations:

Exhibit 1: Chapter 676, Statutes of 1993
Exhibit 2: Chapter 685, Statutes of 1994
Exhibit 3: Chapter 294, Statutes of 1997
Exhibit 4: Chapter 116, Statutes of 1997
Exhibit 5: Chapter 763, Statutes of 2002

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 23 day of September, 2003, at San Jose, California, by:

David J. Elledge

Dave Elledge, Controller-Treasurer
County of Santa Clara

DECLARATION OF DAVE ELLEDGE

I, Dave Elledge, make the following declaration under oath:

I am the Controller-Treasurer for County of Santa Clara. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

I declare that I have examined the County of Santa Clara's State mandated duties and resulting costs, in implementing the subject law, and find that such costs are, in my opinion, "costs mandated by the State", as defined in Government Code, Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 23 day of September, 2003, at San Jose, California.

David S. Elledge

Dave Elledge
Controller-Treasurer
County of Santa Clara

BILL NUMBER: AB 803 CHAPTERED 10/04/93
BILL TEXT

CHAPTER 676
FILED WITH SECRETARY OF STATE OCTOBER 4, 1993
APPROVED BY GOVERNOR OCTOBER 1, 1993
PASSED THE ASSEMBLY SEPTEMBER 10, 1993
PASSED THE SENATE SEPTEMBER 9, 1993
AMENDED IN SENATE SEPTEMBER 7, 1993
AMENDED IN SENATE AUGUST 30, 1993
AMENDED IN SENATE AUGUST 18, 1993
AMENDED IN SENATE AUGUST 17, 1993
AMENDED IN SENATE JULY 12, 1993
AMENDED IN ASSEMBLY APRIL 15, 1993

INTRODUCED BY Assembly Member Gotch

FEBRUARY 25, 1993

An act to amend Section 3351 of, to add Sections 3003, 3006, 3054, 3279.3, 3281, 3282, 3283, 3284, 3285.1, 3285.2, 3285.3, and 3285.4 to, and to repeal and add Section 3285 of, the Health and Safety Code, relating to communicable disease.

LEGISLATIVE COUNSEL'S DIGEST

AB 803, Gotch. Communicable disease: tuberculosis.

(1) Existing law requires the State Department of Health Services to maintain a program for the control of tuberculosis.

This bill would authorize the State Director of Health Services and a local health officer to order examinations for tuberculosis infection, as defined, of certain persons.

The bill would require the department to be the lead agency for all tuberculosis control and prevention activities at the state level.

The bill would, with certain exceptions, prohibit a person known to have active tuberculosis disease, as defined, or a person for whom the medical staff has reasonable grounds to believe has active tuberculosis disease from being discharged from a licensed health facility, or penal institution, or

transferred, until certain notification and in some situations, treatment plan approval requirements are met.

The bill would require a health care provider who provides treatment to, or a person in charge of a health facility or clinic providing outpatient treatment for, a person with active tuberculosis, to report to the local health officer, as prescribed. The bill would require the health care provider to examine, or cause to be examined all household contacts of the person, as specified.

This bill would require a health officer to notify the medical officer of the parole region when there are reasonable grounds to believe that a parolee under the jurisdiction of the Department of Corrections has active tuberculosis disease. By imposing new duties upon a local entity, this bill would impose a state-mandated local program.

(2) Existing law requires a local health officer to use every available means to ascertain the existence of, and investigate, all reported or suspected cases of tuberculosis in the infection stages, to make examinations and isolate, or quarantine and isolate certain persons, following local rules and regulations, and to make an examination order and isolation or quarantine order under certain circumstances, as prescribed.

This bill would in addition authorize the local health officer, under prescribed conditions, to issue an order authorizing removal to, or admission into, a health facility or other treatment facility, an order requiring completion of an appropriate prescribed course of medication, an order to follow a course of directly observed therapy, or an order for exclusion from the workplace. The bill would authorize a health officer to issue an order for isolation of persons with infectious tuberculosis in their residence. The order would be required to include certain information, including payer source. The bill would authorize a health officer to issue an order authorizing removal to, or admission into, a health facility or other treatment facility, as prescribed. The bill would exclude persons incarcerated in a state correctional institution from being subject to one of those orders.

The bill would prohibit anything in that provision from being construed to permit or require forcible administration of medication.

This bill would authorize a health officer to remove to, or detain in, a hospital or other place for examination or

treatment persons subject to an order under this act, as prescribed.

(3) Existing law provides that any person who violates or fails to comply with an order of a health officer directing his or her isolation or examination is guilty of a misdemeanor.

This bill would instead provide that any person who violates or fails to comply with any order described in (2) is guilty of a misdemeanor. By changing the definition of a crime, the bill would impose a state-mandated local program.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that for certain costs no reimbursement is required by this act for a specified reason.

Moreover, this bill would provide that, if the Commission on State Mandates determines that this bill contains other costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3003 is added to the Health and Safety Code, to read:

3003. As used in this division, a person has "active tuberculosis disease" when either one of the following occur:

(a) A smear or culture taken from any source has tested positive for tuberculosis and the person has not completed the appropriate prescribed course of medication for tuberculosis disease.

(b) There is radiographic, current clinical, or laboratory evidence sufficient to establish a medical diagnosis of tuberculosis for which treatment is indicated.

SEC. 2. Section 3006 is added to the Health and Safety Code, to read:

3006. As used in this division the following terms have the following meanings, unless the context indicates otherwise:

(a) "Infectious tuberculosis disease" means active or suspected active tuberculosis disease in an infectious state.

(b) "Tuberculosis infection" means the latent phase of tuberculosis, during which the infected person cannot spread tuberculosis to others.

(c) "Heightened risk of tuberculosis exposure" means likely exposure to persons with infectious tuberculosis disease.

(d) "The appropriate prescribed course of medication for tuberculosis disease" means that course recommended by the most recent guidelines of the department, the most recent guidelines of the Centers for Disease Control and Prevention, or the most recent guidelines of the American Thoracic Society.

(e) "Directly observed therapy" means the appropriately prescribed course of treatment for tuberculosis disease in which the prescribed antituberculosis medications are administered to the person or taken by the person under direct observation.

(f) An "examination" for tuberculosis infection or disease means conducting tuberculosis specific tests, including, but not limited to, Mantoux tuberculin skin tests, laboratory examination, and X-rays, as recommended by the most recent guidelines of any of the following:

(1) The local health officer.

(2) The department.

(3) The Centers for Disease Control and Prevention.

(4) The American Thoracic Society.

(g) "State correctional institution" means a prison, institution, or other facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority.

(h) "Local detention facility" is defined in Section 6031.4 of the Penal Code.

(i) "Penal institution" means either a state correctional institution or a local detention facility.

(j) "Health facility" means a licensed health facility as defined in Sections 1250, 1250.2, and 1250.3.

SEC. 3. Section 3054 is added to the Health and Safety Code, to read:

3054. (a) The state director may order examinations for tuberculosis infection in the following persons for the purpose of directing preventive measures:

(1) Persons in close contact with persons with infectious tuberculosis disease.

(2) Other persons for whom the state director has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination for tuberculosis infection shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

SEC. 4. Section 3279.3 is added to the Health and Safety Code, to read:

3279.3. The state department shall be the lead agency for all tuberculosis control and prevention activities at the state level.

SEC. 5. Section 3281 is added to the Health and Safety Code, to read:

3281. (a) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(1) A person known to have active tuberculosis.

(2) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis.

In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 3282 is approved by a health officer.

Persons specified in this subdivision may be discharged from a penal institution only after a written treatment plan described in Section 3282 is received by a health officer. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(b) No health facility shall transfer a person described in paragraph (1) or (2) of subdivision (a) to another health facility unless subdivision (e) is complied with. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in paragraph (1) or (2) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in paragraphs (1) and (2) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written

treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) Persons specified in paragraph (1) or (2) of subdivision (a), in subdivision (b), in subdivision (c), or in subdivision (d) may be discharged, released, or transferred, as the case may be, only after notification and a written treatment plan pursuant to Section 3282 has been received by the local health officer. When prior notification is not possible or would jeopardize the public safety or the safety and security of the penal institution, then the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

SEC. 6. Section 3282 is added to the Health and Safety Code, to read:

3282. Each health care provider who treats a person for active tuberculosis, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis shall promptly report to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis, and when a person ceases treatment for tuberculosis. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or discontinues care. The report shall include an individual treatment plan that indicates the name of the medical provider who has specifically agreed to provide medical care, the address of the person, and any other pertinent clinical or laboratory information required by the health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plans. Nothing in this section shall authorize the disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 1.11 (commencing with Section 199.20) of, Chapter 1.12 (commencing with Section 199.30) of, and Chapter 1.13 (commencing with Section 199.42) of, Division 1.

In the case of a parolee under the jurisdiction of the Department of Corrections, the health officer shall notify the medical officer of the parole region when there are reasonable

grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

SEC. 7. Section 3283 is added to the Health and Safety Code, to read:

3283. Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to the local health officer for examination. Each health care provider shall promptly notify the health officer of the referral. When required by the health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the health officer or designee. If any abnormality consistent with the symptoms of tuberculosis disease is found, steps satisfactory to the health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment. Contacts shall be reexamined at times and in a manner as the health officer may require. When requested by the health officer, a health care provider shall report the results of any examination related to tuberculosis of a contact.

SEC. 8. Section 3284 is added to the Health and Safety Code, to read:

3284. (a) Within the territory under his or her jurisdiction, each health officer may order examinations for tuberculosis infection for the purposes of directing preventive measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the health officer has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination pursuant to this section shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

SEC. 9. Section 3285 of the Health and Safety Code is repealed.

SEC. 10. Section 3285 is added to the Health and Safety Code, to read:

3285. Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active

uberculosis disease in the jurisdiction, and to ascertain the ources of those infections. In carrying out the nvestigations, each health officer shall follow applicable ocal rules and regulations and all general and special rules, egulations, and orders of the state department. If the health fficer determines that the public health in general or the ealth of a particular person is endangered by exposure to a erson who is known to have active tuberculosis disease, or to a erson for whom there are reasonable grounds to believe has ctive tuberculosis disease, the health officer may issue any rders he or she deems necessary to protect the public health or he health of any other person, and may make application to a ourt for enforcement of the orders. The orders shall be in riting, and shall include the name of the person, the period of ime during which the order shall remain effective, the ocation, payor source, and other terms and conditions as may be ecessary to protect the public health. Upon issuing an order, copy of the order shall be served upon the person named in he order. Upon the receipt of information that any order has een violated, the health officer shall advise the district ttorney of the county in which the violation has occurred, in riting, and shall submit to the district attorney the nformation in his or her possession relating to the subject matter of the order, and of the violation or violations thereof.

Any and all orders authorized under this chapter shall be ade by the health officer, and his or her authority to make the rders may be delegated to the person in charge of medical reatment of inmates in penal institutions within the territory, r pursuant to Section 7. The health officer shall not make ny orders incorporating by reference any other rules or egulations.

The orders may include, but shall not be limited to, any of he following:

(a) An order authorizing the removal to, or admission into, a ealth facility or other treatment facility for appropriate examination for tuberculosis of a person who is known to have active tuberculosis, or a person for whom there are reasonable grounds to believe that the person has active tuberculosis and who is unable or unwilling voluntarily to submit to the examination by a physician or by the health officer. Any person whom the health officer determines should have an examination for tuberculosis may have the examination made by a physician of

of medication for tuberculosis and, if necessary, follow required contagion precautions for tuberculosis. The behavior may include, but is not limited to, refusal or failure to take medication for tuberculosis, refusal or failure to keep appointments or treatment for tuberculosis, refusal or failure to complete the treatment for tuberculosis, or disregard for contagion precautions for tuberculosis.

(f) An order for exclusion from attendance at the workplace for persons with infectious tuberculosis. The order may, also, exclude the person from any place when the health officer determines that the place cannot be maintained in a manner adequate to protect others against the spread of tuberculosis.

(g) An order for isolation of persons with infectious tuberculosis to their place of residence until the health officer has determined that they no longer have infectious tuberculosis.

(h) This section shall apply to all persons except those incarcerated in a state correctional institution.

(i) This section shall not be construed to require a private hospital or other private treatment facility to accept any patient without a payment source, including county responsibilities under Section 17000 of the Welfare and Institutions Code, except as required by Sections 1317 et seq. or by federal law.

SEC. 11. Section 3285.1 is added to the Health and Safety Code, to read:

3285.1. The health officer may remove to, or detain in, a hospital or other place for examination or treatment a person who is the subject of an order of removal or detention issued pursuant to Section 3285 without a prior court order except that when a person detained pursuant to Section 3285 has requested release, the health officer shall make an application for a court order authorizing the detention within 72 hours after the request or, if the 72-hour period ends on a Saturday, Sunday, or legal holiday, by the end of the first business day following the Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After the request for release, detention shall not continue for more than five business days in the absence of a court order authorizing detention. However, in no event shall any person be detained for more than 60 days without a court order authorizing the detention. The health officer shall seek further court review of the detention within 90 days following the initial court

his or her own choice who is licensed to practice medicine under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code under terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.

(b) An order requiring a person who has active tuberculosis to complete an appropriate prescribed course of medication for tuberculosis and, if necessary, to follow required contagion precautions for tuberculosis. This subdivision does not allow the forceable or involuntary administration of medication. If an order to complete therapy is not complied with, the health officer may issue orders pursuant to subdivision (d), (e), (f), or (g).

(c) An order requiring a person who has active tuberculosis and who is unable or unwilling otherwise to complete an appropriate prescribed course of medication for tuberculosis to follow a course of directly observed therapy. This subdivision does not allow forceable or involuntary administration of medication. If an order to follow a course of directly observed therapy is not complied with, the health officer may issue orders pursuant to subdivision (d), (e), (f), or (g).

(d) An order for the removal to, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has infectious tuberculosis, or who presents a substantial likelihood of having infectious tuberculosis, based upon proven epidemiologic evidence, clinical evidence, X-ray readings, or tuberculosis laboratory test results.

(2) The health officer finds, based on recognized infection control principles, that there is a substantial likelihood the person may transmit tuberculosis to others because of his or her inadequate separation from others.

(e) An order for the removal to, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has active tuberculosis disease, or has been reported to the health officer as having active tuberculosis disease with no subsequent report to the health officer of the completion of an appropriate prescribed course of medication for tuberculosis.

(2) There is a substantial likelihood, based on the person's past or present behavior, that he or she cannot be relied upon to participate in or complete an appropriate prescribed course

order authorizing detention and thereafter within 90 days of each subsequent court review. In any court proceeding to enforce a health officer's order for the removal or detention of a person, the health officer shall prove the particularized circumstances constituting the necessity for the detention by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by counsel and upon the request of the person, counsel shall be provided.

SEC. 12. Section 3285.2 is added to the Health and Safety Code, to read:

3285.2. (a) An order of a health officer pursuant to Section 3285 shall set forth all of the following:

(1) The legal authority under which the order is issued, including the particular sections of state law or regulations.

(2) An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order.

(3) The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected.

(b) An order for the removal and detention of a person shall do all of the following:

(1) Include the purpose of the detention.

(2) Advise the person being detained that he or she has the right to request release from detention by contacting a person designate on the health officer's order at the telephone number stated on the order and that the detention shall not continue for more than five business days after the request, in the absence of a court order authorizing the detentions.

(3) Advise the person being detained that, whether or not he or she requests release from detention, the health officer is required to obtain a court order authorizing detention within 60 days following the commencement of detention and thereafter shall further seek court review of the detention within 90 days of the court order and within 90 days of each subsequent court review.

(4) Advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(5) Be accompanied by a separate notice that shall include, but not be limited to, all of the following additional information:

(A) That the person being detained has the right to request release from detention by contacting a person designated on the health officer's order at a telephone number stated on the order, and that the detention shall not continue for more than five business days after the request in the absence of a court order authorizing the detention.

(B) That he or she has the right to arrange to be advised and represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(C) That he or she may supply the addresses or telephone numbers of friends or relatives to receive notification of the person's detention, and that the health officer shall, at the patient's request, provide notice to a reasonable number of those people that the person is being detained.

SEC. 13. Section 3285.3 is added to the Health and Safety Code, to read:

3285.3. Notwithstanding any inconsistent provision of Section 3285, 3285.1 or 3285.2, all of the following shall apply:

(a) A person who is detained solely pursuant to subdivision (a) of Section 3285 shall not continue to be detained beyond the minimum period of time required, with the exercise of all due diligence, to make a medical determination of whether a person who is suspected of having tuberculosis, has active tuberculosis or whether a person who has active tuberculosis has infectious tuberculosis. Further detention of the person shall be authorized only upon the issuance of a health officer's order pursuant to subdivision (d) or (e) of Section 3285.

(b) A person who is detained solely for the reasons described in subdivision (d) of Section 3285 shall not continue to be detained after he or she ceases to be infectious or after the health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis after his or her release from detention.

(c) A person who is detained for the reasons described in subdivision (f) of Section 3285 shall not continue to be detained after he or she has completed an appropriate prescribed course of medication.

SEC. 14. Section 3285.4 is added to the Health and Safety Code, to read:

3285.4. For the purposes of Sections 3285, 3285.1, and 3285.2, all of the following shall apply:

(a) If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law.

(b) Nothing in those sections shall be construed to permit or require the forcible administration of any medication without a prior court order.

(c) Any and all orders authorized under those sections shall be made by the health officer and his or her authority to make the orders shall be delegated only pursuant to Section 7. The health officer shall not make any orders incorporating by reference any other rules or regulations.

SEC. 15. Section 3351 of the Health and Safety Code is amended to read:

3351. Inasmuch as the orders provided for by Section 3285 are for the protection of the public health, any person who, after service upon him or her of an order of a health officer as provided in Section 3285 violates or fails to comply with the order, is guilty of a misdemeanor. Upon conviction thereof, in addition to any and all other penalties that may be imposed by law upon the conviction, the person may be ordered by the court confined until the order of the health officer shall have been fully complied with or terminated by the health officer, but not exceeding one year from the date of passing judgment upon the conviction, further, the court, upon suitable assurances that the order of the health officer will be complied with, may place any person convicted of a violation of the order of the health officer upon probation for a period not to exceed two years, upon condition that the order of the health officer be fully complied with, further, upon any subsequent violation of the order of the health officer, the probation shall be terminated and confinement as provided for in this section shall be ordered by the court.

SEC. 16. Section 3355 of the Health and Safety Code is amended to read:

3355. The district attorney of the county in which a violation of Sections 3285 and 3351 may be committed, shall prosecute all such violations and, upon the request of a health officer, shall prosecute, as provided in Section 3351, violations of any order of a health officer made and served as

provided in Section 3285 or Section 3002.

SEC. 17. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Moreover, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Also, notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution. Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

BILL NUMBER: AB 804 CHAPTERED 09/21/94
BILL TEXT

CHAPTER 685
FILED WITH SECRETARY OF STATE SEPTEMBER 21, 1994
APPROVED BY GOVERNOR SEPTEMBER 20, 1994
PASSED THE ASSEMBLY AUGUST 26, 1994
PASSED THE SENATE AUGUST 23, 1994
AMENDED IN SENATE AUGUST 9, 1994
AMENDED IN SENATE JUNE 30, 1994
AMENDED IN ASSEMBLY MAY 6, 1993
AMENDED IN ASSEMBLY APRIL 22, 1993

INTRODUCED BY Assembly Member Gotch

FEBRUARY 25, 1993

An act to amend Sections 3003, 3006, 3281, 3282, 3283, 3284, 3285, 3285.1, 3285.2, 3285.3, 3285.4, and 3351 of the Health and Safety Code, relating to communicable disease.

LEGISLATIVE COUNSEL'S DIGEST

AB 804, Gotch. Communicable disease: tuberculosis.

Existing law requires the State Department of Health Services to maintain a program for the control of tuberculosis and administer the funds made available to it by the state for the care of tuberculosis patients.

Existing law, with certain exceptions, prohibits discharge or release of persons from certain facilities if the person is known to have tuberculosis, or if there are reasonable grounds to believe the person has tuberculosis, unless certain procedures are followed, including providing a notice and report to the local health officer.

This bill would clarify that local health officers may delegate duties and authority relating to the issuance of related orders, and would make conforming and other technical changes. The bill would require review of related treatment plans within 24 hours, and would thereby impose a state-mandated local program.

Existing law requires that related delegations of authority

by the local health officer be made pursuant to specified provisions of law relating to delegation of authority to a deputy.

This bill would provide that delegation may also be made to the person in charge of medical treatment of inmates at penal institutions. The bill would specify that in cases of court enforcement of an order, confinement may be accomplished by placement in any appropriate facility, penal institution, or dwelling specifically approved by the local health officer.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3003 of the Health and Safety Code is amended to read:

3003. As used in this division, a person has "active tuberculosis disease" when either one of the following occur:

(a) A smear or culture taken from any source in the person's body has tested positive for tuberculosis and the person has not completed the appropriate prescribed course of medication for active tuberculosis disease.

(b) There is radiographic, current clinical, or laboratory evidence sufficient to support a medical diagnosis of tuberculosis for which treatment is indicated.

SEC. 2. Section 3006 of the Health and Safety Code is amended to read:

3006. As used in this division the following terms have the following meanings, unless the context indicates otherwise:

(a) "Infectious tuberculosis disease" means active or

suspected active tuberculosis disease in an infectious state.

(b) "Tuberculosis infection" means the latent phase of tuberculosis, during which the infected person cannot spread tuberculosis to others.

(c) "Heightened risk of tuberculosis exposure" means likely exposure to persons with infectious tuberculosis disease.

(d) "The appropriate prescribed course of medication for tuberculosis disease" means that course recommended by the health officer, the most recent guidelines of the department, the most recent guidelines of the Centers for Disease Control and Prevention, or the most recent guidelines of the American Thoracic Society.

(e) "Directly observed therapy" means the appropriately prescribed course of treatment for tuberculosis disease in which the prescribed antituberculosis medications are administered to the person or taken by the person under direct observation of a health care provider or a designee of the health care provider approved by the local health officer.

(f) An "examination" for tuberculosis infection or disease means conducting tests, including, but not limited to, Mantoux tuberculin skin tests, laboratory examination, and X-rays, as recommended by any of the following:

(1) The local health officer.

(2) The most recent guidelines of the state department.

(3) The most recent guidelines of the Centers for Disease Control and Prevention.

(4) The most recent guidelines of the American Thoracic Society.

(g) "State correctional institution" means a prison, institution, or other facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority.

(h) "Local detention facility" is defined in Section 6031.4 of the Penal Code.

(i) "Penal institution" means either a state correctional institution or a local detention facility.

(j) "Health facility" means a licensed health facility as defined in Sections 1250, 1250.2, and 1250.3.

(k) "Health officer" or "local health officer" includes his or her designee.

SEC. 3. Section 3281 of the Health and Safety Code is amended to read:

3281. (a) (1) A health facility, local detention facility,

or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(A) A person known to have active tuberculosis disease.

(B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.

(2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 3282 is approved by a local health officer of the jurisdiction in which the health facility is located. Treatment plans submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of receipt of the plans.

(3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges described in this paragraph shall occur only after the notification and treatment plan required by Section 3282 have been received by the local health officer.

(4) This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(b) No health facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility unless subdivision (e) is complied with. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the

chief medical officer of the local detention facility receiving the person.

(e) All discharges, releases, or transfers described in subdivisions (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 3282 has been received by the local health officer. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution, then the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

SEC. 4. Section 3282 of the Health and Safety Code is amended to read:

3282. Each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease shall promptly report to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or discontinues care. The initial disease notification report shall include an individual treatment plan that includes the patient name, address, date of birth, tuberculin skin test results, pertinent radiologic, microbiologic, and pathologic reports whether final or pending, and any other information required by the local health officer. Subsequent reports shall provide updated clinical status and laboratory results, assessment of treatment adherence, name of current care provider if patient transfers care, and any other information required by the local health officer. A facility discharge, release, or transfer report shall include all pertinent and updated information required by the local health officer not previously reported on initial or subsequent reports, and shall specifically include verified patient address, the name of the medical provider who has specifically agreed to provide medical care, clinical information used to assess the current infectious state, and any other information required by the local health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing

outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plans. Nothing in this section shall authorize the disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 1.11 (commencing with Section 199.20) of, Chapter 1.12 (commencing with Section 199.30) of, and Chapter 1.13 (commencing with Section 199.42) of, Division 1.

In the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the medical officer of the parole region or the physician and surgeon designated by the Director of Corrections when there are reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the local health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

SEC. 5. Section 3283 of the Health and Safety Code is amended to read:

3283. Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to the local health officer for examination. Each health care provider shall promptly notify the local health officer of the referral.

When required by the local health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the local health officer or designee. If any abnormality consistent with tuberculosis disease is found, steps satisfactory to the local health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment.

Contacts shall be reexamined at times and in a manner as the local health officer may require. When requested by the local health officer, a health care provider shall report the results of any examination related to tuberculosis of a contact.

SEC. 6. Section 3284 of the Health and Safety Code is amended to read:

3284. (a) Within the territory under his or her jurisdiction, each local health officer may order examinations for tuberculosis infection for the purposes of directing preventive measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the

local health officer has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination pursuant to this section shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

SEC. 7. Section 3285 of the Health and Safety Code is amended to read:

3285. Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections. In carrying out the investigations, each local health officer shall follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department. If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer may issue any orders he or she deems necessary to protect the public health or the health of any other person, and may make application to a court for enforcement of the orders. Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof.

The orders may include, but shall not be limited to, any of the following:

(a) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility for appropriate examination for active tuberculosis disease of a person who is known to have active tuberculosis disease, or a person for whom there are reasonable grounds to believe that the person has active tuberculosis disease and who is unable or unwilling voluntarily to submit to the examination by a physician or by the local health officer. Any person whom the health officer determines should have an examination for tuberculosis disease may have the examination made by a physician and surgeon of his or her own choice who is licensed to practice medicine under Chapter 5 (commencing with Section

2000) of Division 2 of the Business and Professions Code under terms and conditions as the local health officer shall determine on reasonable grounds to be necessary to protect the public health. This section does not authorize the local health officer to mandate involuntary anergy testing.

(b) An order requiring a person who has active tuberculosis disease to complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, to follow required infection control precautions for tuberculosis disease. This subdivision does not allow the forceable or involuntary administration of medication.

(c) An order requiring a person who has active tuberculosis disease and who is unable or unwilling otherwise to complete an appropriate prescribed course of medication for tuberculosis disease to follow a course of directly observed therapy. This subdivision does not allow forceable or involuntary administration of medication.

(d) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has infectious tuberculosis disease, or who presents a substantial likelihood of having infectious tuberculosis disease, based upon proven epidemiologic evidence, clinical evidence, X-ray readings, or tuberculosis laboratory test results.

(2) The local health officer finds, based on recognized infection control principles, that there is a substantial likelihood the person may transmit tuberculosis to others because of his or her inadequate separation from others.

(e) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has active tuberculosis disease, or has been reported to the health officer as having active tuberculosis disease with no subsequent report to the health officer of the completion of an appropriate prescribed course of medication for tuberculosis disease.

(2) There is a substantial likelihood, based on the person's past or present behavior, that he or she cannot be relied upon to participate in or complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, follow required infection control precautions for tuberculosis disease. The behavior may include, but is not limited to,

refusal or failure to take medication for tuberculosis disease, refusal or failure to keep appointments or treatment for tuberculosis disease, refusal or failure to complete the treatment for tuberculosis disease, or disregard for infection control precautions for active tuberculosis disease.

(f) An order for exclusion from attendance at the workplace for persons with infectious tuberculosis disease. The order may, also, exclude the person from any place when the local health officer determines that the place cannot be maintained in a manner adequate to protect others against the spread of tuberculosis disease.

(g) An order for isolation of persons with infectious tuberculosis disease to their place of residence until the local health officer has determined that they no longer have infectious tuberculosis disease.

(h) This section shall apply to all persons except those incarcerated in a state correctional institution.

(i) This section shall not be construed to require a private hospital or other private treatment facility to accept any patient without a payment source, including county responsibilities under Section 17000 of the Welfare and Institutions Code, except as required by Sections 1317 et seq. or by federal law.

SEC. 8. Section 3285.1 of the Health and Safety Code is amended to read:

3285.1. The local health officer may detain in a hospital or other appropriate place for examination or treatment, a person who is the subject of an order of detention issued pursuant to subdivision (a), (d), or (e) of Section 3285 without a prior court order except that when a person detained pursuant to subdivision (a), (d), or (e) of Section 3285 has requested release, the local health officer shall make an application for a court order authorizing the continued detention within 72 hours after the request or, if the 72-hour period ends on a Saturday, Sunday, or legal holiday, by the end of the first business day following the Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After the request for release, detention shall not continue for more than five business days in the absence of a court order authorizing detention. However, in no event shall any person be detained for more than 60 days without a court order authorizing the detention. The local health officer shall seek further court review of the detention within 90 days

following the initial court order authorizing detention and thereafter within 90 days of each subsequent court review. In any court proceeding to enforce a local health officer's order for the removal or detention of a person, the local health officer shall prove the particularized circumstances constituting the necessity for the detention by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by counsel and upon the request of the person, counsel shall be provided.

SEC. 9. Section 3285.2 of the Health and Safety Code is amended to read:

3285.2. (a) An order of a local health officer pursuant to Section 3285 shall set forth all of the following:

(1) The legal authority under which the order is issued, including the particular sections of state law or regulations.

(2) An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order.

(3) The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected.

(4) The orders shall be in writing, and shall include the name of the person, the period of time during which the order shall remain effective, the location, payer source if known, and other terms and conditions as may be necessary to protect the public health. Upon issuing an order, a copy of the order shall be served upon the person named in the order.

(b) An order for the detention of a person shall do all of the following:

(1) Include the purpose of the detention.

(2) Advise the person being detained that he or she has the right to request release from detention by contacting a person designated on the local health officer's order at the telephone number stated on the order and that the detention shall not continue for more than five business days after the request for release, in the absence of a court order authorizing the detention.

(3) Advise the person being detained that, whether or not he or she requests release from detention, the local health officer is required to obtain a court order authorizing detention within 60 days following the commencement of detention and thereafter shall further seek court review of the detention

within 90 days of the court order and within 90 days of each subsequent court review.

(4) Advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(5) Be accompanied by a separate notice that shall include, but not be limited to, all of the following additional information:

(A) That the person being detained has the right to request release from detention by contacting a person designated on the local health officer's order at a telephone number stated on the order, and that the detention shall not continue for more than five business days after the request in the absence of a court order authorizing the detention.

(B) That he or she has the right to arrange to be advised and represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(C) That he or she may supply the addresses or telephone numbers of not more than two individuals to receive notification of the person's detention, and that the local health officer shall, at the patient's request, provide notice within the limits of reasonable diligence to those people that the person is being detained.

SEC. 10. Section 3285.3 of the Health and Safety Code is amended to read:

3285.3. Notwithstanding any inconsistent provision of Section 3285, 3285.1 or 3285.2, all of the following shall apply:

(a) A person who is detained solely pursuant to subdivision (a) of Section 3285 shall not continue to be detained beyond the minimum period of time required, with the exercise of all due diligence, to make a medical determination of whether a person who is suspected of having tuberculosis disease, has active tuberculosis or whether a person who has active tuberculosis disease has infectious tuberculosis disease. Further detention of the person shall be authorized only upon the issuance of a local health officer's order pursuant to subdivision (d) or (e) of Section 3285.

(b) A person who is detained solely for the reasons described in subdivision (d) of Section 3285 shall not continue to be

detained after he or she ceases to be infectious or after the local health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis disease after his or her release from detention.

(c) A person who is detained for the reasons described in subdivision (e) of Section 3285 shall not continue to be detained after he or she has completed an appropriate prescribed course of medication.

SEC. 11. Section 3285.4 of the Health and Safety Code is amended to read:

3285.4. For the purposes of Sections 3285, 3285.1, and 3285.2, all of the following shall apply:

(a) If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law.

(b) Nothing in those sections shall be construed to permit or require the forcible administration of any medication without a prior court order.

(c) Any and all orders authorized under those sections shall be made by the local health officer. His or her authority to make the orders may be delegated to the person in charge of medical treatment of inmates in penal institutions within the local health officer's jurisdiction, or pursuant to Section 7. The local health officer shall not make any orders incorporating by reference any other rules or regulations.

SEC. 12. Section 3351 of the Health and Safety Code is amended to read:

3351. Inasmuch as the orders provided for by Section 3285 are for the protection of the public health, any person who, after service upon him or her of an order of a local health officer as provided in Section 3285 violates or fails to comply with the order, is guilty of a misdemeanor. Upon conviction thereof, in addition to any and all other penalties that may be imposed by law upon the conviction, the person may be ordered by the court confined until the order of the local health officer shall have been fully complied with or terminated by the local health officer, but not exceeding one year from the date of passing judgment upon the conviction, further, the court, upon suitable assurances that the order of the local health officer will be complied with, may place any person convicted of a violation of the order of the local health officer upon probation for a period not to exceed two years, upon condition

that the order of the local health officer be fully complied with, further, upon any subsequent violation of the order of the local health officer, the probation shall be terminated and confinement as provided for in this section shall be ordered by the court. Confinement may be accomplished by placement in any appropriate facility, penal institution, or dwelling approved for the specific case by the local health officer.

SEC. 13. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

Senate Bill No. 391

CHAPTER 294

An act to repeal Article 6 (commencing with Section 58105) of Chapter 1 of Part 1 of Division 21 of the Food and Agricultural Code, to amend Sections 95004 and 95030 of, and to add Section 95001.5 to, to amend Sections 104380, 106805, 115065, 115080, 120955, 121200, 121260, and 121305 of, to add Sections 110241, 120970, 121358, 123255, and 123279 to, to add Chapter 1.5 (commencing with Section 124450) to Part 4 of Division 106 of, to add and repeal Section 1179.3 of, and to repeal Sections 349.109, 104485, 104550, 104569, 120450, 121205, 121215, 121220, and 124950 of, the Health and Safety Code, to amend Section 12696.05 of, and to repeal Section 12699.50 of, the Insurance Code, and to amend Section 1372 of the Penal Code, to amend Sections 4643.5, 4681.1, 4681.3, 6600.05, 7228, 14094.3, 14105.31, 14105.33, 14132.22, 14154.15, 14163, 16809.5, 16909, 16945, and 16990.5 of, to add Sections 4418.1, 4418.7, 4433, 4596.5, 4639, 7200.06, 7200.07, 7202, 7204, 7229, 7230, 7231, 7232, 7233, 14005.75, 14005.76, 14005.82, 14005.83, 14005.84, 14005.88, 14005.89, 14011.4, 14029, 14067, 14093.07, 14093.09, 14109.6, 14133.14, 14138.5, 14459.5, 14459.7, and 17000.51 to, and to add and repeal Sections 14085.7, 14085.8, 14148.99, and 16997.1 of, the Welfare and Institutions Code, relating to human services, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 18, 1997. Filed with Secretary of State August 18, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

SB 391, Solis. Health.

Existing law authorizes the Department of Food and Agriculture to establish a program designed to provide eligible persons with coupons that may be exchanged for fresh, nutritious foods at farmers' markets pursuant to a program established by federal law, the WIC Farmers' Market Nutrition Act of 1992.

This bill would delete this authority and would instead authorize the State Department of Health Services to establish this program.

Existing law specifies that the provisions requiring the implementation of the Comprehensive Perinatal Outreach Program shall become inoperative July 1, 1997, and shall be repealed on January 1, 1998, unless a later enacted statute revises or repeals that date.

This bill would repeal the provision repealing the program.

Existing law requires the Secretary of the Health and Welfare Agency to establish an Office of Rural Health, or an alternative

organizational structure, in one of the departments of the Health and Welfare Agency to promote a strong working relationship between the state government and local and federal agencies, universities, and other entities, develop health initiatives, and maximize the use of existing resources relating to health services.

This bill would, until July 1, 1998, require that council, through the Office of Statewide Health Planning and Development, to develop and administer a program of grants for projects located in rural areas, as determined by the council.

Existing law provides for the allocation of funds to local lead agencies for the implementation of tobacco use prevention programs, and specifies that no local lead agency shall receive an allocation of less than $110,000.

This bill would increase that minimum allocation limit to $150,000.

Existing law specifies that the provisions requiring the implementation of the Tobacco Use Prevention Program shall become inoperative July 1, 1997, and shall be repealed on January 1, 1998, unless a later enacted statute revises or repeals that date.

This bill would repeal that provision repealing the program.

Existing law specifies that the provisions requiring the implementation of the Cigarette and Tobacco Product Surtax Medical Research Program shall become inoperative July 1, 1997, and shall be repealed on January 1, 1998, unless a later enacted statute revises or repeals that date.

This bill would repeal the provision repealing that program.

Existing law specifies that the provisions requiring the reimbursement of selected primary care clinics for the delivery of medical services, including preventative health care and smoking prevention and cessation services, including case management services, to eligible beneficiaries whose income is under 200% of the federal poverty level shall become inoperative July 1, 1997, and shall be repealed on January 1, 1998, unless a later enacted statute revises or repeals that date.

This bill would repeal the provision repealing that program.

Existing federal regulations for the federal Early Intervention Program for Infants and Toddlers with Disabilities requires participating states to establish a state interagency coordinating council in order to receive federal financial assistance.

This bill would prohibit any member of the council from casting a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest.

Under existing law, the California Early Intervention Services Act, various state departments provide coordinated services to infants and toddlers with disabilities and their families. Existing law requires early intervention services to be provided directly to eligible infants and toddlers and their families through the regional center system and the local education agency system. Under existing law, the act

will repeal on January 1, 1998, unless the state terminates its participation in a specified federal program before that date.

This bill would require these services to be provided by family resource centers that provide certain services. The bill would extend the operation of the act to January 1, 2000.

Existing law establishes requirements for the certification of radon measurement laboratories, radon testing and consulting specialists, and radon mitigation contracts, and requires the application fees for certification to be deposited into the Radon Contractor Certification Fund.

This bill would instead require these fees to be deposited in the General Fund.

Existing law establishes requirements regarding the issuance of export documents for the exportation of food, drugs, or devices manufactured or produced in this state, and establishes an Export Document Program Fund.

This bill would require all fees collected by the State Department of Health Services pursuant to requests to conduct a voluntary medical device review to be deposited into the Export Document Program Fund and to be expended, upon appropriation, for the purpose of determining if the device is a new device or is substantially equivalent to a current or previously marked device.

Existing law establishes requirements regarding the licensing and regulation of sources of ionizing radiation.

This bill would amend certain of these provisions to notwithstand a provision contained in the Government Code that prohibits prescribed governmental bodies from paying certain filing fees.

Existing law requires medical expenses to be reimbursed in an amount not to exceed $25,000 when incurred due to a severe adverse reaction to an immunization required by state law.

This bill would repeal this provision.

Existing law requires, to the extent funds are appropriated, the department to establish and administer a program to provide drug treatments to persons infected with HIV.

This bill would establish additional client assistance provisions applicable if the department utilizes a contractor or subcontractor to administer any aspect of this program.

Existing law requires the State Director of Health Services to develop a list of drugs to be provided under a program for the treatment of the human immunodeficiency virus (HIV) and requires manufacturers of drugs on the list to pay the department a rebate of 15% of the average wholesale cost price of each drug.

This bill would instead require these manufacturers to pay the department a rebate that is equal to the rebate that would apply to the drug under certain provisions of federal law.

Existing law establishes the AIDS Vaccine Research and Development Grant Program.

This bill would repeal certain provisions of law relating to the creation and implementation of this program.

Existing law requires the department and each county to administer a tuberculosis control, prevention, and detention program.

This bill would prohibit individuals housed under this program, other than criminal offenders, from residing in correctional facilities. It would require the department and local health jurisdiction, by January 1, 1998, to identify a detention site for recalcitrant tuberculosis patients for each local health jurisdiction.

Existing law specifies that the provisions requiring the implementation of the Access for Infants and Mothers (AIM) Program and establishment of the continuously appropriated Perinatal Insurance Fund shall become inoperative July 1, 1997, and shall be repealed on January 1, 1998, unless a later enacted statute revises or repeals that date.

This bill would repeal the provision for the repeal of that program, and would make conforming changes to provisions authorizing the Major Risk Medical Insurance Board to adopt regulations for administration of that program.

Existing law requires the State Department of Health Services to maintain a program of maternal and child health.

This bill would authorize the department to maintain a child health program in each county, and to allocate funds to counties for these purposes that submit plans in compliance with minimum standards established by the department.

Existing law provides for various benefits through the implementation of programs for persons with developmental disabilities (consumers) through the State Department of Developmental Services. Existing law provides for the delivery of services to consumers through regional centers pursuant to contracts with the department.

This bill would require the department to contract with an independent agency or organization for the tracking and monitoring of consumers who are moved from state hospitals to the community to ensure that they are receiving necessary services and supports. The bill would require the department to monitor corrective actions taken by regional centers as a result of this tracking and monitoring and to establish a task force to review the findings of the contractor and make recommendations regarding tracking and monitoring.

The bill would provide for the provision of services on an emergency basis when the community placement of a consumer is at risk of failing and admittance to a state developmental center is likely. The bill would require the department to immediately seek admission to a state developmental center when it determines that admission is necessary to protect the health and welfare of the consumer.

This bill would require the department to contract with a nonprofit agency or agencies to provide clients' rights advocacy services, beginning January 1, 1998.

Existing law establishes area boards on developmental disabilities to protect and advocate the rights of all persons in the area who have developmental disabilities.

This bill would require the State Department of Developmental Services, by July 1, 1998, to enter into an interagency agreement with the Organization of Area Boards, on behalf of area boards, under which each area board would conduct life quality assessments of consumers at least once every 3 years or more frequently on the request of a consumer or, when appropriate, a family member, subject to appropriation of funds in the Budget Act.

Under existing law, a consumer who has been determined to be eligible for services by a regional center shall be considered eligible by any other regional center if he or she moves to another location within the state.

This bill would provide for the provision of equivalent levels and types of services when a consumer transfers from one regional center catchment area to another, pending the development of a new individual program plan.

This bill would require the governing board of a regional center to annually contract with an independent accounting firm for an audited financial statement.

Existing law requires the department to annually establish reimbursement rates for developmental services, including reimbursement rates for out-of-home care, with these rates to be reviewed by the State Council on Developmental Disabilities. Existing law requires that, in establishing reimbursement rates for out-of-home care services, one of the cost elements to be included is an adequate amount to be paid to facilities for the basic living needs of a person with developmental disabilities. The department is required to make a redetermination of basic living costs every 3 years, with the first report to be made on March 1, 1999.

This bill would, instead, require that the first report be made by March 1, 2000. The bill would provide for the increase of the rate schedule for the 1997–98 fiscal year based on the amount appropriated in the Budget Act of 1997.

Under existing law, a person cannot be tried or adjudged to punishment while that person is mentally incompetent. Existing law sets forth procedures under which a criminal defendant who was adjudged mentally incompetent and who has regained mental competence, shall be returned to the committing court, and subsequently returned to a hospital or other commitment facility based on a need for continued treatment in order to maintain competence to stand trial.

This bill would revise these procedures, and would require the State Department of Mental Health to report to the Legislature regarding specified time limits.

Existing law states legislative intent that persons committed to a secure facility for mental health treatment shall be placed in Atascadero State Hospital unless unique circumstances preclude the placement.

This bill would instead require Atascadero State Hospital to be used whenever a person is committed to a secure facility for mental health treatment and is placed in a state hospital at the direction of the department, unless unique circumstances preclude the placement.

Under existing law, the State Department of Mental Health has jurisdiction over 4 state hospitals for the care, treatment, and education of the mentally disordered.

This bill would provide for the commitment of sexually violent predators to Atascadero State Hospital. The bill would limit the number of patients whose placement has been required pursuant to the Penal Code to 980, who may be placed at Napa State Hospital and would limit the hospital's total patient population to 1,200. This bill would require the department to regularly consult with the Napa State Hospital Task Force on proposed policy or structural modifications to the hospital that may affect the Napa community.

This bill would provide for grounds privileges or passes for patients in these state hospitals whose placement has been required pursuant to the Penal Code.

Under existing law, the State Department of Mental Health is required to evaluate each patient committed to state hospitals pursuant to specified provisions of the Penal Code to determine whether they need to be treated in a secure setting, and requires the department to treat all Penal Code commitments and mentally disordered sex offenders who do not require a secure treatment setting as near to the patient's community as possible.

This bill would instead provide that prior to admission to the Napa State Hospital or Metropolitan State Hospital, the department shall evaluate these patients. The bill would provide that patients determined to be a high security risk shall be treated in the department's most secure facilities, and that those patients not needing this level of security shall be treated as near to the patient's community as possible if an appropriate treatment program is available.

This bill would prohibit the admission to Napa State Hospital of patients whose placement has been required pursuant to the Penal Code, until specified conditions are met, except as provided. The bill would prohibit placement of those patients whose placement is required under the Penal Code outside of the perimeter security fence, with certain exceptions, and would limit the number of those patients that may be placed at that facility. The bill would prohibit

placement of high security risk patients at Metropolitan State Hospital or Napa State Hospital. The bill would require the department to develop policies and procedures at each state hospital, to notify appropriate law enforcement agencies in the event of a patient escape or walkaway. The bill would require the department to issue a state hospital administrative directive to require patients whose placement has been required pursuant to the Penal Code and other patients within the secured perimeter at each state hospital to wear clothing that enables them to be readily identified.

This bill would state legislative intent to complete the 250-bed addition at Atascadero State Hospital as expeditiously as feasible and to provide funding for the construction phase of this project in the Budget Act of 1998.

Existing law provides for the Medi-Cal program, administered by the State Department of Health Services, under which qualified low-income persons are provided with health care services.

Existing law provides for extended eligibility for Medi-Cal benefits for a limited time for families whose eligibility for Medi-Cal benefits is terminated due to the loss of eligibility for assistance due to increased hours of employment, income from employment, or the loss of earned income disregards.

This bill would require the department, if federal financial participation is available, to notify beneficiaries of the availability of extended assistance under these provisions to seek a waiver from the federal government to simplify these extended benefits, to contract for an independent evaluation of changes to the program, and to develop a community outreach campaign to inform beneficiaries of the availability of extended benefits. The department would be permitted to implement the community outreach campaign through a contract that would be exempt from approval by the Director of General Services and from the Public Contract Code. The bill would also require the department to monitor participation rates and would, if federal financial participation is available, alter eligibility for these extended benefits. Since each county is required to determine Medi-Cal eligibility, modification of eligibility for extended Medi-Cal benefits would constitute a state-mandated local program.

The bill would also require the department, not later than 6 months following the effective date of the bill, to create and implement a simplified eligibility process for pregnant women and children, as described.

The bill would also require the department, not later than 6 months following the effective date of the bill, to develop and conduct a community outreach and education campaign to help people learn about and apply for Medi-Cal benefits.

Existing law authorizes the department to enter into contracts with hospitals for inpatient services to be rendered to Medi-Cal

program beneficiaries. These contracts are negotiated by the California Medical Assistance Commission.

This bill would create the Medi-Cal Medical Education Supplemental Payment Fund and the Large Teaching Emphasis Hospital and Children's Hospital Medi-Cal Medical Education Supplemental Payment Fund in the State Treasury, to be under the administrative control of the State Department of Health Services, and to consist of moneys from specified sources. The bill would require that moneys deposited in these funds qualify for federal financial participation, and would require moneys in these funds to be paid to specified types of hospitals for medical education costs incurred for services rendered to Medi-Cal beneficiaries. The bill would require the department to obtain federal matching funds to the full extent permitted by law. The bill would provide that these funds shall be continuously appropriated, thereby making an appropriation.

This bill would make these provisions inoperative on June 30, 1999, and repeal them by January 1, 2000.

This bill would state legislative intent that the University of California work with the department and the commission to develop a federal demonstration project to address future funding of graduate medical education in the state, and that implementing legislation be enacted by June 30, 1999. The bill would request the University of California to submit a progress report to the Governor and the Legislature by November 1, 1998.

Existing law relating to the Medi-Cal program requires the State Department of Health Services to establish the County Administrative Cost Control Plan to establish standards and performance criteria to which counties are required to adhere. Existing law authorizes a county to petition the department for an augmentation of its plan in order to implement a plan for the outstationing of one or more eligibility workers at alternative sites in order to facilitate receipt and processing of applications for Medi-Cal eligibility for pregnant women, infants, and children.

This bill would revise the requirements applicable to that petition process and would recast that provision to authorize a county to petition for an augmentation of its county administrative cost control plan to implement a plan for outstationing eligibility workers at all types of outstation locations meeting specified federal requirements.

Under existing law, services covered under the California Children's Services program, when provided to Medi-Cal recipients, prohibited from being incorporated into any Medi-Cal managed care contract entered into after August 1, 1994, and pursuant to specified provisions of law, until 3 years after the effective date of the contract.

This bill would, instead prohibit these services from being incorporated into a contract until August 1, 2000, and would exempt from this prohibition contracts entered into for county-organized

health systems in the Counties of San Mateo, Santa Barbara, Solano, and Napa.

Under existing law, low-income children in foster care are covered under the Medi-Cal program.

This bill would require the county child welfare agency with the responsibility for the care and placement of the child, in consultation with the child's foster care giver, to determine whether it is in the best interest of the child to enroll in a Medi-Cal managed care plan. By imposing this requirement on local agencies, this bill would impose a state-mandated local program.

Existing law, under the Medi-Cal program, provides that home and community-based services, in-home medical care services, and early and periodic screening, diagnosis, and treatment for individuals under 21 years of age may be covered if certain conditions are met.

This bill would require that any decision to transfer a child who is being case managed by the California Children's Services program to the home setting, for whom any of the above services has been requested, be made in consultation with the child's California Children's Services program case manager.

Existing law requires the department, in administering the Medi-Cal program, to enter into contracts with manufacturers of drugs for the best price and requires that the contract provide for an equalization payment amount to be remitted to the department quarterly. The law requires that the department submit an invoice to each manufacturer for the equalization payment based on supporting data.

This bill would require transmittal of the invoice and the supporting data within 30 days of the federal Health Care Financing Administration's file of manufacturer rebate information, would establish procedures for the calculation and payment of rebate interest, and would provide a procedure for contesting the invoice amount. This bill would establish certain collection procedures for rebate payments, including default and termination provisions. The bill would establish procedures for availability of drugs upon prior approval.

Existing law provides that drugs of any manufacturer who did not renew or enter into a contract within a prescribed period of time would be available only through prior approval.

This bill would delete this provision.

Existing law authorizes Medi-Cal reimbursement for transitional inpatient care, as defined, in general acute care hospitals and other specified health facilities.

Existing law provides, however, that, for the initial 2 years following implementation of reimbursement for this care, transitional inpatient care shall be made available only to persons 18 years of age or over, and that this care shall not be available to patients in acute care hospitals defined as small and rural.

This bill would indefinitely extend these limitations.

Existing law imposes certain requirements regarding the implementation of prior authorization procedures for the provision of services under the Medi-Cal program.

This bill would require the department to use certain criteria to identify providers to be placed on prior authorization for noninvasive testing procedures.

Existing law requires the department to administer certain provisions related to child health and disability prevention programs.

This bill would require the department to report to the Legislature by January 1, 1998, regarding prescribed data with respect to the programs.

Under the Medi-Cal program, the department is required to make supplemental payments to certain disproportionate share hospitals based on specified criteria. Existing law generally defines a disproportionate share hospital as a hospital that has proportionately higher costs, volume, or services related to the provision of services to Medi-Cal or other low-income patients than the statewide average. Payments are made from moneys paid by hospitals into the Medi-Cal Inpatient Payment Adjustment Fund, with this fund being continuously appropriated for specified purposes, including, for the 1994–95 and 1995–96 fiscal years, an annual transfer of $239,757,690, and for the 1996–97 fiscal year and each fiscal year thereafter, an annual transfer of $229,757,690, to the Health Care Deposit Fund.

This bill would provide that the amount to be transferred each fiscal year subsequent to the 1996–97 fiscal year to the Health Care Deposit Fund would be $154,757,690.

By increasing the amount available in the fund for appropriation to disproportionate share hospitals, this bill would make an appropriation.

This bill would authorize a local initiative entity that has performed unanticipated work resulting in additional costs attributable to the development of its local initiative health delivery system to file a claim with the department under the disproportionate share hospital reimbursement provisions for the costs due to delays in start dates.

Existing law requires a prepaid health plan to maintain financial records and to have an independent annual audit or additional audits, and requires the department to perform routine auditing of prepaid health plan contractors and affiliated subcontractors providing services under the Medi-Cal program.

This bill would require the department to make only the final report of each external review available to the Legislature within 30 calendar days of completion, and to the public upon request.

This bill would require the department to implement a management information and decision support system to integrate data from managed care plans to monitor and evaluate the quality of care, to provide the Legislature with annual progress reports, and to

provide the Legislature with system or information access with the most cost-effective technology available.

Existing law requires each county to provide aid and medical care to indigent persons. These programs are known as county general assistance programs.

Existing law prescribes a formula under which counties must provide minimum aid grant levels for general assistance recipients, but specifies that counties may reduce these levels by, among other things, the monthly actuarial value of up to $40 per month of medical care. A recent court decision held that this provision permitted a county either to make the aid grant reduction or not provide any medical care if it chose not to make the reduction.

This bill would provide that, notwithstanding this court decision, this provision was not intended, and shall not be construed, to give a county or city and county specified authority relating to the provision of health care services, except that this provision would cease to be implemented if, and only to the extent that, a final court decision holds that the provisions imposes a state-mandated local program.

This bill would also declare that it confirms and is declarative of, rather than a change in, existing law.

Existing law, operative until July 1, 1997, and repealed on January 1, 1998, provides for the provision of perinatal services, perinatal outreach, coordination, and expansion services, provides limitations on the use of funds from the Health Education Account in the Cigarette and Tobacco Products Surtax Fund for purposes of the perinatal outreach, coordination, and expansion services.

This bill would repeal the provision for the repeal of that program.

Existing law contained in the California Health Care for the Indigent Program (CHIP) provides, operative until July 1, 1997, and repealed on January 1, 1998, for the allocation of money from the Cigarette and Tobacco Products Surtax Fund to the counties to provide health care benefits, and requires each county that receives CHIP funds to submit reports containing specified information to the State Department of Health Services.

This bill would repeal the provision for the repeal of that program, and would make conforming changes to provisions for the administration of the program.

This bill would authorize the Director of Finance to authorize the augmentation or reduction of amounts appropriated in the Budget Act for the programs authorized by this act if the funds in the Cigarette and Tobacco Products Surtax Fund are insufficient to support the Budget Act appropriations for the programs authorized by this act, and, by authorizing the augmentation of those appropriated funds, this bill would result in an appropriation.

This bill would specify that the State Department of Health Services may adopt emergency regulations to implement this bill.

This bill would specify that funds appropriated in the Budget Act of 1999 for certain tobacco use prevention media campaign grant programs shall be available for expenditure only until July 1, 2000, and would make funds appropriated in the Budget Act of 1997 for the Tobacco Use Prevention Program and for the rural health improvement grant program established by this bill available for expenditure until July 1, 1999. By extending the period those appropriations would be available for expenditure, this bill would result in an appropriation.

Existing law requires the department to administer certain programs relating to AIDS.

This bill would authorize the department to use the sum of $1,600,000 appropriated pursuant to Item 4260-111-0001 of the Budget Act of 1997 for the extension of the term of contracts with entities receiving funds in the 1996–97 fiscal year to provide HIV testing services, would authorize the department to amend these contracts for the 1997–98 fiscal year, and would authorize advance payments not to exceed 25% of the expected funding, thereby making an appropriation. This provision would become inoperative on July 1, 1998, and would be repealed on January 1, 1999.

Existing law provides for the funding of clinics for the provision of health care under the seasonal and migratory workers program, the rural health services development program, and the expanded access to primary care program.

This bill would require a clinic funded under those programs to provide nonelective primary health care to all persons eligible for these programs who are impacted by a declared emergency or disaster and who present themselves for treatment at the clinic. The bill would require the department to deny payment to any clinic funded by these programs that charges patients for care without utilizing a sliding-fee scale based on income.

This bill would authorize the State Department of Health Services to adopt emergency regulations to implement this act and specified Medi-Cal benefits established by the Budget Act of 1997.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Article 6 (commencing with Section 58105) of Chapter 1 of Part 1 of Division 21 of the Food and Agricultural Code is repealed.

SEC. 2. Section 95001.5 is added to the Government Code, to read:

95001.5. In order to prevent any potential conflict of interest and pursuant to Section 303.604 of Title 34 of the Code of Federal Regulations, no member of the interagency coordinating council may cast a vote on any matter that would provide direct financial benefit to that member or otherwise give the appearance of a conflict of interest.

SEC. 3. Section 95004 of the Government Code, as added by Section 2 of Chapter 945 of the Statutes of 1993, is amended to read:

95004. The early intervention services specified in this title shall be provided as follows:

(a) Direct services for eligible infants and toddlers and their families shall be provided pursuant to the existing regional center system under the Lanterman Developmental Disabilities Services Act (Division 4.5 (commencing with Section 4500) of the Welfare and Institutions Code) and the existing local education agency system under appropriate sections of Part 30 (commencing with Section 56000) of the Education Code and regulations adopted pursuant thereto, and Part H of the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1471 et seq.).

(b) Services shall be provided by family resource centers that provide, but are not limited to, parent-to-parent support, information dissemination and referral, public awareness, family professional collaboration activities, and transition assistance for families.

(c) Existing obligations of the state to provide these services at state expense shall not be expanded.

(d) It is the intent of the Legislature that services be provided in accordance with Sections 303.124, 303.126, and 303.527 of Title 34 of the Code of Federal Regulations.

SEC. 4. Section 95030 of the Government Code is amended to read:

95030. Unless repealed earlier pursuant to subdivision (c) of Section 95003, this division shall remain in effect only until January 1, 2000, and as of that date is repealed, unless a later enacted statute, which is chaptered before January 1, 2000, deletes or extends that date.

SEC. 5. Section 349.109 of the Health and Safety Code, as amended by Chapter 199 of the Statutes of 1996, is repealed.

SEC. 6. Section 1179.3 is added to the Health and Safety Code, to read:

1179.3. (a) (1) The Rural Health Policy Council shall develop and administer a competitive grants program for projects located in rural areas of California.

(2) The Rural Health Policy Council shall define "rural area" for the purposes of this section after receiving public input and upon recommendation of the Interdepartmental Rural Health Coordinating Committee and the Rural Health Programs Liaison.

(3) The purpose of the grants program shall be to fund innovative, collaborative, cost-effective, and efficient projects that pertain to the delivery of health and medical services in rural areas of the state.

(4) The Rural Health Policy Council shall develop and establish uses for the funds to fund special projects that alleviate problems of access to quality health care in rural areas and to compensate public and private health care providers associated with direct delivery of patient care. The funds shall be used for medical and hospital care and treatment of patients who cannot afford to pay for services and for whom payment will not be made through private or public programs.

(5) The Office of Statewide Health Planning and Development shall administer the funds appropriated by the Budget Act of 1997 for purposes of this section. Entities eligible for these funds shall include rural health providers served by the programs operated by the departments represented on the Rural Health Policy Council, which include the State Department of Alcohol and Drug Programs, the Emergency Medical Services Authority, the State Department of Health Services, the State Department of Mental Health, and the Office of Statewide Health Planning and Development. The grant funds shall be used to expand existing services or establish new services and shall not be used to supplant existing levels of service.

(b) The Rural Health Policy Council shall establish the criteria and standards for eligibility to be used in requests for proposals or requests for application, the application review process, determining the maximum amount and number of grants to be awarded, preference and priority of projects, compliance monitoring, and the measurement of outcomes achieved after receiving comment from the public at a meeting held pursuant to the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code).

(c) The Office of Statewide Health Planning and Development shall periodically report to the Rural Health Policy Council on the status of the funded projects. This information shall also be available at the public meetings.

(d) This section shall become inoperative on July 1, 1998, and, as of January 1, 1999, is repealed, unless a later enacted statute, that

becomes operative on or before January 1, 1999, deletes or extends the dates on which it becomes inoperative and is repealed.

SEC. 7. Section 104380 of the Health and Safety Code is amended to read:

104380. (a) Funds appropriated to the department for local lead agencies for purposes of this article shall be allocated prospectively, on a quarterly basis in accordance with this section.

(b) No local lead agency shall be allocated less than one hundred fifty thousand dollars ($150,000).

(c) (1) Except as provided in subdivision (b), counties not listed in subdivision (d) shall receive an allocation based on each county's proportion of the statewide population.

(2) Counties that receive their allocations pursuant to paragraph (1) shall receive 73 percent of their 1990–91 fiscal year allocation.

(d) Except as provided in subdivision (b), the balance of the funds after the allocation contained in subdivision (c) have been made, shall be allocated to the following specified counties in accordance with the following percentages:

COUNTY	ALLOCATION
Alameda	4.7427%
Contra Costa	1.8032%
Fresno	2.6855%
Kern	1.7083%
Lake	0.1826%
Los Angeles	43.8057%
Mendocino	0.2664%
Merced	0.7244%
Monterey	1.2937%
Orange	5.1382%
Placer	0.3697%
Riverside	3.1828%
Sacramento	3.2922%
San Bernardino	3.7972%
San Diego	5.9971%
San Francisco	5.3898%
San Joaquin	1.7413%
San Luis Obispo	0.8096%
San Mateo	1.4582%
Santa Barbara	0.7918%
Santa Clara	5.2450%
Santa Cruz	0.7709%
Stanislaus	1.2793%

Tulare	1.3768%
Ventura	1.5472%
Yolo	0.6004%

(e) Except as provided in subdivision (b), the allocation for those counties in which a city health department which is a local lead agency as defined by subdivision (*l*) of Section 104355 is located shall be apportioned among the local lead agencies in that county based on their jurisdiction's proportionate share of the countywide population.

(f) Reductions in allocations necessary to comply with subdivision (b) shall be distributed among the counties listed in subdivision (d) proportionately based on the table contained in subdivision (d).

(g) The department shall use population estimates for 1989 for each county and for each city as specified in the Department of Finance E-1 Report.

(h) Payments shall be made prospectively, on a quarterly basis, to local jurisdictions.

(i) (1) The department shall conduct a fiscal and program review on a regular basis.

(2) If the department determines that any county is not in compliance with any provision of this chapter, the county shall submit to the department, within 60 days, a plan for complying with this article.

(3) The department may withhold funds from local lead agencies allocated funds under this section that are not in compliance with this chapter in the same manner as the department is authorized under Chapter 5 (commencing with Section 16940) of Part 4.7 of Division 9 of the Welfare and Institutions Code. The department may terminate the agreement with the noncompliant local lead agency, recoup any unexpended funds from the noncompliant local lead agency, and reallocate both the withheld and recouped funds to provide services available under this section to the jurisdiction of the noncompliant agency through an agreement with a different governmental or private nonprofit agency capable of delivering those services based on the department's local lead agency guidelines for local plans and a process determined by the department. The department may encumber and reallocate these funds no sooner than three months after the date of the first notification that the department has determined the local lead agency to be out of compliance with statutory requirements.

SEC. 8. Section 104485 of the Health and Safety Code is repealed.

SEC. 9. Section 104550 of the Health and Safety Code is repealed.

SEC. 10. Section 104569 of the Health and Safety Code, as amended and renumbered by Section 133 of Chapter 1023 of the Statutes of 1996, is repealed.

SEC. 11. Section 106805 of the Health and Safety Code is amended to read:

106805. (a) The application fees for certification are nonrefundable and shall be in the following amounts:

(1) Radon Measurement Laboratory	$300
(2) Radon Testing and Consulting Specialist	$100
(3) Radon Mitigation Contractor	$200

(b) These fees shall be deposited into the General Fund. The moneys in this fund are available, upon appropriation by the Legislature, to the department for the purposes of this article.

SEC. 12. Section 110241 is added to the Health and Safety Code, to read:

110241. All fees collected by the department pursuant to requests to conduct a voluntary medical device review shall be deposited into the Export Document Program Fund and, upon appropriation, shall be expended for the purpose of determining if the device is a new device or is substantially equivalent to a current or previously marked device.

SEC. 13. Section 115065 of the Health and Safety Code is amended to read:

115065. (a) Notwithstanding Section 6103 of the Government Code, the department shall provide by regulation a schedule of the fees that shall be paid by the following persons:

(1) Persons possessing radioactive materials under licenses issued by the department or under other state or federal licenses for the use of these radioactive materials, when these persons use these radioactive materials in the state in accordance with the regulations adopted pursuant to subdivision (d) of Section 115060.

(2) Persons generally licensed for the use of devices and equipment utilizing radioactive materials that are designed and manufactured for the purpose of detecting, measuring, gauging, or controlling thickness, density, level, interface location, radiation, leakage, or qualitative or quantitative chemical composition, or for producing light or an ionized atmosphere, if the devices are manufactured pursuant to a specific license authorizing distribution to general licensees.

(b) The revenues derived from the fees shall be used, together with other funds made available therefor, for the purpose of the issuance of licenses or the inspection and regulation of the licensees.

(c) The department may adopt emergency regulations pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code to establish and adjust fees for radioactive materials licenses in an amount to produce estimated revenues equal to at least 95 percent of the department's costs in

carrying out these licensing requirements, if the new fees were to remain in effect throughout the fiscal year for which the fee is established or adjusted.

(d) A local agency participating in a negotiated agreement pursuant to Section 114990 shall be fully reimbursed for direct and indirect costs based upon activities governed by Section 115070. With respect to these agreements, any salaries, benefits, and other indirect costs shall not exceed comparable costs of the department.

(e) The fees for licenses for radioactive materials and of devices and equipment utilizing those materials shall be adjusted annually pursuant to Section 100425.

SEC. 14. Section 115080 of the Health and Safety Code is amended to read:

115080. (a) Notwithstanding Section 6103 of the Government Code, the department shall provide by regulation a ranking of priority for inspection, as determined by the degree of potentially damaging exposure of persons by ionizing radiation and the requirements of Section 115085, and a schedule of fees, based upon that priority ranking, that shall be paid by persons possessing sources of ionizing radiation that are subject to registration in accordance with subdivisions (b) and (e) of Section 115060, and regulations adopted pursuant thereto. The revenues derived from the fees shall be used, together with other funds made available therefor, for the purpose of carrying out any inspections of the sources of ionizing radiation required by this chapter or regulations adopted pursuant thereto. The fees shall, together with any other funds made available to the department, be sufficient to cover the costs of administering this chapter, and shall be set in amounts intended to cover the costs of administering this chapter for each priority source of ionizing radiation. Revenues generated by the fees shall not offset any general funds appropriated for the support of the radiologic programs authorized pursuant to this chapter, and the Radiologic Technology Act (Section 27), and Chapter 7.6 (commencing with Section 114960). Persons who pay fees shall not be required to pay, directly or indirectly, for the share of the costs of administering this chapter of those persons for whom fees are waived. The department shall take into consideration any contract payment from the Health Care Financing Administration for performance of inspections for Medicare certification and shall reduce this fee accordingly.

(b) A local agency participating in a negotiated agreement pursuant to Section 114990 shall be fully reimbursed for direct and indirect costs based upon activities governed by Section 115085. With respect to these agreements, any salaries, benefits, and other indirect costs shall not exceed comparable costs of the department. Any changes in the frequency of inspections or the level of reimbursement to local agencies made by this section or Section

115085 during the 1985–86 Regular Session shall not affect ongoing contracts.

(c) The fees paid by persons possessing sources of ionizing radiation shall be adjusted annually pursuant to Section 100425.

(d) The department shall establish two different registration fees for mammography equipment pursuant to this section based upon whether the equipment is accredited by an independent accrediting agency recognized under the federal Mammography Quality Standards Act (42 U.S.C. Sec. 263b).

SEC. 15. Section 120450 of the Health and Safety Code is repealed.

SEC. 16. Section 120955 of the Health and Safety Code is amended to read:

120955. (a) To the extent that state and federal funds are appropriated in the Budget Act for these purposes, the director shall establish and may administer a program to provide drug treatments to persons infected with human immunodeficiency virus (HIV), the etiologic agent of acquired immune deficiency syndrome (AIDS). The director shall develop, maintain, and update as necessary a list of drugs to be provided under this program. Drugs on the list shall include, but not be limited to, the drugs zidovudine (AZT) and aerosolized pentamidine.

(b) The director may grant funds to a county public health department through standard agreements to administer this program in that county. To maximize the recipients' access to drugs covered by this program, the director shall urge the county health department in counties granted these funds to decentralize distribution of the drugs to the recipients.

(c) The director shall establish a rate structure for reimbursement for the cost of each drug included in the program. Rates shall not be less than the actual cost of the drug. However, the director may purchase a listed drug directly from the manufacturer and negotiate the most favorable bulk price for that drug.

(d) Manufacturers of the drugs on the list shall pay the department a rebate equal to the rebate that would be applicable to the drug under Section 1927(c) of the federal Social Security Act (42 U.S.C. Sec. 1396r-8(c)), except that no rebates shall be paid to the department under this section on drugs for which the department has received a rebate under Section 1927(c) of the federal Social Security Act (42 U.S.C. Sec. 1396r-8(c)) or that have been purchased on behalf of county health departments or other eligible entities at discount prices made available under Section 256b of Title 42 of the United States Code.

(e) The department shall submit an invoice, not less than two times per year, to each manufacturer for the amount of the rebate required by subdivision (d).

(f) Drugs may be removed from the list for failure to pay the rebate required by subdivision (d), unless the department determines that removal of the drug from the list would cause substantial medical hardship to beneficiaries.

(g) The department may adopt emergency regulations to implement amendments to this chapter made during the 1997–98 Regular Session, in accordance with the Administrative Procedure Act, Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The initial adoption of emergency regulations shall be deemed to be an emergency and considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health and safety, or general welfare. Emergency regulations adopted pursuant to this section shall remain in effect for no more than 180 days.

(h) Reimbursement under this chapter shall not be made for any drugs that are available to the recipient under any other private, state, or federal programs, or under any other contractual or legal entitlements, except that the director may authorize an exemption from this subdivision where exemption would represent a cost savings to the state.

SEC. 17. Section 120970 is added to the Health and Safety Code, to read:

120970. In the event the department utilizes a contractor or subcontractor to administer any aspect of the program provided for under this chapter, the following additional client assistance provisions shall apply:

(a) The contractor shall, either directly or through subcontracted pharmacy outlets, obtain and dispense the necessary drugs, in their approved forms according to the program formulary, and shall comply with all applicable provisions of the California Pharmacy Law (Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code) and regulations adopted thereunder.

(b) Upon receipt of notification by the department, the contractor shall be able to accommodate additions or changes in the formulary within 10 business days.

(c) Clients shall receive drugs from a participating pharmacy either directly, through the client's designated representative, or mailed or delivered to the client's place of residence by the contractor or subcontractor, whichever the client prefers. Proof of delivery of the prescription to the client's designated address, by signature acknowledging receipt thereof, shall be required for all mail order prescriptions.

(d) Clients shall have their prescriptions filled within 24 hours of submission of prescription requests, and mail order prescriptions shall be shipped by the contractor within 48 hours of receipt of client prescription requests.

(e) The contractor shall provide 24-hour free telephone and fax machine access for physicians and surgeons, or medical care providers as authorized under state law, to call in or transmit prescriptions for mail order pharmacy.

(f) Clients shall have toll-free telephone access during business hours to speak with licensed pharmacists for medication counseling and for mail order prescription requests. The contractor shall provide consultation in the prevention of potentially harmful drug interactions in connection with prescriptions filled for clients.

(g) The contractor shall have the ability to subcontract with any willing provider, including independent and sole proprietorship pharmacies, provided the subcontractor accepts the rates offered by the contractor, supplies the contractor with timely information, and complies with necessary contract terms and conditions and other needs of the program as determined by the contractor or the department.

(h) It is the intent of the Legislature that the contractor subcontract with all willing providers accepting the terms and conditions provided for in subdivisions (a) to (g), inclusive, in order to facilitate continuity of care for clients under this chapter.

(i) All types of information, whether written or oral, concerning a client, made or kept in connection with the administration of this program shall be confidential, and shall not be used or disclosed except for purposes directly connected with the administration of the program.

(j) Information regarding program policies and procedures, including enrollment procedures, eligibility guidelines, and lists of drugs covered, shall be made available to clients in appropriate literacy levels in English, Spanish, Mandarin/Cantonese, Tagalog, and in other languages, as determined by the department.

(k) The contractor shall develop and maintain a timely and accessible grievance procedure for clients to resolve problems regarding all components of the delivery of drugs under this chapter.

SEC. 18. Section 121200 of the Health and Safety Code is amended to read:

121200. The Legislature finds and declares all of the following:

(a) Over the past five years AIDS has reached an epidemic stage and is estimated to affect 30,000 Californians by 1990.

(b) The estimated cost of medical care alone for the 4,000 AIDS cases that have occurred to date in California totals approximately two hundred fifty million dollars ($250,000,000). By the end of 1990, medical care is projected to approach three billion five hundred million dollars ($3,500,000,000) and the total public health and medical care expenditures are expected to exceed five billion dollars ($5,000,000,000).

(c) There is no cure for the AIDS virus. The long-term solution to the elimination of AIDS lies in conducting vaccine research.

(d) Much research has already been completed by the private sector and should be utilized to the maximum extent possible, including supplementing with public funds.

(e) Profitmaking corporations are (1) not eligible for most of the existing public funding sources as are institutions of higher learning and nonprofit corporations; (2) when eligible, the public funding amounts are not adequate to conduct research; and (3) private grants are only available to nonprofit corporations.

(f) Moreover, private research companies, already having established vaccine development and manufacturing capabilities, are uniquely situated to maximize available resources and to utilize both management and research staff, equipment, and technical innovations to their greatest efficiency towards the specific goal of developing and manufacturing an AIDS vaccine at the earliest possible time.

(g) Exclusion of private corporations from public funding to develop an approved vaccine will likely result in (1) a delay in the development of a vaccine to prevent AIDS; (2) continued spread of AIDS to the general population; and (3) continued increases in private and public funds to provide care to AIDS victims.

(h) It is appropriate to mandate that a grant made to a private entity to develop an AIDS vaccine, once the vaccine has been approved by the FDA for use by the general population, should be reimbursed to the state from the sale of the vaccine.

SEC. 19. Section 121205 of the Health and Safety Code is repealed.

SEC. 20. Section 121215 of the Health and Safety Code is repealed.

SEC. 21. Section 121220 of the Health and Safety Code is repealed.

SEC. 22. Section 121260 of the Health and Safety Code is amended to read:

121260. The Legislature further finds and declares all of the following:

(a) The average cost per patient in the treatment of AIDS until death is now one hundred fifty thousand dollars ($150,000). It is estimated that total costs including health care of the first 10,000 AIDS cases in the United States totaled more than six billion three hundred million dollars ($6,300,000,000). By 1990, according to the department, Californians will spend almost five billion dollars ($5,000,000,000) in medical costs alone in care and treatment of 30,000 AIDS patients, with no realistic hope for their remission or cure. This cost does not include money spent on education, research, and lost income.

(b) To date, the costs of caring for people with AIDS related complex (ARC) has not been officially calculated. However, it is safe to assume the costs are substantial over time. Experts fear that the

illnesses of ARC patients, although they may not be fatal, are severe. For example, the virus invades the brain rendering the patients incapable of caring for themselves. It is, therefore, plausible that a percentage of ARC patients will need to be institutionalized.

(c) The Legislature intends by this chapter to take uncommon action to remove the impediments to the expeditious development of an AIDS vaccine.

(d) It is further the intent of the Legislature to provide to any person, whose injury is proximately caused by the use of the vaccine, except to the extent the injuries are attributable to the comparative negligence of the claimant in the use of the vaccine, all of the following:

(1) Compensation for related medical costs associated with the care and treatment of the injury.

(2) Compensation for the loss of any and all earnings caused by the injury.

(3) Compensation for pain and suffering caused by the injury, except that in no action shall the amount of damages for noneconomic losses exceed five hundred fifty thousand dollars ($550,000).

(e) It is further the intent of the Legislature to establish the AIDS Clinical Trials Testing Fund that will be available to not more than three California manufacturers of an AIDS vaccine approved by the federal Food and Drug Administration (FDA) or the department pursuant to Part 5 (commencing with Section 109875) of Division 104 for clinical trials with humans.

(f) The AIDS Vaccine Research and Development Advisory Committee shall review requests from California manufacturers for funds from the AIDS Clinical Trials Testing Fund and shall make recommendations to the department regarding the award of funds, including the appropriate amount of funding. The department, taking into consideration the committee's recommendations, may allocate the funds to the manufacturers specified in the protocol approved by the FDA or the department pursuant to Part 5 (commencing with Section 109875) of Division 104 for administering the clinical trials.

(g) A California manufacturer seeking the approval of the FDA, rather than the department, for administering clinical trials of an AIDS vaccine may apply while FDA approval is pending to the AIDS Vaccine Research and Development Advisory Committee for the committee's recommendation that the manufacturer receive funds from the AIDS Clinical Trials Testing Fund upon FDA approval.

SEC. 23. Section 121305 of the Health and Safety Code is amended to read:

121305. For the purposes of this chapter, the following definitions apply:

(a) "AIDS" means acquired immune deficiency syndrome.

(b) "An HIV-positive individual" means an individual who is infected with the AIDS virus.

(c) "Committee" means the AIDS Vaccine Research and Development Advisory Committee.

(d) "Grant award" means an AIDS Vaccine Clinical Trial Grant Award for the Prevention of Maternal Transmission of HIV Infection.

(e) "AIDS vaccine," for the purposes of this chapter, means a vaccine that has been developed by a manufacturer and is being tested and administered for the purposes of determining whether immunization of HIV-infected pregnant women will protect against maternal transmission of the AIDS virus. Clinical trials must be conducted under an investigational new drug (IND) application on file with the federal Food and Drug Administration (FDA).

(f) "Research subject" means a person who is administered an AIDS vaccine, or a fetus of a woman administered an AIDS vaccine, or a child born to a woman administered an AIDS vaccine during pregnancy.

(g) "Researcher" means a person employed by or affiliated with a manufacturer or a research institution, who participates in the development or testing or administration of an AIDS vaccine, or who is involved in the diagnosis and treatment of a research subject.

SEC. 24. Section 121358 is added to the Health and Safety Code, to read:

121358. (a) Notwithstanding any other provision of law, individuals housed or detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities, and the funds available under that program with regard to those individuals shall not be disbursed to, or used by, correctional facilities. This section shall not be interpreted to prohibit the institutionalization of criminals with tuberculosis in correctional facilities.

(b) The department shall work with local health jurisdictions to identify a detention site for recalcitrant tuberculosis patients appropriate for each local health jurisdiction in the state. The department shall notify all counties of their designated site by January 1, 1998.

SEC. 25. Section 123255 is added to the Health and Safety Code, to read:

123255. (a) The department may maintain a maternal and child health program in each county.

(b) Notwithstanding any other provision of law, the department may allocate, for the purposes of maintaining a maternal and child health program, to a county an amount determined in a manner as the director shall provide. The total of all county allocations shall not exceed the annual appropriation for this purpose.

(c) To be considered for an allocation, the county's governing board shall submit a plan and budget for the county's program in

accordance with maternal and child health plans and priorities to be approved by the department under Title V of the Public Health Service Act (42 U.S.C. Sec. 701 et seq.). The department shall establish the procedures and format for submission of the plan and budget. The plan shall conform to the department's maternal and child health priorities that are in accordance with the core public health functions of needs assessment, policy development, and assurance.

(d) The department shall establish minimum standards that govern the basis for allocations to counties, including, but not limited to, the services to be provided, administration, staffing, fiscal accountability, and eligibility for services. The department may recoup or withhold all or part of a county's allocation for failure to comply with those standards.

(e) Claims for reimbursement shall be made in a manner as provided by the director for activities provided in accordance with the plan and budget for the fiscal year in which the expenses upon which the claim is based are incurred.

(f) There shall be no reimbursement for any of the following:

(1) Projects or programs identified unless previously approved by the department as part of the maternal and child health plan.

(2) Capital improvements.

(3) The purchase or construction of buildings except for the equipment items and remodeling expenses as may be allowed by the department on a case-by-case basis.

(g) The department and counties shall maximize the use of federal funds available to implement this section, including using state or county funds to match funds claimable under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.).

(h) (1) For purposes of this program, the department shall reimburse a county pursuant to this section in lieu of renewing or commencing a cooperative agreement with a county for the operation of a maternal and child health program.

(2) It is the intent of the Legislature that cooperative agreements between the department and a county for the operation of a maternal and child health program pursuant to this section be replaced by the process described in this section beginning with the 1997–98 fiscal year.

SEC. 26. Section 123279 is added to the Health and Safety Code, to read:

123279. (a) It is the intent of the Legislature in adding this section to authorize the establishment of a program designed to implement the federal WIC Farmers' Market Nutrition Act of 1992 (Public Law 102-314), which is designed to accomplish the following:

(1) Provide resources to persons who are nutritionally at risk, in the form of fresh, high-quality agricultural products from certified farmers' markets.

(2) Expand the awareness and use of certified farmers' markets and increase sales at those markets.

(b) The department may establish a program designed to implement the federal WIC Farmers Market Nutrition Act of 1992.

(c) If the program is established, the department shall develop criteria to permit any producer authorized by the department to participate in the program to sell fresh nutritious foods to recipients in exchange for nutrition coupons.

(d) If the program is established, the department shall authorize local agencies to distribute nutrition coupons to all recipients, as defined by subdivision (c) of Section 123285 of the Health and Safety Code.

(e) If the program is established, the department shall design the nutrition coupon issuance process to ensure that nutrition coupons are bearer-only, nonnegotiable, and nontransferable by the recipient and that they may be redeemed by recipients only to purchase fresh produce and redeemed for reimbursement only by authorized producers.

(f) It is the intent of the Legislature that the program established by this section to implement the federal WIC Farmers' Market Nutrition Act of 1992 (Public Law 102-314) be funded 70 percent by federal funds and 30 percent by private or other funds, as specified by the federal act.

SEC. 27. Chapter 1.5 (commencing with Section 124450) is added to Part 4 of Division 106 of the Health and Safety Code, to read:

CHAPTER 1.5. CLINIC SERVICES

124450. (a) In any emergency or disaster, as declared by the Governor, clinics funded under the seasonal agricultural and migratory workers program provided for by Chapter 3 (commencing with Section 124550), the rural health services development program provided for by Chapter 5 (commencing with Section 124600) or the expanded access to primary care program provided for by Article 2 (commencing with Section 124900) of Chapter 7 shall provide nonelective, primary health care services, utilizing a sliding-fee scale based on income, including a zero payment option, to all persons who are impacted by the emergency or disaster and who present themselves for treatment at the clinic.

(b) The department shall deny or recoup payment under Chapter 3 (commencing with Section 124550), Chapter 5 (commencing with Section 124600), and Article 2 (commencing with Section 124900) of Chapter 7, assess civil penalties, revoke or suspend the license of the clinic pursuant to Section 1229, or impose other sanctions or other penalties authorized by law, when the clinic charges patients for care and fails to utilize a sliding-fee scale based on income, including a

zero-payment option, to determine the fees to be charged to any patient pursuant to subdivision (a).

(c) To the extent that the department enters into contracts or renews contracts with clinics identified in subdivision (b) on or after the effective date of this section, those contracts shall require clinics to utilize a sliding-fee scale based on income, including a zero-payment option, when determining fees to be assessed for patients.

SEC. 28. Section 124950 of the Health and Safety Code is repealed.

SEC. 29. Section 12696.05 of the Insurance Code is amended to read:

12696.05. The board may do all of the following:

(a) Determine eligibility criteria for the program. These criteria shall include the requirements set forth in Section 12698.

(b) Determine the eligibility of applicants.

(c) Determine when subscribers are covered and the extent and scope of coverage.

(d) Determine subscriber contribution amounts schedules. Subscriber contribution amounts shall be indexed to the federal poverty level and shall not exceed 2 percent of a subscriber's annual gross family income.

(e) Provide coverage through participating health plans or through coordination with other state programs, and contract for the processing of applications and the enrollment of subscribers. Any contract entered into pursuant to this part shall be exempt from any provision of law relating to competitive bidding, and shall be exempt from the review or approval of any division of the Department of General Services. The board shall not be required to specify the amounts encumbered for each contract, but may allocate funds to each contract based on projected and actual subscriber enrollments in a total amount not to exceed the amount appropriated for the program.

(f) Authorize expenditures from the fund to pay program expenses which exceed subscriber contributions, and to administer the program as necessary.

(g) Develop a promotional component of the program to make Californians aware of the program and the opportunity that it presents.

(h) Issue rules and regulations as necessary to administer the program. All rules and regulations issued pursuant to this subdivision that manage program integrity, revise the benefit package, or reduce the eligibility criteria below 300 percent of the federal poverty level may be adopted as emergency regulations in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). The adoption of these regulations shall be deemed an

emergency and necessary for the immediate preservation of the public peace, health, and safety, or general welfare. The regulations shall become effective immediately upon filing with the Secretary of State.

(i) Exercise all powers reasonably necessary to carry out the powers and responsibilities expressly granted or imposed by this part.

SEC. 30. Section 12699.50 of the Insurance Code is repealed.

SEC. 31. Section 1372 of the Penal Code is amended to read:

1372. (a) (1) If the medical director of the state hospital or other facility to which the defendant is committed, or the community program director, county mental health director, or regional center director providing outpatient services, determines that the defendant has regained mental competence, the director shall immediately certify that fact to the court by filing a certificate of restoration with the court by certified mail, return receipt requested. For purposes of this section, the date of filing shall be the date on the return receipt.

(2) The court's order committing an individual to a state hospital or other treatment facility pursuant to Section 1370 shall include direction that the sheriff shall redeliver the patient to the court without any further order from the court upon receiving from the state hospital or treatment facility a copy of the certificate of restoration. The defendant shall be returned to the committing court in the following manner: A patient who remains confined in a state hospital or other treatment facility shall be redelivered to the sheriff of the county from which the patient was committed. The sheriff shall immediately return the person from the state hospital or other treatment facility to the court for further proceedings. The patient who is on outpatient status shall be returned by the sheriff to court through arrangements made by the outpatient treatment supervisor. In all cases, the patient shall be returned to the committing court no later than 10 days following the filing of a certificate of restoration. The state shall only pay for 10 hospital days for patients following the filing of a certificate of restoration of competency. The State Department of Mental Health shall report to the fiscal and policy committees of the Legislature on an annual basis in January, on the number of days that exceed the 10-day limit.

(b) If the defendant becomes mentally competent after a conservatorship has been established pursuant to the applicable provisions of the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, and Section 1370, the conservator shall certify that fact to the sheriff and district attorney of the county in which defendant's case is pending, defendant's attorney of record, and the committing court.

(c) When a defendant is returned to court with a certification that competence has been regained, the court shall notify either the community program director, the county mental health director, or

the regional center director and the Director of Developmental Services, as appropriate, of the date of any hearing on the defendant's competence and whether or not the defendant was found by the court to have recovered competence.

(d) Where the committing court approves the certificate of restoration to competence as to a person in custody, the court shall hold a hearing to determine whether the person is entitled to be admitted to bail or released on own recognizance status pending conclusion of the proceedings. Where the superior court approves the certificate of restoration to competence regarding a person on outpatient status, unless it appears that the person has refused to come to court, that person shall remain released either on own recognizance status, or, in the case of a developmentally disabled person, either on the defendant's promise or on the promise of a responsible adult to secure the person's appearance in court for further proceedings. Where the person has refused to come to court, the court shall set bail and may place the person in custody until bail is posted.

(e) A defendant subject to either subdivision (a) or (b) who is not admitted to bail or released under subdivision (d) may, at the discretion of the court, upon recommendation of the director of the facility where the defendant is receiving treatment, be returned to the hospital or facility of his or her original commitment or other appropriate secure facility approved by the community program director, the county mental health director, or the regional center director. The recommendation submitted to the court shall be based on the opinion that the person will need continued treatment in a hospital or treatment facility in order to maintain competence to stand trial or that placing the person in a jail environment would create a substantial risk that the person would again become incompetent to stand trial before criminal proceedings could be resumed.

(f) Notwithstanding subdivision (e), if a defendant is returned by the court to a hospital or other facility for the purpose of maintaining competency to stand trial and that defendant is already under civil commitment to that hospital or facility from another county pursuant to the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code) or as a developmentally disabled person committed pursuant to Article 2 (commencing with Section 6500) of Chapter 2 of Part 2 of Division 6 of the Welfare and Institutions Code, the costs of housing and treating the defendant in that facility following return pursuant to subdivision (e) shall be the responsibility of the original county of civil commitment.

SEC. 32. Section 4418.1 is added to the Welfare and Institutions Code, to read:

4418.1. (a) The Legislature recognizes that it has a special obligation to ensure the well-being of persons with developmental disabilities who are moved from state hospitals to the community.

(b) To ensure that persons with developmental disabilities who are moved from state hospitals to the community are receiving necessary services and supports, the department shall contract with an independent agency or organization for the tracking and monitoring of those persons, including all persons moved as a result of the Coffelt v. State Department of Developmental Services settlement agreement and any persons moved after the terms of that agreement have been met.

(c) The contractor shall be experienced in all of the following:

(1) Designing valid tracking instruments.

(2) Tracking the quality of community programs, including outcome-based measures such as health and safety, quality of life, integration, choice, and consumer satisfaction.

(3) Tracking the quality and appropriateness of community placements for persons moving from large institutions into community settings.

(4) Developing data systems.

(5) Data analysis and report preparation.

(d) The contractor shall measure consumer and family satisfaction with services provided, including case management and quality of life, including, but not limited to, health and safety, independence, productivity, integration, opportunities for choice, and delivery of needed services.

(e) The information maintained for each person shall include the person's name, address, nature of disability, medical condition, scope of community-based services and supports, and the annual data collected by the contractor.

(f) The contractor shall meet with each person, and the person's family, legal guardian, or conservator, when appropriate, no less than once a year to discuss quality of life and observe the person's services and supports. In cases where the consumer is not capable of communicating his or her responses and where there is no family member, guardian, or conservator involved, the contractor shall meet with no less than two persons familiar with the consumer. Additionally, the contractor shall interview staff and friends who know the consumer best and review records, as appropriate.

(g) If the contractor identifies any suspected violation of the legal, civil, or service rights of an individual, or if the contractor determines that the health and welfare of the individual is at risk, that information shall be provided immediately to the regional center providing case management services, the client rights advocate, and to the department.

(h) The department shall monitor the corrective actions taken by the regional center and maintain a report in the person's file. The

consumer and, when appropriate, his or her parents, legal guardian, or conservator, shall be provided with access to the person's file and be provided with copies of all reports filed with the regional center or department relative to them.

(i) The department shall establish a task force, including representatives from stakeholder organizations, to annually review the findings of the contractor and make recommendations regarding additional or differing criteria for information to be gathered by the contractor in future interviews.

(j) As of July 1, 1998, and annually thereafter, the contractor shall provide a report to the Governor, the Legislature, and the department outlining the activities and findings of this process. The reports shall be public and shall contain no personally identifying information about the persons being monitored.

SEC. 33. Section 4418.7 is added to the Welfare and Institutions Code, to read:

4418.7. (a) If the regional center determines, or is informed by the consumer's parents, legal guardian, or conservator, that the community placement of a consumer is at risk of failing, and that admittance to a state developmental center is a likelihood, the regional center shall immediately notify the department, the consumer, and the parents, legal guardian, or conservator.

(b) In these cases, the department shall immediately arrange for an assessment of the situation. If, based on the assessment, the department determines that additional or different services and supports are necessary, the department shall ensure that the regional center provides those services and supports on an emergency basis. An individual program plan meeting, including the department's representative, shall be convened as soon as possible to review the emergency services and supports and determine the consumer's ongoing needs for services and supports.

(c) If the department, in consultation with the regional center, the consumer, and the consumer's parents, legal guardian, or conservator, when appropriate, determines that admittance to a state developmental center is necessary to protect the health and welfare of the consumer, the department shall immediately seek that admission.

SEC. 34. Section 4433 is added to the Welfare and Institutions Code, to read:

4433. (a) The Legislature finds and declares all of the following:

(1) The State of California accepts its responsibility to ensure and uphold the rights of persons with developmental disabilities and an obligation to ensure that laws, regulations, and policies on the rights of persons with developmental disabilities are observed and protected.

(2) Persons with developmental disabilities are vulnerable to abuse, neglect, and deprivations of their rights.

(3) Clients' rights advocacy services provided by the regional centers, the advocacy services currently provided by the department at the state hospitals, and the services provided by the department's Office of Human Rights may have conflicts of interest, or the appearance of a conflict of interest.

(4) The services provided to individuals with developmental disabilities and their families are of such a special and unique nature that they cannot satisfactorily be provided by state agencies or regional centers and must be contracted out pursuant to paragraph (3) of subdivision (b) of Section 19130 of the Government Code.

(b) (1) To avoid the potential for a conflict of interest or the appearance of a conflict of interest, beginning January 1, 1998, the department shall contract for clients' rights advocacy services. The department shall solicit a single statewide contract with a nonprofit agency that results in at least three responsive bids that meet all of the criteria specified in paragraph (2) to perform the services specified in subdivision (d). If three responsive bids are not received, the department may rebid the contract on a regional basis, not to exceed three regional contracts and one contract for developmental centers and headquarters.

(2) Any contractor selected shall meet the following requirements:

(A) The contractor can demonstrate the capability to provide statewide advocacy services to individuals with developmental disabilities living in developmental centers and in the community.

(B) The contractor does not directly or indirectly provide services to individuals with developmental disabilities, except advocacy services.

(C) The contractor has knowledge of the service system, entitlements, and service rights of persons receiving services from regional centers and in state hospitals.

(D) The contractor can demonstrate the capability of coordinating services with the protection and advocacy agency specified in Division 4.7 (commencing with Section 4900) and the area boards.

(E) The contractor has not provided any services, except advocacy services, to, or been employed by, any regional center or the Association of Regional Center Agencies during the two-year period prior to the effective date of the contract.

(c) For the purposes of this section, the Legislature further finds and declares that because of a potential conflict of interest or the appearance of a conflict of interest, the goals and purposes of the regional center clients' rights advocacy services, the state hospitals, and the services of the Office of Human Rights, cannot be accomplished through the utilization of persons selected pursuant to the regular civil service system, nor can the services be provided through the department's contracts with regional centers.

Accordingly, contracts into which the department enters pursuant to this section are permitted and authorized by paragraphs (3) and (5) of subdivision (b) of Section 19130 of the Government Code.

(d) The contractor shall do all of the following:

(1) Provide clients' rights advocacy services to persons with developmental disabilities who are consumers of regional centers and to individuals who reside in the state developmental centers and hospitals, including ensuring the rights of persons with developmental disabilities, and assisting persons with developmental disabilities in pursuing administrative and legal remedies.

(2) Investigate and take action as appropriate and necessary to resolve complaints from, or concerning persons with, developmental disabilities residing in licensed health and community care facilities regarding abuse, and unreasonable denial, or punitive withholding, of rights guaranteed under this division.

(3) Provide consultation, technical assistance, supervision and training, and support services for clients' rights advocates that were previously the responsibility of the Office of Human Rights.

(4) Coordinate the provision of clients' rights advocacy services in consultation with the department, stakeholder organizations, and persons with developmental disabilities and their families representing California's multicultural diversity.

(5) Provide at least two self-advocacy trainings for consumers and family members.

(e) In order to ensure that individuals with developmental disabilities have access to high quality advocacy services, the contractor shall establish a grievance procedure and shall advise persons receiving services under the contract of the availability of other advocacy services, including the services provided by the protection and advocacy agency specified in Division 4.7 (commencing with Section 4900) and the area boards.

(f) The department shall contract on a multiyear basis for a contract term of up to three years, subject to the annual appropriation of funds by the Legislature.

(g) This section shall not prohibit the department and the regional centers from advocating for the rights, including the right to generic services, of persons with developmental disabilities.

SEC. 35. Section 4596.5 is added to the Welfare and Institutions Code, to read:

4596.5. (a) In order to remain informed about the quality of services in the area and protect the legal, civil, and service rights of persons with developmental disabilities pursuant to Section 4590, the Legislature finds that it is necessary to conduct life quality assessments with consumers served by the regional centers.

(b) It is the intent of the Legislature that life quality assessments described in this section be conducted by area boards, unless an independent evaluation of the life quality assessment process, that

shall be completed by April 30, 1998, identifies compelling reasons why this function should not be conducted by area boards.

(c) By July 1, 1998, the department shall enter into an interagency agreement with the Organization of Area Boards, on behalf of the area boards, to conduct the life quality assessments described in this section.

(d) Consistent with the responsibilities described in this chapter, the area board, with the consent of the consumer and, when appropriate, a family member, shall conduct life quality assessments with consumers living in out-of-home placements, supported living arrangements, or independent living arrangements no less than once every three years or more frequently upon the request of a consumer, or, when appropriate, a family member. A regional center shall annually provide the local area board with a list, including the name, address, and telephone number of each consumer, and, when appropriate, a family member, the consumer's date of birth, and the consumer's case manager, for all consumers living in out-of-home placements, supported living arrangements, or independent living arrangements, in order to facilitate area board contact with consumers and, when appropriate, family members, for the purpose of conducting life quality assessments.

(e) The life quality assessments shall be conducted by utilizing the State Department of Developmental Services' Looking at Life Quality Handbook.

(f) The assessments shall be conducted by consumers, families, providers, and others, including volunteer surveyors. Each area board shall recruit, train, supervise, and coordinate surveyors. Upon request, and if feasible, the area board shall respect the request of a consumer and, when appropriate, family member, for a specific surveyor to conduct the life quality assessment. An area board may provide stipends to surveyors.

(g) A life quality assessment shall be conducted within 90 days prior to a consumer's triennial individual program plan meeting, so that the consumer and regional center may use this information as part of the planning process.

(h) Prior to conducting a life quality assessment, the area board shall meet with the regional center to coordinate the exchange of appropriate information necessary to conduct the assessment and ensure timely followup to identified violations of any legal, civil, or service rights.

(i) Following the conduct of each life quality assessment, the area board shall develop a report of its findings and provide a copy of the report to the consumer, when appropriate, family members, and the regional center providing case management services to the consumer. In the event that a report identifies alleged violations of any legal, civil, or service right, the area board shall notify the regional center and the department of the alleged violation. The

department shall monitor the regional center to ensure that violations are addressed and resolved in a timely manner.

(j) Regional centers shall review information from the life quality assessments on a systemic basis in order to identify training and resource development needs.

(k) Effective August 1, 1999, and annually thereafter, the Organization of Area Boards shall prepare and submit a report to the Governor, the Legislature, and the department describing the activities and accomplishments related to the implementation of this section. The report shall include, but not be limited to, the number of life quality assessments conducted, the number of surveyors, including those provided stipends, a description of the surveyor recruitment process and training program, including any barriers to recruitment, the number, nature, and outcome of any identified violations of legal, civil, or service rights reported to regional centers, and recommendations for improvement in the life quality assessment process.

(*l*) Implementation of this section shall be subject to an annual appropriation of funds in the state Budget Act for this purpose.

(m) If the department finds, based on the results of the independent study described in subdivision (b), that there is a compelling reason why the area boards should not conduct the life quality assessments, it may select an alternative governmental agency or contract with a nonprofit agency to conduct the life quality assessments as described in this section. The department shall notify the Governor and the Legislature of such a finding, including the reasons for the finding and a description of the alternative method by which the department will ensure the life quality assessment process is completed.

SEC. 36. Section 4639 is added to the Welfare and Institutions Code, to read:

4639. The governing board of a regional center shall annually contract with an independent accounting firm for an audited financial statement. The audit report and accompanying management letter shall be reviewed and approved by the regional center board and submitted to the department within 60 days of completion and before April 1 of each year. Upon submission to the department, the audit report and accompanying management letter shall be made available to the public by the regional center. It is the intent of the Legislature that no additional funds be appropriated for this purpose.

SEC. 37. Section 4643.5 of the Welfare and Institutions Code is amended to read:

4643.5. (a) If a consumer is or has been determined to be eligible for services by a regional center, he or she shall also be considered eligible by any other regional center if he or she has moved to another location within the state.

(b) An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

(c) Whenever a consumer transfers from one regional center catchment area to another, the level and types of services and supports specified in the consumer's individual program plan shall be authorized and secured, if available, pending the development of a new individual program plan for the consumer. If these services and supports do not exist, the regional center shall convene a meeting to develop a new individual program plan within 30 days. Prior to approval of the new individual program plan, the regional center shall provide alternative services and supports that best meet the individual program plan objectives in the least restrictive setting. The department shall develop guidelines that describe the responsibilities of regional centers in ensuring a smooth transition of services and supports from one regional center to another, including, but not limited to, pretransferring planning and a dispute resolution process to resolve disagreements between regional centers regarding their responsibilities related to the transfer of case management services.

SEC. 38. Section 4681.1 of the Welfare and Institutions Code is amended to read:

4681.1. (a) By July 1 each year, the department shall establish rates, that shall be reviewed by the state council. Payment of these rates shall be subject to the appropriation of sufficient funds for that purpose in the Budget Act. In reviewing the sufficiency of these rates that is required by March 1, 1989, the department shall take into account the findings and recommendations of the study conducted by the State Council on Developmental Disabilities pursuant to Section 4541.

(b) In establishing rates to be paid for out-of-home care, the department shall include each of the cost elements in this section as follows:

(1) Rates established for all facilities shall include an adequate amount to care for "basic living needs" of a person with developmental disabilities. "Basic living needs" shall include housing, shelter, utilities, furnishings, food, incidental transportation, housekeeping, and personal care items. The amount required for basic living needs shall be calculated each year as the average cost of these items in community care facilities. The department shall annually publish a listing of the allowable cost components of these cost items and the methodology used to determine the amounts of each item. The amount for basic living needs shall be adjusted depending on the extent to which there is a demonstrated variation

based on the size of the out-of-home facility. These amounts shall be adjusted annually to reflect cost-of-living changes. A redetermination of basic living costs shall be undertaken every three years by the State Department of Developmental Services, using the best available estimating methods. The first report shall be made on March 1, 2001. The department shall convene an advisory committee and develop a plan, including a proposal for an appropriate study methodology, for the redetermination of basic living costs. The advisory committee shall include, but not be limited to, service consumers, family members, residential service providers, and advocacy groups.

(2) Rates established for all facilities that provide direct supervision for persons with developmental disabilities shall include an amount for "direct supervision." The cost of "direct supervision" shall vary with the person's functioning in the areas of self-care and daily living skills, physical coordination and mobility, and behavioral self-control and shall reflect one of the following:

(A) Basic self-help and daily living skills, no significant limitations in physical coordination and mobility, and behavioral self-control.

(B) Poor self-help and daily living skills, some limitations in physical coordination and mobility, or some disruptive or self-injurious behavior.

(C) Severe deficits in self-care and daily living skills, severe impairments in physical coordination and mobility, or severely disruptive or self-injurious behavior.

The individual program plan developed pursuant to Section 4646 shall determine the amount of direct supervision required for each individual. The cost of direct supervision shall be calculated as the wage and benefit costs of caregiving staff depending on the level of service being provided to meet the functional needs of the person with developmental disabilities. These rates shall be adjusted annually to reflect wage changes and shall comply with all federal regulations for hospitals and residential care establishments under the federal Fair Labor Standards Act.

(3) Rates established for all facilities that provide "special services" for persons with developmental disabilities shall include an amount to pay for such "special services" for each person receiving special services. "Special services" include specialized training, treatment, supervision, or other services which the individual program plan of each person requires to be provided by the residential facility in addition to the direct supervision provided pursuant to the person's individual program plan in subdivision (b). Facilities shall be paid for providing special services for each individual to the extent that such services are specified in the person's individual program plan and the facility is a designated provider of such special services. Rates of payment for special services shall be the same as prevailing rates paid for similar services in the area.

(4) To the extent applicable, rates established for facilities shall include a reasonable amount for "unallocated services." These costs shall be determined using generally accepted accounting principles. "Unallocated services" means the indirect costs of managing a facility and includes costs of managerial personnel, facility operation, maintenance and repair, employee benefits, taxes, interest, insurance, depreciation, and general and administrative support. If a facility serves other persons in addition to developmentally disabled persons, unallocated services expenses shall be reimbursed under this section, only for the proportion of the costs associated with the care of developmentally disabled persons. The amount for unallocated services shall be adjusted depending on the extent to which there is a demonstrated variation due to such factors as facility size or administrative structure.

(5) Rates established for facilities shall include an amount to reimburse facilities for the depreciation of "mandated capital improvements and equipment" as established in the state's uniform accounting manual. For purposes of this section, "mandated capital improvements and equipment" are only those remodeling and equipment costs incurred by a facility because an agency of government has required such remodeling or equipment as a condition for the use of the facility as a provider of out-of-home care to persons with developmental disabilities.

(6) When applicable, rates established for proprietary facilities shall include a reasonable "proprietary fee."

(7) Rates established for all facilities shall include as a "factor" an amount to reflect differences in the cost of living for different geographic areas in the state.

(8) Rates established for developmentally disabled persons who are also mentally disordered may be fixed at a higher rate. The State Department of Mental Health shall establish criteria upon which higher rates may be fixed pursuant to this subdivision. The higher rate for developmentally disabled persons who are also mentally disordered may be paid when requested by the director of the regional center and approved by the Director of Developmental Services.

(c) This section shall apply to facility rates paid under the alternative residential model originally authorized in Item 4300-101-001 of the Budget Act of 1985 and as identified in the department's report of April 1987 entitled Alternative Residential Model (ARM).

(d) The department shall approve additional facilities to receive rates pursuant to this section upon the appropriation of funds for that purpose.

(e) It is the intent of the Legislature that the department phase in implementation of the alternative residential model during the fiscal years 1987–88, 1988–89, 1989–90, and 1990–91. The department

shall include all facilities providing services pursuant to this article in the alternative residential model by January 1, 1991.

(f) By April 1, 1989, the State Department of Developmental Services shall prepare draft regulations establishing quality service standards for facilities and procedures for administering the alternative residential model. The department shall confer with interested parties concerning the draft regulations by July 1, 1989. By July 1, 1990, the department shall submit to the Office of Administrative Law regulations establishing quality service standards for facilities, procedures for administering the Alternative Residential Model, and ratesetting methodology. Full statewide implementation of the Alternative Residential Model shall not occur until the department has submitted these regulations.

(g) In addition to establishing rates as required by this section, the State Department of Developmental Services shall detail obstacles to ensuring sufficient numbers of living arrangements for persons served by the department, and to providing an adequate quality of care and services to persons served by the department who reside in residential facilities, and make recommendations for overcoming these obstacles.

SEC. 39. Section 4681.3 of the Welfare and Institutions Code is amended to read:

4681.3. (a) Notwithstanding any other provision of this article, for the 1996–97 fiscal year, the rate schedule authorized by the department in operation June 30, 1996, shall be increased based upon the amount appropriated in the Budget Act of 1996 for that purpose. The increase shall be applied as a percentage, and the percentage shall be the same for all providers.

(b) Notwithstanding any other provision of this article, for the 1997–98 fiscal year, the rate schedule authorized by the department in operation on June 30, 1997, shall be increased based upon the amount appropriated in the Budget Act of 1997 for that purpose. The increase shall be applied as a percentage, and the percentage shall be the same for all providers.

SEC. 40. Section 6600.05 of the Welfare and Institutions Code is amended to read:

6600.05. Atascadero State Hospital shall be used whenever a person is committed to a secure facility for mental health treatment pursuant to Section 6600 and is placed in a state hospital under the direction of the State Department of Mental Health unless there are unique circumstances that would preclude the placement of a person at that facility. If a state hospital is not used, the facility to be used shall be located on a site or sites determined by the Director of Corrections and the Director of Mental Health. In no case shall a person committed to a secure facility for mental health treatment pursuant to Section 6600 be placed at Metropolitan State Hospital or Napa State Hospital.

SEC. 41. Section 7200.06 is added to the Welfare and Institutions Code, to read:

7200.06. (a) Of the total patient population residing at Napa State Hospital in any given fiscal year, not more than 80 percent shall be patients whose placement has been required pursuant to the Penal Code.

(b) After construction of the perimeter security fence is completed at Napa State Hospital, no patient whose placement has been required pursuant to the Penal Code shall be placed outside the perimeter security fences, with the exception of placements in the General Acute Care and Skilled Nursing Units. The State Department of Mental Health shall ensure that appropriate security measures are in place for the general acute care and skilled nursing units.

(c) After construction of the perimeter security fence is completed at Napa State Hospital, in no case shall the population of patients whose placement has been required pursuant to the Penal Code exceed 980.

SEC. 42. Section 7200.07 is added to the Welfare and Institutions Code, to read:

7200.07. Notwithstanding any other provision of law, not more than 824 patients whose placement has been required pursuant to the Penal Code shall be placed at Napa State Hospital in the 1998–99 fiscal year.

SEC. 43. Section 7202 is added to the Welfare and Institutions Code, to read:

7202. The State Department of Mental Health shall regularly consult with the Napa State Hospital Task Force, which consists of local community representatives, on proposed policy or structural modifications to Napa State Hospital that may affect the Napa community, including, but not limited to, all of the following:

(a) Changes in the patient population mix.

(b) Construction of, or significant alterations to, facility structures.

(c) Changes in the hospital security plan.

SEC. 44. Section 7204 is added to the Welfare and Institutions Code, to read:

7204. (a) Grounds privileges or passes may be earned by patients, whose placement has been required pursuant to the Penal Code, at all state hospitals. Grounds privileges shall be restricted to areas of the state hospital that are designated as secured campus areas.

(b) Off-ground privileges or passes shall not be granted to patients, whose placement has been required pursuant to the Penal Code, at state hospitals. When a patient whose placement has been required pursuant to the Penal Code leaves a state hospital for any purpose other than discharge, the patient shall be accompanied by staff at all times.

SEC. 45. Section 7228 of the Welfare and Institutions Code is amended to read:

7228. Prior to admission to the Napa State Hospital or the Metropolitan State Hospital, the State Department of Mental Health shall evaluate each patient committed pursuant to Section 1026 or 1370 of the Penal Code. A patient determined to be a high security risk shall be treated in the department's most secure facilities. A Penal Code patient not needing this level of security shall be treated as near to the patient's community as possible if an appropriate treatment program is available.

SEC. 46. Section 7229 is added to the Welfare and Institutions Code, to read:

7229. Notwithstanding any other provision of law, patients whose placement has been required pursuant to the Penal Code, above the 593 patients approved through the Budget Act of 1996, shall be admitted to Napa State Hospital only after all of the following conditions have been met:

(a) The perimeter security fence, as approved in the Budget Act of 1997, is completed. The completion of this fence is a matter of public safety and has the highest urgency to be completed as quickly as possible. It is the intent of the Legislature for the state administration to take the administrative action needed to ensure the timely construction of the perimeter security fence.

(b) An appropriately trained state hospital security force, as identified in the hospital's security plan developed in conjunction with the City of Napa, the County of Napa, local law enforcement personnel, local community leaders, and security consultants as needed, is in place to meet the security needs of the state hospital.

(c) Specialized training to level-of-care and, as necessary, nonlevel-of-care, staff has been provided to ensure the safest and most therapeutic environment possible for both patients and staff.

(d) A 30-day notification to the fiscal and policy committees of the Legislature has been provided.

SEC. 47. Section 7230 is added to the Welfare and Institutions Code, to read:

7230. Those patients determined to be high security risk patients, as described in Section 7228, shall be treated at Atascadero State Hospital or Patton State Hospital, a correctional facility, or other secure facility as defined by the State Department of Mental Health, but shall not be treated at Metropolitan State Hospital or Napa State Hospital. Metropolitan State Hospital and Napa State Hospital shall treat only low- to moderate-risk patients, as defined by the State Department of Mental Health.

SEC. 48. Section 7231 is added to the Welfare and Institutions Code, to read:

7231. The State Department of Mental Health shall develop policies and procedures, by no later than 30 days following the

effective date of the Budget Act of 1997, at each state hospital, to notify appropriate law enforcement agencies in the event of a patient escape or walkaway. Local law enforcement agencies, including local police and county sheriff departments, shall review the policies and procedures prior to final implementation by the department.

SEC. 49. Section 7232 is added to the Welfare and Institutions Code, to read:

7232. The State Department of Mental Health shall issue a state hospital administrative directive by no later than 30 days following the effective date of the Budget Act of 1997 to require patients whose placement has been required pursuant to the Penal Code, and other patients within the secured perimeter at each state hospital, to wear clothing that enables these patients to be readily identified.

SEC. 50. Section 7233 is added to the Welfare and Institutions Code, to read:

7233. It is the intent of the Legislature to complete the 250-bed addition at Atascadero State Hospital as expeditiously as feasible due to the need to provide appropriate, secure housing for patients whose placement has been required pursuant to the Penal Code. To facilitate this completion, it is the intent of the Legislature to provide funding for the construction phase of this project in the Budget Act of 1998.

SEC. 51. Section 14005.75 is added to the Welfare and Institutions Code, to read:

14005.75. (a) The Legislature finds and declares all of the following:

(1) As a result of federal welfare reform, unprecedented numbers of welfare recipients will be leaving welfare for work, and will face time limits on the receipt of aid.

(2) It is in the interest of the state both to encourage welfare recipients to seek employment and to ensure the continuity of health coverage for these recipients as they move from welfare to work.

(3) California's transitional Medi-Cal program is intended to encourage welfare recipients to seek employment and to ensure continuity of health coverage, but various procedural restrictions limit its effectiveness in achieving those goals.

(b) It is, therefore, the intent of the Legislature to streamline the transitional Medi-Cal program in order to maximize its effectiveness in assisting persons leaving welfare for work.

SEC. 52. Section 14005.76 is added to the Welfare and Institutions Code, to read:

14005.76. (a) The department shall provide a Medi-Cal beneficiary whose Medi-Cal eligibility is established pursuant to Section 1930 of the federal Social Security Act (42 U.S.C. Sec. 1396u-1) with simple and clear written notice of the availability of the transitional Medi-Cal program and the requirements for that program. This notice shall be provided at the time that Medi-Cal

eligibility is conferred to the beneficiary and at least once every six months thereafter.

(b) When a beneficiary loses Medi-Cal eligibility established pursuant to Section 1930 of the federal Social Security Act (42 U.S.C. Sec. 1396u-1) for failure to meet reporting requirements, the department shall provide the beneficiary with the notice described in subdivision (a), and a form with simple and clear instructions on how to complete and return the form to the county. The form shall be used to determine whether the beneficiary is eligible for the transitional Medi-Cal program.

(c) The notice and form described in subdivisions (a) and (b) shall be prepared by the department. The department shall seek input on the notice and form from beneficiaries of aid, beneficiary representatives, and counties.

(d) The department shall review, and if necessary for simplicity and clarity, revise the notice required by subdivision (b) of Section 14005.8 and Section 14005.81. The department shall seek input from beneficiaries, beneficiary representatives, and counties.

(e) Notwithstanding any other provision of law, this section shall become operative nine months after the effective date of this section.

(f) Notwithstanding any other provision of law, this section shall be implemented only if, and to the extent that, the department determines that federal financial participation, as provided under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.), is available.

SEC. 53. Section 14005.82 is added to the Welfare and Institutions Code, to read:

14005.82. (a) Any person who the department determines, pursuant to the notice and information on the form required by subdivision (b) of Section 14005.76, is eligible for transitional Medi-Cal benefits, shall be made retroactively eligible for transitional Medi-Cal benefits from the date that person loses Medi-Cal eligibility established pursuant to Section 1931 of the federal Social Security Act (42 U.S.C. Sec. 1396u-1). All information contained on the form required by subdivision (b) of Section 14005.76 is subject to verification by the county using applicable criteria.

(b) Notwithstanding any other provision of law, this section shall be implemented only if, and to the extent that, the department determines that federal financial participation, as provided under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.) is available.

SEC. 54. Section 14005.83 is added to the Welfare and Institutions Code, to read:

14005.83. (a) The director shall seek a waiver from the federal government to simplify the transitional Medi-Cal program described in Section 14005.81.

(b) The waiver required to be sought pursuant to subdivision (a) shall seek to include all of the following:

(1) Any family receiving Medi-Cal benefits whose Medi-Cal eligibility was established pursuant to Section 1931 of the federal Social Security Act (42 U.S.C. Sec. 1396u-1) in the month prior to becoming ineligible for those benefits due to increased hours of employment, income from employment, or the loss of earned income disregards shall be eligible for Medi-Cal coverage subject to the time limits contained in Section 14005.81.

(2) Status reports to determine ongoing eligibility for transitional Medi-Cal benefits shall be required not more frequently than every six months.

(3) Receipt of transitional Medi-Cal coverage for any portion of the initial six-month period of eligibility shall be sufficient to establish eligibility for successive six-month periods of coverage, provided other applicable eligibility requirements are met.

(c) Notwithstanding any other provision of law, this section shall be implemented only if, and to the extent that, the department determines that federal financial participation, as provided under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.), is available.

(d) This section shall not become operative until the director executes a declaration, which shall be retained by the director, stating that the federal approval necessary for implementation of this section has been obtained.

SEC. 55. Section 14005.84 is added to the Welfare and Institutions Code, to read:

14005.84. (a) The department shall develop and conduct a community outreach and education campaign to assist persons whose Medi-Cal eligibility is established pursuant to Section 1931 of the federal Social Security Act (42 U.S.C. Sec. 1396u-1), to learn about the availability of the transitional Medi-Cal program.

(b) Any managed care plan, local initiative, or county organized health system contracting with the department to provide services to Medi-Cal enrollees shall include in its evidence of coverage and marketing materials information about the transitional Medi-Cal program and how to apply for program benefits.

(c) To implement this section, the department may develop and execute a contract or may amend any existing or future outreach campaign contract that it has executed. Notwithstanding any other provision of law, any such contract developed and executed, or amended, as required to implement this section shall be exempt from the approval of the Director of General Services and from the Public Contract Code.

(d) Notwithstanding any other provision of law, this section shall be implemented only if, and to the extent that, the department determines that federal financial participation, as provided under

Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.), is available.

SEC. 56. Section 14005.88 is added to the Welfare and Institutions Code, to read:

14005.88. (a) The department shall contract for an independent evaluation, to be completed no later than January 1, 2001, in order to determine the effect of changes made in the transitional Medi-Cal program by the enactment of Sections 14005.76, 14005.82, 14005.83, 14005.84, 14005.87, 14005.89, and the amendment to Section 14005.85 enacted during the first year of the 1997–98 Regular Session of the Legislature, on the employment of welfare recipients and the continuity of their health coverage.

(b) Notwithstanding any other provision of law, this section shall be implemented only if, and to the extent that, the department determines that federal financial participation, as provided under Title XIX of the federal Social Security Act (42 U.S.C. Sec. 1396 et seq.), is available.

SEC. 57. Section 14005.89 is added to the Welfare and Institutions Code, to read:

14005.89. (a) The department shall monitor participation rates for transitional Medi-Cal and seek input from beneficiaries, beneficiary representatives, and counties, on a regular basis throughout each year to consider changes in transitional Medi-Cal procedures as may be necessary to ensure that participation rates are at levels that would reasonably be expected, given aid caseload developments. Before any such changes are made, the department shall seek any federal waivers, or obtain other federal approval, that may be necessary to implement the changes.

(b) The department shall make the participation rate monitoring data described in subdivision (a) available upon request.

SEC. 58. Section 14011.4 is added to the Welfare and Institutions Code, to read:

14011.4. The department shall, subject to the requirements of federal law, and not later than six months after the effective date of this section, develop a simple referral form to be used as proof of birth, in order to initiate Medi-Cal enrollment and the establishment of benefits for newborns who are eligible for one year of automatic continuous Medi-Cal eligible benefits pursuant to Section 1902(e)(4) of the federal Social Security Act (42 U.S.C. Sec. 1396a(e)(4)). In developing the referral form, the department shall seek input from beneficiary representatives and health care providers serving pregnant women receiving, or eligible for, Medi-Cal benefits. The infant's parent or guardian, or, with the knowledge and written consent of the infant's parent or guardian, a health care provider or other hospital worker, may submit the referral form by mail or facsimile. Upon receipt of the form, the department shall, subject to

the requirements of federal law, assign a Medi-Cal number to the newborn and issue a Medi-Cal card.

SEC. 59. Section 14029 is added to the Welfare and Institutions Code, to read:

14029. Whenever a request for services authorized pursuant to subdivision (s), (t), or (v) of Section 14132 is made to the department for a child who is being case-managed by the California Children's Services program, any decision to transfer the child to the home setting shall be made only in consultation with the California Children's Services program case manager for the child.

SEC. 60. The Legislature finds and declares all of the following:

(a) It is estimated that a large number of children may meet the family income requirements for Medi-Cal, but are not enrolled in the program.

(b) Many families of uninsured children who are potentially eligible for Medi-Cal fail to successfully apply for the program because they are unaware their children may be eligible or because the application form and process are too complicated and difficult to complete.

(c) Under Public Law 104-193, eligibility for cash assistance under the Temporary Assistance for Needy Families (TANF) program may decline significantly in comparison to eligibility under the Aid to Families with Dependent Children (AFDC) program.

(d) Families who would have qualified for AFDC benefits under the eligibility requirements in effect on July 16, 1996, will be eligible for Medi-Cal benefits under Public Law 104-193.

(e) However, without adequate education and outreach about Medi-Cal, many of these families may fail to learn that they qualify and will not successfully apply for the program.

(f) Without health coverage, children are much more likely to go without crucial health care services.

(g) Almost 1.6 million children in California, or about one out of every five adolescents, lack health insurance.

(h) It is estimated that a significant number of these children may be eligible for Medi-Cal, but not enrolled.

SEC. 61. Section 14067 is added to the Welfare and Institutions Code, to read:

14067. (a) The department shall develop and conduct a community outreach and education campaign to help families learn about, and apply for, Medi-Cal, subject to the requirements of federal law. In conducting this campaign, the department may seek input from various entities and programs that serve children, including, but not limited to, the State Department of Education, counties, Women, Infants, and Children program agencies, Head Start and Healthy Start programs, and community-based organizations that deal with potentially eligible families and children.

(b) The outreach and education campaign shall be established and implemented no later than six months after the effective date of this section.

(c) In implementing this section, the department may amend any existing or future media outreach campaign contract that it has entered into pursuant to Section 14148.5. Notwithstanding any other provision of law, any such contract entered into, or amended, as required to implement this section, shall be exempt from the approval of the Director of General Services and from the provisions of the Public Contract Code.

SEC. 62. (a) It is the intent of the Legislature that the University of California work with the State Department of Health Services and the California Medical Assistance Commission to address future funding of graduate medical education in the State of California. It is further the intent of the Legislature that implementing legislation be enacted no later than June 30, 1999.

(b) The University of California, in coordination with the State Department of Health Services and the California Medical Assistance Commission, is requested to submit a progress report on efforts to develop future funding of graduate medical education to the Governor and the health policy and fiscal committees of each house of the Legislature by November 1, 1998.

SEC. 63. Section 14085.7 is added to the Welfare and Institutions Code, to read:

14085.7. (a) The Medi-Cal Medical Education Supplemental Payment Fund is hereby created in the State Treasury. Notwithstanding Section 13340 of the Government Code, the fund shall be continuously appropriated to, and under the administrative control of, the department for the purposes specified in this section. Except as otherwise limited by this section, the fund shall consist of all of the following:

(1) All public moneys transferred by public agencies to the department for deposit into the fund, as permitted under Section 433.51 of Title 42 of the Code of Federal Regulations or any other applicable federal medicaid laws.

(2) All private moneys donated by private individuals or entities to the department for deposit in the fund as permitted under applicable federal medicaid laws.

(3) Any amounts appropriated to the fund by the Legislature.

(4) Any interest that accrues on amounts in the fund.

(b) Any public agency transferring moneys to the fund may, for that purpose, utilize any revenues, grants, or allocations received from the state for health care programs or purposes, unless otherwise prohibited by law. A public agency may also utilize its general funds or any other public moneys or revenues for purposes of transfers to the fund, unless otherwise prohibited by law.

(c) The department shall have the discretion to accept or not accept moneys offered to the department for deposit in the fund. If the department accepts moneys pursuant to this section, the department shall obtain federal matching funds to the full extent permitted by law. The department shall accept only those funds that are certified by the transferring or donating entity as qualifying for federal financial participation under the terms of the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991 (P.L. 102-234) or Section 433.51 of Title 42 of the Code of Federal Regulations, as applicable, and may return any funds transferred or donated in error.

(d) Moneys in the fund shall be used as the source for the nonfederal share of payments to hospitals under this section. Moneys shall be allocated from the fund by the department and matched by federal funds in accordance with customary Medi-Cal accounting procedures for purposes of payments under subdivision (e). Distributions from the fund shall be supplemental to any other amounts that hospitals receive under the contracting program.

(e) For purposes of recognizing medical education costs incurred for services rendered to Medi-Cal beneficiaries, payments from this fund shall be negotiated between the California Medical Assistance Commission and hospitals contracting under this article that meet the definition of university teaching hospitals or major (nonuniversity) teaching hospitals as set forth on page 51 and as listed on page 57 of the department's report dated May 1991, entitled "Hospital Peer Grouping." Payments from the fund shall be used solely for the purposes identified in the contract between the hospital and the state.

(f) The state shall be held harmless from any federal disallowance resulting from this section. A hospital receiving supplemental reimbursement pursuant to this section shall be liable for any reduced federal financial participation resulting from the implementation of this section with respect to that hospital. The state may recoup any federal disallowance from the hospital.

(g) This section shall become inoperative on June 30, 1999, and, as of January 1, 2000, is repealed, unless a later enacted statute, that becomes effective on or before January 1, 2000, deletes or extends the dates on which it becomes inoperative and is repealed.

SEC. 64. Section 14085.8 is added to the Welfare and Institutions Code, to read:

14085.8. (a) The Large Teaching Emphasis Hospital and Children's Hospital Medi-Cal Medical Education Supplemental Payment Fund is hereby created in the State Treasury.

(b) Notwithstanding Section 13340 of the Government Code, the fund shall be continuously appropriated to, and under the administrative control of, the department for the purposes specified in this section.

(c) Except as otherwise limited by this section, the fund shall consist of all of the following:

(1) All public moneys transferred by public agencies to the department for deposit into the fund, as permitted under Section 433.51 of Title 42 of the Code of Federal Regulations or any other applicable federal medicaid laws.

(2) All private moneys donated by private individuals or entities to the department for deposit in the fund as permitted under applicable federal medicaid laws.

(3) Any amounts appropriated to the fund by the Legislature.

(4) Any interest that accrues on amounts in the fund.

(d) Any public agency transferring moneys to the fund may, for that purpose, utilize any revenues, grants, or allocations received from the state for health care programs or purposes, unless otherwise prohibited by law. A public agency may also utilize its general funds or any other public moneys or revenues for purposes of transfers to the fund, unless otherwise prohibited by law.

(e) The department may accept or not accept moneys offered to the department for deposit in the fund. If the department accepts moneys pursuant to this section, the department shall obtain federal matching funds to the full extent permitted by law. The department shall accept only those funds that are certified by the transferring or donating entity as qualifying for federal financial participation under the terms of the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991 (P.L. 102-234) or Section 433.51 of Title 42 of the Code of Federal Regulations, as applicable, and may return any funds transferred or donated in error.

(f) Moneys in the fund shall be used as the source for the nonfederal share of payments to hospitals under this section. Moneys shall be allocated from the fund by the department and matched by federal funds in accordance with customary Medi-Cal accounting procedures for purposes of payments under subdivision (g). Distributions from the fund shall be supplemental to any other amounts that hospitals receive under the contracting program.

(g) (1) For purposes of recognizing medical education costs incurred for services rendered to Medi-Cal beneficiaries, contracts for payments from the fund may, at the discretion of the California Medical Assistance Commission, be negotiated between the commission and hospitals contracting under this article that are defined as either of the following:

(A) A large teaching emphasis hospital, as set forth on page 51 and listed on page 57 of the department's report dated May 1991, entitled "Hospital Peer Grouping," and meets the definition of eligible hospital as defined in paragraph (3) of subdivision (a) of Section 14105.98.

(B) A children's hospital pursuant to Section 10727 and meets the definition of eligible hospital as defined in paragraph (3) of subdivision (a) of Section 14105.98.

(2) Payments from the fund shall be used solely for the purposes identified in the contract between the hospital and the state.

(h) The state shall be held harmless from any federal disallowance resulting from this section. A hospital receiving supplemental reimbursement pursuant to this section shall be liable for any reduced federal financial participation resulting from the implementation of this section with respect to that hospital. The state may recoup any federal disallowance from the hospital.

(i) This section shall become inoperative on June 30, 1999, and, as of January 1, 2000, is repealed, unless a later enacted statute, that becomes effective on or before January 1, 2000, deletes or extends the dates on which it becomes inoperative and is repealed.

SEC. 65. Section 14093.07 is added to the Welfare and Institutions Code, to read:

14093.07. For purposes of this article the following definitions apply:

(a) "Foster child" means any child who has been taken into custody or placed by a juvenile court pursuant to Article 6 (commencing with Section 300) of Chapter 2 of Part 1 of Division 2 or Section 601 or 602.

(b) "Medi-Cal managed care plan" means any person or entity that has entered into a contract with the director pursuant to Article 2.7 (commencing with Section 14087.3), Article 2.9 (commencing with Section 14088), or Article 2.91 (commencing with Section 14089) of this chapter or pursuant to Article 1 (commencing with Section 14200) of Chapter 8.

(c) "Out-of-county placement" means any foster care placement in which the child has been placed outside of the county with the responsibility for the care and placement of the child.

SEC. 66. Section 14093.09 is added to the Welfare and Institutions Code, to read:

14093.09. (a) No child in foster care shall be required to enroll in a Medi-Cal managed care plan. A foster child may be voluntarily enrolled in a Medi-Cal managed care plan only when the county child welfare agency with responsibility for the care and placement of the child, in consultation with the child's foster caregiver, determines that it is in the best interest of the child to do so and the department determines that enrollment is available to the child.

(b) Whenever a foster child is placed in an out-of-county placement, the county child welfare agency with responsibility for the care and placement of the child shall determine, in consultation with the child's foster caregiver, if the child should remain in, or has enrolled in, a Medi-Cal managed care plan in the county where the child will be placed or in the county with responsibility for the care

and placement of the child, as long as the department determines that enrollment is available for the child.

(c) The State Department of Health Services shall establish for Medi-Cal managed care plans urgent disenrollment procedures that provide for disenrollment of foster children in out-of-county placements within two working days of receipt by the department's enrollment contractor, or the department, if the department has no enrollment contractor, of a request for disenrollment made by the child welfare services agency, the foster caregiver, or other person authorized to make medical decisions on behalf of the foster child.

(d) Medi-Cal managed care plans shall process and pay appropriately documented claims submitted by out-of-plan providers for services provided to foster children in out-of-county placements while they are Medi-Cal members of the plan. This section shall not be construed to prevent a plan from requiring prior authorization for nonemergency services consistent with the plan's established policies and procedures.

SEC. 67. Section 14094.3 of the Welfare and Institutions Code is amended to read:

14094.3. (a) Notwithstanding this article or Section 14093.05 or 14094.1, CCS covered services shall not be incorporated into any Medi-Cal managed care contract entered into after August 1, 1994, pursuant to Article 2.7 (commencing with Section 14087.3), Article 2.8 (commencing with Section 14087.5), Article 2.9 (commencing with Section 14088), Article 2.91 (commencing with Section 14089), Article 2.95 (commencing with Section 14092); or either Article 2 (commencing with Section 14200), or Article 7 (commencing with Section 14490) of Chapter 8, until August 1, 2000, except for contracts entered into for county organized health systems in the Counties of San Mateo, Santa Barbara, Solano and Napa.

(b) Notwithstanding any other provision of this chapter, providers serving children under the CCS program who are enrolled with a Medi-Cal managed care contractor but who are not enrolled in a pilot project pursuant to subdivision (c) shall continue to submit billing for CCS covered services on a fee-for-service basis until CCS covered services are incorporated into the Medi-Cal managed care contracts described in subdivision (a).

(c) (1) The department may authorize a pilot project in Solano County in which reimbursement for conditions eligible under the CCS program may be reimbursed on a capitated basis pursuant to Section 14093.05, and provided all CCS program's guidelines, standards, and regulations are adhered to, and CCS program's case management is utilized.

(2) During the time period described in subdivision (a), the department may approve, implement, and evaluate limited pilot projects under the CCS program to test alternative managed care models tailored to the special health care needs of children under the

CCS program. The pilot projects may include, but need not be limited to, coverage of different geographic areas, focusing on certain subpopulations, and the employment of different payment and incentive models. Pilot project proposals from CCS program-approved providers shall be given preference. All pilot projects shall utilize CCS program-approved standards and providers pursuant to Section 14094.1.

(d) (1) The department shall submit to the appropriate committees of the Legislature an evaluation of pilot projects established pursuant to subdivision (c) based on at least one full year of operation.

(2) The evaluation required by paragraph (1) shall address the impact of the pilot projects on outcomes as set forth in paragraph (4) and, in addition, shall do both of the following:

(A) Examine the barriers, if any, to incorporating CCS covered services into the Medi-Cal managed care contracts described in subdivision (a).

(B) Compare different pilot project models with the fee-for-service system. The evaluation shall identify, to the extent possible, those factors that make pilot projects most effective in meeting the special needs of children with CCS eligible conditions.

(3) CCS covered services shall not be incorporated into the Medi-Cal managed care contracts described in subdivision (a) before the evaluation process has been completed.

(4) The pilot projects shall be evaluated to determine if:

(A) All children enrolled with a Medi-Cal managed care contractor described in subdivision (a) identified as having a CCS eligible condition are referred in a timely fashion for appropriate health care.

(B) All children in the CCS program have access to coordinated care that includes primary care services in their own community.

(C) CCS program standards are adhered to.

(e) For purposes of this section, CCS covered services include all program benefits administered by the program specified in Section 123840 of the Health and Safety Code regardless of the funding source.

(f) Nothing in this section shall be construed to exclude or restrict CCS eligible children from enrollment with a managed care contractor or from receiving from the managed care contractor with which they are enrolled primary and other health care unrelated to the treatment of the CCS eligible condition.

SEC. 68. Section 14105.31 of the Welfare and Institutions Code is amended to read:

14105.31. For purposes of the Medi-Cal contract drug list, the following definitions shall apply:

(a) "Single-source drug" means a drug that is produced and distributed under an original New Drug Application approved by the

federal Food and Drug Administration. This shall include a drug marketed by the innovator manufacturer and any cross-licensed producers or distributors operating under the New Drug Application, and shall also include a biological product, except for vaccines, marketed by the innovator manufacturer and any cross-licensed producers or distributors licensed by the federal Food and Drug Administration pursuant to Section 262 of Title 42 of the United States Code. A drug ceases to be a single-source drug when the same drug in the same dosage form and strength manufactured by another manufacturer is approved by the federal Food and Drug Administration under the provisions for an Abbreviated New Drug Application.

(b) "Best price" means the negotiated price, or the manufacturer's lowest price available to any class of trade organization or entity, including, but not limited to, wholesalers, retailers, hospitals, repackagers, providers, or governmental entities within the United States, that contracts with a manufacturer for a specified price for drugs, inclusive of cash discounts, free goods, volume discounts, rebates, and on- or off-invoice discounts or credits, shall be based upon the manufacturer's commonly used retail package sizes for the drug sold by wholesalers to retail pharmacies.

(c) "Equalization payment amount" means the amount negotiated between the manufacturer and the department for reimbursement by the manufacturer, as specified in the contract. The equalization payment amount shall be based on the difference between the manufacturer's direct catalog price charged to wholesalers and the manufacturer's best price, as defined in subdivision (b).

(d) "Manufacturer" means any person, partnership, corporation, or other institution or entity that is engaged in the production, preparation, propagation, compounding, conversion, or processing of drugs, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, or in the packaging, repackaging, labeling, relabeling, and distribution of drugs.

(e) "Price escalator" means a mutually agreed upon price specified in the contract, to cover anticipated cost increases over the life of the contract.

(f) "Medi-Cal pharmacy costs" or "Medi-Cal drug costs" means all reimbursements to pharmacy providers for services or merchandise, including single-source or multiple-source prescription drugs, over-the-counter medications, and medical supplies, or any other costs billed by pharmacy providers under the Medi-Cal program.

(g) "Medicaid rebate" means the rebate payment made by drug manufacturers pursuant to Section 1927 of the federal Social Security Act (42 U.S.C. Sec. 1396r-8).

(h) "State rebate" means any negotiated rebate under the Drug Discount Program in addition to the medicaid rebate.

(i) "Date of mailing" means the date that is evidenced by the postmark date by the United States Postal Service or other common mail carrier on the envelope.

(j) This section shall remain in effect only until January 1, 1999, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

SEC. 69. Section 14105.33 of the Welfare and Institutions Code is amended to read:

14105.33. (a) The department may enter into contracts with manufacturers of single-source and multiple-source drugs, on a bid or nonbid basis, for drugs from each major therapeutic category, and shall maintain a list of those drugs for which contracts have been executed.

(b) (1) Contracts executed pursuant to this section shall be for the manufacturer's best price, as defined in Section 14105.31, which shall be specified in the contract, and subject to agreed upon price escalators, as defined in that section. The contracts shall provide for an equalization payment amount, as defined in Section 14105.31, to be remitted to the department quarterly. The department shall submit an invoice to each manufacturer for the equalization payment amount, including supporting utilization data from the department's prescription drug paid claims tapes within 30 days of receipt of the Health Care Financing Administration's file of manufacturer rebate information. In lieu of paying the entire invoiced amount, a manufacturer may contest the invoiced amount pursuant to procedures established by the federal Health Care Financing Administration's Medicaid Drug Rebate Program Releases or regulations by mailing a notice, that shall set forth its grounds for contesting the invoiced amount, to the department within 38 days of the department's mailing of the state invoice and supporting utilization data. For purposes of state accounting practices only, the contested balance shall not be considered an accounts receivable amount until final resolution of the dispute pursuant to procedures established by the federal Health Care Financing Administration's Medicaid Drug Rebate Program Releases or regulations that results in a finding of an underpayment by the manufacturer. Manufacturers may request, and the department shall timely provide, at cost, Medi-Cal provider level drug utilization data, and other Medi-Cal utilization data necessary to resolve a contested department-invoiced rebate amount.

(2) The department shall provide for an annual audit of utilization data used to calculate the equalization amount to verify the accuracy of that data. The findings of the audit shall be documented in a written audit report to be made available to manufacturers within 90 days of receipt of the report from the auditor. Any manufacturer may

receive a copy of the audit report upon written request. Contracts between the department and manufacturers shall provide for any equalization payment adjustments determined necessary pursuant to an audit.

(3) Utilization data used to determine an equalization payment amount shall exclude data from both of the following:

(A) Health maintenance organizations, as defined in Section 300e(a) of Title 42 of the United States Code, including those organizations that contract under Section 1396b(m) of Title 42 of the United States Code.

(B) Capitated plans that include a prescription drug benefit in the capitated rate, and that have negotiated contracts for rebates or discounts with manufacturers.

(c) In order that Medi-Cal beneficiaries may have access to a comprehensive range of therapeutic agents, the department shall ensure that there is representation on the list of contract drugs in all major therapeutic categories. Except as provided in subdivision (a) of Section 14105.35, the department shall not be required to contract with all manufacturers who negotiate for a contract in a particular category. The department shall ensure that there is sufficient representation of single-source and multiple-source drugs, as appropriate, in each major therapeutic category.

(d) (1) The department shall select the therapeutic categories to be included on the list of contract drugs, and the order in which it seeks contracts for those categories. The department may establish different contracting schedules for single-source and multiple-source drugs within a given therapeutic category.

(2) The department shall make every attempt to complete the initial contracting process for each major therapeutic category by January 1, 1999.

(e) (1) In order to fully implement subdivision (d), the department shall, to the extent necessary, negotiate or renegotiate contracts to ensure there are as many single-source drugs within each therapeutic category or subcategory as the department determines necessary to meet the health needs of the Medi-Cal population. The department may determine in selected therapeutic categories or subcategories that no single-source drugs are necessary because there are currently sufficient multiple-source drugs in the therapeutic category or subcategory on the list of contract drugs to meet the health needs of the Medi-Cal population. However, in no event shall a beneficiary be denied continued use of a drug which is part of a prescribed therapy in effect as of September 2, 1992, until the prescribed therapy is no longer prescribed.

(2) In the development of decisions by the department on the required number of single-source drugs in a therapeutic category or subcategory, and the relative therapeutic merits of each drug in a therapeutic category or subcategory, the department shall consult

with the Medi-Cal Contract Drug Advisory Committee. The committee members shall communicate their comments and recommendations to the department within 30 business days of a request for consultation, and shall disclose any associations with pharmaceutical manufacturers or any remuneration from pharmaceutical manufacturers.

(3) In order to expedite implementation of paragraph (1), the requirements of Sections 14105.37, 14105.38, subdivisions (a), (c), (e), and (f) of Sections 14105.39, 14105.4, and 14105.405 are waived for the purposes of this section until January 1, 1994.

(f) In order to achieve maximum cost savings, the Legislature declares that an expedited process for contracts under this section is necessary. Therefore, contracts entered into on a nonbid basis shall be exempt from Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code.

(g) In no event shall a beneficiary be denied continued use of a drug that is part of a prescribed therapy in effect as of September 2, 1992, until the prescribed therapy is no longer prescribed.

(h) Contracts executed pursuant to this section shall be confidential and shall be exempt from disclosure under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

(i) The department shall provide individual notice to Medi-Cal beneficiaries at least 60 calendar days prior to the effective date of the deletion or suspension of any drug from the list of contract drugs. The notice shall include a description of the beneficiary's right to a fair hearing and shall encourage the beneficiary to consult a physician to determine if an appropriate substitute medication is available from Medi-Cal.

(j) In carrying out the provisions of this section, the department may contract either directly, or through the fiscal intermediary, for pharmacy consultant staff necessary to initially accomplish the treatment authorization request reviews.

(k) (1) Manufacturers shall calculate and pay interest on late or unpaid rebates. The interest shall not apply to any prior period adjustments of unit rebate amounts or department utilization adjustments.

(2) For state rebate payments, manufacturers shall calculate and pay interest on late or unpaid rebates for quarters that begin on or after the effective date of the act that added this subdivision.

(3) Following final resolution of any dispute pursuant to procedures established by the federal Health Care Financing Administration's Medicaid Drug Rebate Program Releases or regulations regarding the amount of a rebate, any underpayment by a manufacturer shall be paid with interest calculated pursuant to subdivisions (m) and (n), and any overpayment, together with

interest at the rate calculated pursuant to subdivisions (m) and (n), shall be credited by the department against future rebates due.

(*l*) Interest pursuant to subdivision (k) shall begin accruing 38 calendar days from the date of mailing of the invoice, including supporting utilization data sent to the manufacturer. Interest shall continue to accrue until the date of mailing of the manufacturer's payment.

(m) Except as specified in subdivision (n), interest rates and calculations pursuant to subdivision (k) for medicaid rebates and state rebates shall be identical and shall be determined by the federal Health Care Financing Administration's Medicaid Drug Rebate Program Releases or regulations.

(n) If the date of mailing of a state rebate payment is 69 days or more from the date of mailing of the invoice, including supporting utilization data sent to the manufacturer, the interest rate and calculations pursuant to subdivision (k) shall be as specified in subdivision (m), however the interest rate shall be increased by 10 percentage points. This subdivision shall apply to payments for amounts invoiced for any quarters that begin on or after the effective date of the act that added this subdivision.

(o) If the rebate payment is not received, the department shall send overdue notices to the manufacturer at 38, 68, and 98 days after the date of mailing of the invoice, and supporting utilization data. If the department has not received a rebate payment, including interest, within 180 days of the date of mailing of the invoice, including supporting utilization data, the manufacturer's contract with the department shall be deemed to be in default and the contract may be terminated in accordance with the terms of the contract. For all other manufacturers, if the department has not received a rebate payment, including interest, within 180 days of the date of mailing of the invoice, including supporting utilization data, all of the drug products of those manufacturers shall be made available only through prior authorization effective 270 days after the date of mailing of the invoice, including utilization data sent to manufacturers.

(p) If the manufacturer provides payment or evidence of payment to the department at least 40 days prior to the proposed date the drug is to be made available only through prior authorization pursuant to subdivision (o), the department shall terminate its actions to place the manufacturers' drug products on prior authorization.

(q) The department shall direct the state's fiscal intermediary to remove prior authorization requirements imposed pursuant to subdivision (o) and notify providers within 60 days after payment by the manufacturer of the rebate, including interest. If a contract was in place at the time the manufacturers' drugs were placed on prior authorization, removal of prior authorization requirements shall be

contingent upon good faith negotiations and a signed contract with the department.

(r) A beneficiary may obtain drugs placed on prior authorization pursuant to subdivision (o) if the beneficiary qualifies for continuing care status. To be eligible for continuing care status, a beneficiary must be taking the drug when its manufacturer is placed on prior authorization status. Additionally, the department shall have received a claim for the drug with a date of service that is within 100 days prior to the date the manufacturer was placed on prior authorization.

(s) A beneficiary may remain eligible for continuing care status, provided that a claim is submitted for the drug in question at least every 100 days and the date of service of the claim is within 100 days of the date of service of the last claim submitted for the same drug.

(t) Drugs covered pursuant to Sections 14105.43 and 14133.2 shall not be subject to prior authorization pursuant to subdivision (o), and any other drug may be exempted from prior authorization by the department if the director determines that an essential need exists for that drug, and there are no other drugs currently available without prior authorization that meet that need.

(u) It is the intent of the Legislature in enacting subdivisions (k) to (t), inclusive, that the department and manufacturers shall cooperate and make every effort to resolve rebate payment disputes within 90 days of notification by the manufacturer to the department of a dispute in the calculation of rebate payments.

(v) This section shall remain in effect only until January 1, 1999, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1999, deletes or extends that date.

SEC. 70. Section 14109.6 is added to the Welfare and Institutions Code, to read:

14109.6. Notwithstanding Section 14109, effective September 1, 1997, and pursuant to Section 1396a(n) of Title 42 of the United States Code, as amended by Section 4714 of the federal Balanced Budget Act of 1997, the reimbursement rate for costs specified in Section 14109 for all services, including, but not limited to, hospital inpatient services, shall, to the extent feasible, not exceed the reimbursement rate for similar services established under this chapter. Effective for dates of service on or after September 1, 1997, the reimbursement rates established under this chapter for hospital inpatient services shall be no greater than the amounts paid by the Medicare program for similar services. Notwithstanding the provisions of this section, Section 14109.5 shall remain in effect for dates of service prior to September 1, 1997. It is the intent of the Legislature that regulations and the amendments to the medicaid state plan previously adopted pursuant to Section 14109.5 shall remain in effect for purposes of this section until amended or otherwise modified by the department.

SEC. 71. Section 14132.22 of the Welfare and Institutions Code is amended to read:

14132.22. (a) (1) Transitional inpatient care services, as described in this section and provided by a qualified health facility, is a covered benefit under this chapter, subject to utilization controls and subject to the availability of federal financial participation. These services shall be available to individuals needing short-term medically complex or intensive rehabilitative services, or both.

(2) The department shall seek any necessary approvals from the federal Health Care Financing Administration to ensure that transitional inpatient care services, when provided by a general acute care hospital, will be considered for purposes of determining whether a hospital is deemed to be a disproportionate share hospital pursuant to Section 1396r-4(b) of Title 42 of the United States Code or any successor statute.

(3) Transitional inpatient care services shall be available to Medi-Cal beneficiaries who do not meet the criteria for eligibility for the subacute program provided for pursuant to Section 14132.25, but who need more medically complex and intensive rehabilitative services than are generally available in a skilled nursing facility, and who are clinically stable and no longer need the level of diagnostic and ancillary services provided generally in an acute care facility.

(b) For purposes of this section, "transitional inpatient care" means the level of care needed by an individual who has suffered an illness, injury, or exacerbation of a disease, and whose medical condition has clinically stabilized so that daily physician services and the immediate availability of technically complex diagnostic and invasive procedures usually available only in the acute care hospital are not medically necessary, and when the physician assuming the responsibility of treatment management of the patient in transitional care has developed a definitive and time-limited course of treatment. The individual's care needs may be medical, rehabilitative, or both. However, the individual shall fall within one of the two following patient groups:

(1) "Transitional medical patient," which means a medically stable patient with short-term transitional care needs, whose primary barrier to discharge to a residential setting is medical status rather than functional status. These patients may require simple rehabilitation therapy, but not a rehabilitation program appropriate for multiple interrelated areas of functional disability.

(2) "Transitional rehabilitation patient," which means a medically stable patient with short-term transitional care needs, whose primary barrier to discharge to a residential setting is functional status, rather than medical status, and who has the capacity to benefit from a rehabilitation program as determined by a physiatrist or physician otherwise skilled in rehabilitation medicine. These patients may have unresolved medical problems, but these problems must be

sufficiently controlled to allow participation in the rehabilitation program.

(c) In implementing the transitional inpatient care program the department shall consider the differences between the two patient groups described in paragraphs (1) and (2) of subdivision (b) and shall assure that each group's specific health care needs are met.

(d) Transitional inpatient care services shall be made available only to qualifying Medi-Cal beneficiaries who are 18 years of age or older.

(e) Transitional inpatient care services shall not be available to patients in acute care hospitals defined as small and rural pursuant to Section 124840 of the Health and Safety Code.

(f) (1) Transitional inpatient care services may be provided by general acute care hospitals that are licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code. General acute care hospitals may provide transitional inpatient care services in the acute care hospital, an acute rehabilitation center, or the distinct part skilled nursing unit of the acute care hospital. Licensed skilled nursing facilities, as defined in subdivision (c) of Section 1250 of the Health and Safety Code that are certified to participate as a nursing facility in the Medicare and medicaid programs, pursuant to Titles XVIII and XIX of the federal Social Security Act, and licensed congregate living health facilities, as defined in Section 1265.7 of the Health and Safety Code, that are certified to participate as a nursing facility in the Medicare and medicaid programs pursuant to Titles XVIII and XIX of the federal Social Security Act, may also provide the services described in subdivision (b).

(2) Costs of providing transitional inpatient care services in nonsegregated parts of the distinct part skilled nursing unit of the acute care hospital shall be determinable, in the absence of distinct and separate cost centers established for this purpose. Costs of providing transitional inpatient care services in nondistinct parts of the acute care hospital shall be determinable, in the absence of distinct and separate cost centers established for this purpose. A separate and distinct cost center shall be maintained or established for each unit in freestanding certified nursing facilities in which the services described in subdivision (b) are provided, in order to identify and segregate costs for transitional inpatient care patients from costs for other patients who may be served within the parent facility.

(g) In order to participate as a provider in the transitional inpatient care program, a facility shall meet all applicable standards necessary for participation in the Medi-Cal program and all of the following:

(1) If the health facility is a freestanding certified nursing facility, it shall be located in close proximity to a general acute care hospital

with which the facility has a transfer agreement in order to support the capability to respond to medical emergencies.

(2) The health facility shall demonstrate, to the department, competency in providing high quality care to all patients for whom the facility provides care, experience in providing high quality care to the types of transitional inpatient care patients the facility proposes to serve, and the ability to provide transitional inpatient care to patients pursuant to this chapter.

(3) The health facility shall enter into a provider agreement with the department for the provision of transitional inpatient care. The provider agreement shall specify whether the facility is authorized to serve transitional medical patients or transitional rehabilitation patients or both, depending on the facility's demonstrated ability to meet standards specific to each patient group. Continuation of the provider agreement shall be contingent upon the facility's continued compliance with all the applicable requirements of this section and any other applicable laws or regulations.

(h) In determining a facility's qualifications for initial participation, an onsite review shall be conducted by the department. Subsequent review shall be conducted onsite as necessary, but not less frequently than annually. Initial and subsequent reviews shall be conducted by appropriate department personnel, which shall include a registered nurse and other health professionals where appropriate. The department shall develop written protocols for reviews.

(i) Transitional inpatient care services shall be available to patients receiving care in an acute care hospital. Under specified circumstances, as set forth in regulations, transitional inpatient care shall be available to patients transferring directly from a nursing facility level of care, a physician's office, a clinic, or from the emergency room of a general acute care hospital, provided they have received a comprehensive medical assessment conducted by a physician, and the physician determines, and documents in the medical record, that the patient has been clinically stable for the 24 hours preceding admission to the transitional inpatient care program.

(j) A health facility providing transitional inpatient care shall accept and retain only those patients for whom it can provide adequate, safe, therapeutic, and effective care, and as identified in its application for participation as a transitional inpatient care provider. The facility's determination to accept a patient into the transitional inpatient care unit shall be based on its preadmission screening process conducted by appropriate facility personnel.

(k) The department shall establish a process for providing timely, concurrent authorization and coordination, as required, of all medically necessary services for transitional inpatient care.

(*l*) The department shall adopt regulations specifying admission criteria and an admission process appropriate to each of the transitional inpatient care patient groups specified in subdivision (b). Patient admission criteria to transitional inpatient care shall include, but not be limited to, the following:

(1) Prior to admission to transitional inpatient care, the patient shall be determined to have been clinically stable for the preceding 24 hours by the attending physician and the physician assuming the responsibility of treatment management of the patient in the transitional inpatient care program.

(2) The patient shall be admitted to transitional inpatient care on the order of the physician assuming the responsibility of the management of the patient, with an established diagnosis, and an explicit time-limited course of treatment of sufficient detail to allow the facility to initiate appropriate assessments and services. No patient shall be transferred from an acute care hospital to a transitional inpatient care program that is in a freestanding certified nursing facility if the patient's attending physician documents in the medical record that the transfer would cause physical or psychological harm to the patient.

(3) (A) Medical necessity for transitional care shall include, but not be limited to, one or more of the following:

(i) Intravenous therapy.

(ii) Rehabilitative services.

(iii) Wound care.

(iv) Respiratory therapy.

(v) Traction.

(B) The department shall develop regulations further defining the services to be provided pursuant to clauses (i) to (v), inclusive, and the circumstances under which these services shall be provided.

(m) Registered nurses shall be assigned to the transitional inpatient care unit at all times and in sufficient numbers to allow for the ongoing patient assessment, patient care, and supervision of licensed and unlicensed staff. Participating facilities shall assure that staffing is adequate in number and skill mix, at all times, to address reasonably anticipated admissions, discharges, transfers, patient emergencies, and temporary absences of staff from the transitional care unit including, but not limited to, absences to attend meetings or inservice training. All licensed and certified health care personnel shall hold valid, current licensure or certification.

(n) Continued medical assessments shall be of sufficient frequency as to adequately review, evaluate, and alter plans of care as needed in response to patients' medical progress.

(o) The department shall develop a rate of reimbursement for transitional inpatient care services for providers as specified in subdivision (f). Reimbursement rates shall be specified in regulation

and in accordance with methodologies developed by the department and may include the following:

(1) All inclusive per diem rates.

(2) Individual patient specific rates according to the needs of the individual transitional care patient.

(3) Other rates subject to negotiation with the health facility.

(p) Reimbursement at transitional inpatient care rates shall only be implemented when funds are available for this purpose pursuant to the annual Budget Act. Funds expended to implement this section shall be used by providers to assure safe, therapeutic and effective patient care by staffing at levels which meet patients' needs, and to ensure that these providers have the needed resources and staff to provide quality care to transitional inpatient care patients.

(q) (1) The department shall reimburse physicians for all medically necessary care provided to transitional inpatient care patients and shall establish Medi-Cal physician reimbursement rates commensurate with those for visits to nontransitional acute care patients in acute care hospitals.

(2) It is the intent of this subdivision to cover physician costs not included in the per diem rate.

(r) No later than January 1, 1999, the department shall evaluate, and make recommendations regarding, the effectiveness and safety of the transitional inpatient care program. The evaluation shall be developed in consultation with representatives of providers, facility employees, and consumers. The department may contract for all or a portion of the evaluation. The evaluation shall be for the purpose of determining the impact of the transitional inpatient care program on patient care, including functional outcomes, if applicable, on whether the care costs less than other alternatives, and whether it results in the deterioration of patient health and safety as compared to other placements. The evaluation shall also be for the purpose of determining the effect on patients other than those receiving transitional inpatient care in participating facilities. The evaluation shall include:

(1) Data on patient mortality, patients served, length of stay, and subsequent placement or discharge.

(2) Data on readmission to acute care and emergency room transfers.

(3) Staffing standards in the facilities.

(4) Other outcome measures and indicia of patient health and safety otherwise required to be reported by federal or state law.

(s) The department shall develop regulations to amend Sections 51540 to 51556, inclusive, of Title 22 of the California Code of Regulations, to exclude the cost of transitional inpatient care services rendered in general acute care hospitals from the hospital's inpatient services reimbursement.

(t) The department may adopt emergency regulations as necessary to implement this section in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). The initial adoption of emergency regulations shall be deemed to be an emergency and considered by the Office of Administrative Law as necessary for the immediate preservation of public peace, health and safety, or general welfare. Emergency regulations adopted pursuant to this section shall remain in effect for no more than 180 days. If the department adopts emergency regulations to implement this section, the department shall obtain input from interested parties to address the unique needs of medically complex and intensive rehabilitative patients qualifying for transitional inpatient care. Notwithstanding the requirements of this section, the department shall, if it adopts emergency regulations to implement this section, address the following major subject areas:

(1) Patient selection and assessment criteria, including but not limited to, preadmission screening, patient assessments, physician services, and interdisciplinary teams.

(2) Facility participation criteria and agreements, including but not limited to, facility licensing and certification history, demonstration to the department of a preexisting history in providing care to medically complex or intensive rehabilitative patients, data reporting requirements, demonstration of continued ability to provide high quality of care to all patients, nurse staffing requirements, ancillary services, and staffing requirements.

(u) This section shall remain in effect only until January 1, 2000, and as of that date is repealed, unless a later enacted statute, that is enacted on or before January 1, 2000, deletes or extends that date.

SEC. 72. Section 14133.14 is added to the Welfare and Institutions Code, to read:

14133.14. The criteria that the department shall use to identify providers to be placed on prior authorization for noninvasive testing procedures shall include, but not be limited to, Medi-Cal trend analysis, provider profiling data, provider and beneficiary history data, or appropriateness of the services as related to diagnosis, volume of services, utilization patterns, and specialty of provider. The existing prior authorization appeals process shall be available to these providers for denial of services.

SEC. 73. Section 14138.5 is added to the Welfare and Institutions Code, immediately preceding Section 14139, to read:

14138.5. The State Department of Health Services shall report to the Legislature, by January 1, 1998, for the 1996–97 fiscal year and by January 1, 1999, for the period from October 1, 1997, to October 1, 1998, on all of the following data with respect to the child health and disability prevention program provided for pursuant to Article 6

(commencing with Section 124025) of Chapter 3 of Part 2 of Division 106 of the Health and Safety Code:

(a) The number of children, by age and by county, enrolled in each plan contracting with the department or with the California Medical Assistance Commission.

(b) The improved reporting capabilities of the new contract for the Management Information System/Decision Support System (MIS/DSS), with specific emphasis on how it can be used to gather data from the PM 160 forms that are useful for analytical purposes.

(c) Information on what actions are being taken to ensure compliance with Child Health and Disability Prevention Program examination requirements.

(d) The statewide percentage of all children enrolled in managed care plans, by age, who received a comprehensive Child Health and Disability Prevention Program examination, and the percentage of all children enrolled who received a comprehensive Child Health and Disability Prevention Program examination, by county and by plan.

(e) The number of children in each plan, by age, who are current on periodicity health assessments, with appropriate documentation. If the capability to report this information does not exist, a timeline of when the information will be available and the barriers that exist to reporting the information.

(f) The number of children in each plan, by county and by age, who were referred for followup diagnosis or treatment following a Child Health and Disability Prevention Program comprehensive examination.

(g) The number of children in each plan, by county and by age, who received needed diagnosis and treatment as a result of a Child Health and Disability Prevention Program examination. If the capability to report this information does not exist, a timeline of when it will be available and the barriers that exist to reporting this information.

SEC. 74. Section 14148.99 of the Welfare and Institutions Code is repealed.

SEC. 75. Section 14154.15 of the Welfare and Institutions Code is amended to read:

14154.15. (a) Any county may petition the department for an augmentation of its County Administrative Cost Control Plan in order to implement a plan, as provided for in Section 1105 of the federal Social Security Act (42 U.S.C. Sec. 1305), for the outstationing of one or more eligibility workers at all types of outstation locations, as defined in Section 435.904(c)(3) of Title 42 of the Code of Federal Regulations in order to facilitate receipt and processing of applications for Medi-Cal eligibility for pregnant women, infants and children as specified by Title XIX of the Social Security Act (42 U.S.C. Sec. 1396 and following). In order to participate pursuant to this

section, a county welfare department shall petition under this section in accordance with guidelines established by the department. The petition shall include, but not be limited to, information about the need for outstation workers at alternative sites and the language skills needed by the outstation workers.

(b) In reviewing a petition from a county for an augmentation of its County Administrative Cost Control Plan for outstationing purposes, the department shall take into account the likely success rate of applications processed by the proposed outstationed eligibility workers, the amount of travel and training time required to implement and continue the outstationing plan, and other productivity factors associated with the outstationing plan.

(c) The department may approve those proposed augmentations which, based on its review of the outstationing plan, offer potential to increase eligibility determinations and access to Medi-Cal perinatal services by pregnant women and Medi-Cal services by infants and children specified by Title XIX of the Social Security Act (42 U.S.C., Sec. 1396 and following). The department shall review the approved plan annually to determine if the plan shall be renewed, altered, discontinued, or incorporated into the county administrative funding base.

(d) In addition to any augmentations authorized by this section, the department may, at its discretion, advance administrative funding to a county welfare department for which it approves an augmentation of its County Administrative Cost Control Plan, to cover the initial incremental costs of outstationed eligibility workers under this section.

(e) The department shall conduct a one-time outreach plan to educate county welfare directors, county health officers, and county elected officials on the opportunities and advantages of outstationing Medi-Cal eligibility workers to facilitate access by pregnant women to Medi-Cal perinatal services and Medi-Cal eligibility for infants and children.

SEC. 76. Section 14163 of the Welfare and Institutions Code is amended to read:

14163. (a) For purposes of this section, the following definitions shall apply:

(1) "Public entity" means a county, a city, a city and county, the University of California, a local hospital district, a local health authority, or any other political subdivision of the state.

(2) "Hospital" means a health facility that is licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code to provide acute inpatient hospital services, and includes all components of the facility.

(3) "Disproportionate share hospital" means a hospital providing acute inpatient services to Medi-Cal beneficiaries that meets the

criteria for disproportionate share status relating to acute inpatient services set forth in Section 14105.98.

(4) "Disproportionate share list" means the annual list of disproportionate share hospitals for acute inpatient services issued by the department pursuant to Section 14105.98.

(5) "Fund" means the Medi-Cal Inpatient Payment Adjustment Fund.

(6) "Eligible hospital" means, for a particular state fiscal year, a hospital on the disproportionate share list that is eligible to receive payment adjustment amounts under Section 14105.98 with respect to that state fiscal year.

(7) "Transfer year" means the particular state fiscal year during which, or with respect to which, public entities are required by this section to make an intergovernmental transfer of funds to the Controller.

(8) "Transferor entity" means a public entity that, with respect to a particular transfer year, is required by this section to make an intergovernmental transfer of funds to the Controller.

(9) "Transfer amount" means an amount of intergovernmental transfer of funds that this section requires for a particular transferor entity with respect to a particular transfer year.

(10) "Intergovernmental transfer" means a transfer of funds from a public entity to the state, that is local government financial participation in Medi-Cal pursuant to the terms of this section.

(11) "Licensee" means an entity that has been issued a license to operate a hospital by the department.

(12) "Annualized Medi-Cal inpatient paid days" means the total number of Medi-Cal acute inpatient hospital days, regardless of dates of service, for which payment was made by or on behalf of the department to a hospital, under present or previous ownership, during the most recent calendar year ending prior to the beginning of a particular transfer year, including all Medi-Cal acute inpatient covered days of care for hospitals that are paid on a different basis than per diem payments.

(13) "Medi-Cal acute inpatient hospital day" means any acute inpatient day of service attributable to patients who, for those days, were eligible for medical assistance under the California state plan, including any day of service that is reimbursed on a basis other than per diem payments.

(14) "OBRA 1993 payment limitation" means the hospital-specific limitation on the total annual amount of payment adjustments to each eligible hospital under the payment adjustment program that can be made with federal financial participation under Section 1396r-4(g) of Title 42 of the United States Code as implemented pursuant to the Medi-Cal State Plan.

(b) The Medi-Cal Inpatient Payment Adjustment Fund is hereby created in the State Treasury. Notwithstanding Section 13340 of the

Government Code, the fund shall be continuously appropriated to, and under the administrative control of, the department for the purposes specified in subdivision (d). The fund shall consist of the following:

(1) Transfer amounts collected by the Controller under this section, whether submitted by transferor entities pursuant to applicable provisions of this section or obtained by offset pursuant to subdivision (j).

(2) Any other intergovernmental transfers deposited in the fund, as permitted by Section 14164.

(3) Any interest that accrues with respect to amounts in the fund.

(c) Moneys in the fund, which shall not consist of any state general funds, shall be used as the source for the nonfederal share of payments to hospitals pursuant to Section 14105.98. Moneys shall be allocated from the fund by the department and matched by federal funds in accordance with customary Medi-Cal accounting procedures, and used to make payments pursuant to Section 14105.98.

(d) Except as otherwise provided in Section 14105.98 or in any provision of law appropriating a specified sum of money to the department for administering this section and Section 14105.98, moneys in the fund shall be used only for the following:

(1) Payments to hospitals pursuant to Section 14105.98.

(2) Except for the amount transferred pursuant to paragraph (3), transfers to the Health Care Deposit Fund as follows:

(A) In the amount of two hundred thirty-nine million seven hundred fifty-seven thousand six hundred ninety dollars ($239,757,690), for the 1994–95 and 1995–96 fiscal years.

(B) In the amount of two hundred twenty-nine million seven hundred fifty-seven thousand six hundred ninety dollars ($229,757,690) for the 1996–97 fiscal year.

(C) In the amount of one hundred fifty-four million seven hundred fifty-seven thousand six hundred ninety dollars ($154,757,690) for the 1997–98 fiscal year and each fiscal year thereafter.

(D) Notwithstanding any other provision of law, the amount specified in this paragraph shall be in addition to any amounts transferred to the Health Care Deposit Fund arising from changes of any kind attributable to payment adjustment years prior to the 1993–94 payment adjustment year. These transfers from the fund shall be made in six equal monthly installments to the Medi-Cal local assistance appropriation item (Item 4260-101-001 of the annual Budget Act) in support of Medi-Cal expenditures. The first installment shall accrue in October of each transfer year, and all other installments shall accrue monthly thereafter from November through March.

(3) In the 1993–94 fiscal year, in addition to the amount transferred as specified in paragraph (2), fifteen million dollars ($15,000,000) shall also be transferred to the Medi-Cal local assistance appropriation item (Item 4260-101-001) of the Budget Act of 1993.

(e) For the 1991–92 state fiscal year, the department shall determine, no later than 70 days after the enactment of this section, the transferor entities for the 1991–92 transfer year. To make this determination, the department shall utilize the disproportionate share list for the 1991–92 fiscal year, which shall be issued by the department no later than 65 days after the enactment of this section, pursuant to paragraph (1) of subdivision (f) of Section 14105.98. The department shall identify each eligible hospital on the list for which a public entity is the licensee as of July 1, 1991. The public entity that is the licensee of each identified eligible hospital shall be a transferor entity for the 1991–92 transfer year.

(f) The department shall determine, no later than 70 days after the enactment of this section, the transfer amounts for the 1991–92 transfer year.

The transfer amounts shall be determined as follows:

(1) The eligible hospitals for 1991–92 shall be identified. For each hospital, the applicable total per diem payment adjustment amount under Section 14105.98 for the 1991–92 transfer year shall be computed. This amount shall be multiplied by 80 percent of the eligible hospital's annualized Medi-Cal inpatient paid days as determined from all Medi-Cal paid claims records available through April 1, 1991. The products of these calculations for all eligible hospitals shall be added together to determine an aggregate sum for the 1991–92 transfer year.

(2) The eligible hospitals for 1991–92 involving transferor entities as licensees shall be identified. For each hospital, the applicable total per diem payment adjustment amount under Section 14105.98 for the 1991–92 transfer year shall be computed. This amount shall be multiplied by 80 percent of the eligible hospital's annualized Medi-Cal inpatient paid days as determined from all Medi-Cal paid claims records available through April 1, 1991. The products of these calculations for all eligible hospitals with transferor entities as licensees shall be added together to determine an aggregate sum for the 1991–92 transfer year.

(3) The aggregate sum determined under paragraph (1) shall be divided by the aggregate sum determined under paragraph (2), yielding a factor to be utilized in paragraph (4).

(4) The factor determined in paragraph (3) shall be multiplied by the amount determined for each hospital under paragraph (2). The product of this calculation for each hospital in paragraph (2) shall be divided by 1.771, yielding a transfer amount for the particular transferor entity for the transfer year.

(g) For the 1991–92 transfer year, the department shall notify each transferor entity in writing of its applicable transfer amount or amounts no later than 70 days after the enactment of this section.

(h) For the 1992–93 transfer year and subsequent transfer years, transfer amounts shall be determined in the same procedural manner as set forth in subdivision (f), except:

(1) The department shall use all of the following:

(A) The disproportionate share list applicable to the particular transfer year to determine the eligible hospitals.

(B) The payment adjustment amounts calculated under Section 14105.98 for the particular transfer year. These amounts shall take into account any projected or actual increases or decreases in the size of the payment adjustment program as are required under Section 14105.98 for the particular year in question, including any decreases resulting from the application of the OBRA 1993 payment limitation. Subject to the installment schedule in paragraph (5) of subdivision (i) regarding transfer amounts, the department may issue interim, revised, and supplemental transfer requests as necessary and appropriate to address changes in payment adjustment levels that occur under Section 14105.98. All transfer requests, or adjustments thereto, issued to transferor entities by the department shall meet the requirements set forth in subparagraph (E) of paragraph (5) of subdivision (i).

(C) Data regarding annualized Medi-Cal inpatient paid days for the most recent calendar year ending prior to the beginning of the particular transfer year, as determined from all Medi-Cal paid claims records available through April 1 preceding the particular transfer year.

(D) The status of public entities as licensees of eligible hospitals as of July 1 of the particular transfer year.

(E) (i) Except as provided in subparagraph (ii), transfer amounts calculated by the department may be increased or decreased by a percentage amount consistent with the Medi-Cal State Plan.

(ii) For the 1995–96 transfer year, the nonfederal share of the secondary supplemental payment adjustments described in paragraph (9) of subdivision (y) of Section 14105.98 shall be funded as follows:

(I) Ninety-nine percent of the nonfederal share shall be funded by a transfer from the University of California.

(II) One percent of the nonfederal share shall be funded by transfers from those public entities that are the licensees of the hospitals included in the "other public hospitals" group referred to in clauses (ii) and (iii) of subparagraph (B) of paragraph (9) of subdivision (y) of Section 14105.98. The transfer responsibilities for this one percent shall be allocated to the particular public entities on a pro rata basis, based on a formula or formulae customarily used by

the department for allocating transfer amounts under this section. The formula or formulae shall take into account, through reallocation of transfer amounts as appropriate, the situation of hospitals whose secondary supplemental payment adjustments are restricted due to the application of the limitation set forth in clause (v) of subparagraph (B) of paragraph (9) of subdivision (y) of Section 14105.98.

(III) All transfer amounts under this subparagraph shall be paid by the particular transferor entities within 30 days after the department notifies the transferor entity in writing of the transfer amount to be paid.

(2) For the 1993–94 transfer year and subsequent transfer years, transfer amounts shall be increased on a pro rata basis for each transferor entity for the particular transfer year in the amounts necessary to fund the nonfederal share of the total supplemental lump-sum payment adjustment amounts that arise under Section 14105.98. For purposes of this paragraph, the supplemental lump-sum payment adjustment amounts shall be deemed to arise for the particular transfer year as of the date specified in Section 14105.98. Transfer amounts to fund the nonfederal share of the payments shall be paid by the transferor entities for the particular transfer year within 20 days after the department notifies the transferor entity in writing of the additional transfer amount to be paid.

(3) The department shall prepare preliminary analyses and calculations regarding potential transfer amounts, and potential transferor entities shall be notified by the department of estimated transfer amounts as soon as reasonably feasible regarding any particular transfer year. Written notices of transfer amounts shall be issued by the department as soon as possible with respect to each transfer year. All state agencies shall take all necessary steps in order to supply applicable data to the department to accomplish these tasks. The Office of Statewide Health Planning and Development shall provide to the department quarterly access to the edited and unedited confidential patient discharge data files for all Medi-Cal eligible patients. The department shall maintain the confidentiality of that data to the same extent as is required of the Office of Statewide Health Planning and Development. In addition, the Office of Statewide Health Planning and Development shall provide to the department, not later than March 1 of each year, the data specified by the department, as the data existed on the statewide data base file as of February 1 of each year, from all of the following:

(A) Hospital annual disclosure reports, filed with the Office of Statewide Health Planning and Development pursuant to Section 443.31 or 128735 of the Health and Safety Code, for hospital fiscal years that ended during the calendar year ending 13 months prior to the applicable February 1.

(B) Annual reports of hospitals, filed with the Office of Statewide Health Planning and Development pursuant to Section 439.2 or 127285 of the Health and Safety Code, for the calendar year ending 13 months prior to the applicable February 1.

(C) Hospital patient discharge data reports, filed with the Office of Statewide Health Planning and Development pursuant to subdivision (g) of Section 443.31 or 128735 of the Health and Safety Code, for the calendar year ending 13 months prior to the applicable February 1.

(D) Any other materials on file with the Office of Statewide Health Planning and Development.

(4) For the 1993–94 transfer year and subsequent transfer years, the divisor to be used for purposes of the calculation referred to in paragraph (4) of subdivision (f) shall be determined by the department. The divisor shall be calculated to ensure that the appropriate amount of transfers from transferor entities are received into the fund to satisfy the requirements of Section 14105.98 for the particular transfer year. For the 1993–94 transfer year, the divisor shall be 1.742.

(5) For the 1993–94 fiscal year, the transfer amount that would otherwise be required from the University of California shall be increased by fifteen million dollars ($15,000,000).

(6) Notwithstanding any other provision of law, the total amount of transfers required from the transferor entities for any particular transfer year shall not exceed the sum of the following:

(A) The amount needed to fund the nonfederal share of all payment adjustment amounts applicable to the particular payment adjustment year as calculated under Section 14105.98. Included in the calculations for this purpose shall be any decreases in the program as a whole, and for individual hospitals, that arise due to the provisions of Section 1396r-4(f) or (g) of Title 42 of the United States Code.

(B) The amount needed to fund the transfers to the Health Care Deposit Fund, as referred to in paragraphs (2) and (3) of subdivision (d).

(7) (A) Except as provided in subparagraph (B) and in paragraph (2) of subdivision (j), and except for a prudent reserve not to exceed two million dollars ($2,000,000) in the Medi-Cal Inpatient Payment Adjustment Fund, any amounts in the fund, including interest that accrues with respect to the amounts in the fund, that are not expended, or estimated to be required for expenditure, under Section 14105.98 with respect to a particular transfer year shall be returned on a pro rata basis to the transferor entities for the particular transfer year within 120 days after the department determines that the funds are not needed for an expenditure in connection with the particular transfer year.

(B) The department shall determine the interest amounts that have accrued in the fund from its inception through June 30, 1995,

and, no later than January 1, 1996, shall distribute these interest amounts to transferor entities, as follows:

(i) The total amount transferred to the fund by each transferor entity for all transfer years from the inception of the fund through June 30, 1995, shall be determined.

(ii) The total amounts determined for all transferor entities under clause (i) shall be added together, yielding an aggregate of the total amounts transferred to the fund for all transfer years from the inception of the fund through June 30, 1995.

(iii) The total amount determined under clause (i) for each transferor entity shall be divided by the aggregate amount determined under clause (ii), yielding a percentage for each transferor entity.

(iv) The total amount of interest earned by the fund from its inception through June 30, 1995, shall be determined.

(v) The percentage determined under clause (iii) for each transferor entity shall be multiplied by the amount determined under clause (iv), yielding the amount of interest that shall be distributed under this subparagraph to each transferor entity.

(C) Regarding any funds returned to a transferor entity under subparagraph (A), or interest amounts distributed to a transferor entity under subparagraph (B), the department shall provide to the transferor entity a written statement that explains the basis for the particular return or distribution of funds and contains the general calculations used by the department in determining the amount of the particular return or distribution of funds.

(i) (1) For the 1991–92 transfer year, each transferor entity shall pay its transfer amount or amounts to the Controller, for deposit in the fund, in eight equal installments. Except as provided below, the first installment shall accrue on July 25, 1991, and all other installments shall accrue on the fifth day of each month thereafter from August through February.

(2) Notwithstanding paragraph (1), no installment shall be payable to the Controller until that date which is 20 days after the department notifies the transferor entity in writing that the payment adjustment program set forth in Section 14105.98 has first gained federal approval as part of the Medi-Cal program. For purposes of this paragraph, federal approval requires both (i) approval by appropriate federal agencies of an amendment to the Medi-Cal State Plan, as referred to in subdivision (o) of Section 14105.98, and (ii) confirmation by appropriate federal agencies regarding the availability of federal financial participation for the payment adjustment program set forth in Section 14105.98 at a level of at least 40 percent of the percentage of federal financial participation that is normally applicable for Medi-Cal expenditures for acute inpatient hospital services.

(3) If any installment that would otherwise be payable under paragraph (1) is not paid because of the provisions of paragraph (2), then subparagraphs (A) and (B) shall be followed when federal approval is gained.

(A) All installments that were deferred based on the provisions of paragraph (2) shall be paid no later than 20 days after the department notifies the transferor entity in writing that federal approval has been gained, in an amount consistent with subparagraph (B).

(B) The installments paid pursuant to subparagraph (A) shall be paid in full.

(4) All installments for the 1991–92 transfer year that arise in months after federal approval is gained shall be paid by the fifth day of the month or 20 days after the department notifies the transferor entity in writing that federal approval has been gained, whichever is later.

(5) (A) Except as provided in subparagraphs (B) and (C), for the 1992–93 transfer year and subsequent transfer years, each transferor entity shall pay its transfer amount or amounts to the Controller, for deposit in the fund, in eight equal installments. The first installment shall be payable on July 10 of each transfer year. All other installments shall be payable on the fifth day of each month thereafter from August through February.

(B) For the 1994–95 transfer year, each transferor entity shall pay its transfer amount or amounts to the Controller, for deposit in the fund, in five equal installments. The first installment shall be payable on October 5, 1994. The next four installments shall be payable on the fifth day of each month thereafter from November through February.

(C) For the 1995–96 transfer year, each transferor entity shall pay its transfer amount or amounts to the Controller, for deposit in the fund, in five equal installments. The first installment shall be payable on October 5, 1995. The next four installments shall be payable on the fifth day of each month thereafter from November through February.

(D) Except as otherwise specifically provided, subparagraphs (A) to (C), inclusive, shall not apply to increases in transfer amounts described in paragraph (2) of subdivision (h) or to additional transfer amounts described in subdivision (o).

(E) All requests for transfer payments, or adjustments thereto, issued by the department shall be in writing and shall include (i) an explanation of the basis for the particular transfer request or transfer activity, (ii) a summary description of program funding status for the particular transfer year, and (iii) the general calculations used by the department in connection with the particular transfer request or transfer activity.

(6) A transferor entity may use any of the following funds for purposes of meeting its transfer obligations under this section:

(A) General funds of the transferor entity.

(B) Any other funds permitted by law to be used for these purposes, except that a transferor entity shall not submit to the Controller any federal funds unless those federal funds are authorized by federal law to be used to match other federal funds. In addition, no private donated funds from any health care provider, or from any person or organization affiliated with such a health care provider, shall be channeled through a transferor entity or any other public entity to the fund. The transferor entity shall be responsible for determining that funds transferred meet the requirements of this subparagraph.

(j) (1) If a transferor entity does not submit any transfer amount within the time period specified in this section, the Controller shall offset immediately the amount owed against any funds which otherwise would be payable by the state to the transferor entity. The Controller, however, shall not impose an offset against any particular funds payable to the transferor entity where the offset would violate state or federal law.

(2) Where a withhold or a recoupment occurs pursuant to the provisions of paragraph (2) of subdivision (r) of Section 14105.98, the nonfederal portion of the amount in question shall remain in the fund, or shall be redeposited in the fund by the department, as applicable. The department shall then proceed as follows:

(A) If the withhold or recoupment was imposed with respect to a hospital whose licensee was a transferor entity for the particular state fiscal year to which the withhold or recoupment related, the nonfederal portion of the amount withheld or recouped shall serve as a credit for the particular transferor entity against an equal amount of transfer obligations under this section, to be applied whenever the transfer obligations next arise. Should no such transfer obligation arise within 180 days, the department shall return the funds in question to the particular transferor entity within 30 days thereafter.

(B) For other situations, the withheld or recouped nonfederal portion shall be subject to paragraph (7) of subdivision (h).

(k) All amounts received by the Controller pursuant to subdivision (i), paragraph (2) of subdivision (h), or subdivision (o), or offset by the Controller pursuant to subdivision (j), shall immediately be deposited in the fund.

(*l*) For purposes of this section, the disproportionate share list utilized by the department for a particular transfer year shall be identical to the disproportionate share list utilized by the department for the same state fiscal year for purposes of Section 14105.98. Nothing on a disproportionate share list, once issued by the department, shall be modified for any reason other than mathematical or typographical errors or omissions on the part of the department or the Office of Statewide Health Planning and Development in preparation of the list.

(m) Neither the intergovernmental transfers required by this section, nor any elective transfer made pursuant to Section 14164, shall create, lead to, or expand the health care funding or service obligations for current or future years for any transferor entity, except as required of the state by this section or as may be required by federal law, in which case the state shall be held harmless by the transferor entities on a pro rata basis.

(n) No amount submitted to the Controller pursuant to subdivision (i), paragraph (2) of subdivision (h), or subdivision (o), or offset by the Controller pursuant to subdivision (j), shall be claimed or recognized as an allowable element of cost in Medi-Cal cost reports submitted to the department.

(o) Whenever additional transfer amounts are required to fund the nonfederal share of payment adjustment amounts under Section 14105.98 that are distributed after the close of the particular payment adjustment year to which the payment adjustment amounts apply, the additional transfer amounts shall be paid by the parties who were the transferor entities for the particular transfer year that was concurrent with the particular payment adjustment year. The additional transfer amounts shall be calculated under the formula that was in effect during the particular transfer year. For transfer years prior to the 1993–94 transfer year, the percentage of the additional transfer amounts available for transfer to the Health Care Deposit Fund under subdivision (d) shall be the percentage that was in effect during the particular transfer year. These additional transfer amounts shall be paid by transferor entities within 20 days after the department notifies the transferor entity in writing of the additional transfer amount to be paid.

(p) (1) Ten million dollars ($10,000,000) of the amount transferred from the Medi-Cal Inpatient Payment Adjustment Fund to the Health Care Deposit Fund due to amounts transferred attributable to years prior to the 1993–94 fiscal year is hereby appropriated without regard to fiscal years to the State Department of Health Services to be used to support the development of managed care programs under the department's plan to expand Medi-Cal managed care.

(2) These funds shall be used by the department for both of the following purposes: (A) distributions to counties or other local entities that contract with the department to receive those funds to offset a portion of the costs of forming the local initiative entity, and (B) distributions to local initiative entities that contract with the department to receive those funds to offset a portion of the costs of developing the local initiative health delivery system in accordance with the department's plan to expand Medi-Cal managed care.

(3) Entities contracting with the department for any portion of the ten million dollars ($10,000,000) shall meet the objectives of the

department's plan to expand Medi-Cal managed care with regard to traditional and safety net providers.

(4) Entities contracting with the department for any portion of the ten million dollars ($10,000,000) may be authorized under those contracts to utilize their funds to provide for reimbursement of the costs of local organizations and entities incurred in participating in the development and operation of a local initiative.

(5) To the full extent permitted by state and federal law, these funds shall be distributed by the department for expenditure at the local level in a manner that qualifies for federal financial participation under the medicaid program.

(q) (1) Any local initiative entity that has performed unanticipated additional work for the purposes identified in subparagraph (B) of paragraph (2) of subdivision (p) resulting in additional costs attributable to the development of its local initiative health delivery system, may file a claim for reimbursement with the department for the additional costs incurred due to delays in start dates through the 1996–97 fiscal year. Any such claim shall be filed by the local initiative entity not later than 90 days after the effective date of the act adding this subdivision, and shall not seek extra compensation for any sum that is or could have been asserted pursuant to the contract disputes and appeals resolution provisions of the local initiative entity's respective two-plan model contract. All claims for unanticipated additional incurred costs shall be submitted with adequate supporting documentation including, but not limited to, all of the following:

(A) Invoices, receipts, job descriptions, payroll records, work plans, and other materials that identify the unanticipated additional claimed and incurred costs.

(B) Documents reflecting mitigation of costs.

(C) To the extent lost profits are included in the claim, documentation identifying those profits and the manner of calculation.

(D) Documents reflecting the anticipated start date, the actual start date, and reasons for the delay between the dates, if any.

(2) In determining any amount to be paid, the department shall do all of the following:

(A) Conduct a fiscal analysis of the local initiative entity's claimed costs.

(B) Determine the appropriate amount of payment, after taking into consideration the supporting documentation and the results of any audit.

(C) Provide funding for any such payment, as approved by the Department of Finance through the deficiency process.

(D) Complete the determination required in subparagraph (B) within six months after receipt of a local initiative entity's completed claim and supporting documentation. Prior to final determination,

there shall be a review and comment period for that local initiative entity.

(E) Make reasonable efforts to obtain federal financial participation. In the event federal financial participation is not allowed for this payment, the state's payment shall be 50 percent of the total amount determined to be payable.

SEC. 77. Section 14459.5 is added to the Welfare and Institutions Code, to read:

14459.5. (a) As delegated by the federal government, the department has responsibility for monitoring the quality of all medicaid services provided in the state. A key component of this monitoring function is the performance of annual, independent, external reviews of the quality of services furnished under each state contract with a health maintenance organization, as specified by the federal Health Care Financing Administration.

(b) The Legislature finds and declares that the final report obtained from the external reviews will provide valid and reliable information regarding health care outcomes and the overall quality of care delivered by the managed care plans.

(c) The department shall make only the final report of each external review available, within 30 calendar days of completion, to the fiscal and health policy committees of the Legislature, and shall make only the final report available for public viewing upon request by any individual or organization.

SEC. 78. Section 14459.7 is added to the Welfare and Institutions Code, to read:

14459.7. (a) The department shall implement a Management Information System/Decision Support System (MIS/DSS) for the Medi-Cal Program, that shall integrate data from managed care plans to monitor and evaluate the quality of care provided to beneficiaries, including access to services, establish provider rates, and analyze ways to improve both the managed care and fee-for-service systems.

(b) The department shall provide the fiscal and health policy committees of the Legislature with an annual progress and status report on the implementation of the MIS/DSS. The annual progress and status report shall include a description of the current status of the project, including a list of the specific project objectives that have and have not been met at the time of the report and a comparison of the actual progress of the project with the most recent project schedule approved by the Legislature. The report also shall include estimated expenditures and staffing for the current fiscal year and proposed expenditures and staffing for the next fiscal year as well as a summary of cumulative total project expenditures to date and a projection of future expenditures necessary to complete the project.

(c) The department shall provide system or information access to the fiscal and health policy committees of the Legislature, with the most cost-effective technology available, by the conclusion of the

third phase of this multiphase project. Access shall include both the management information system and ad hoc report systems, or their equivalent, with safeguards to block access to individual patient identities. Public access shall be provided to at least the management information system summary presentation, or an equivalent, by the time of project completion.

SEC. 79. Section 16809.5 of the Welfare and Institutions Code is amended to read:

16809.5. (a) Funds appropriated for the purposes of this section shall be allocated on a monthly basis.

(b) Money allocated for the purposes of this section may be used to expand the scope of benefits, to fund special projects which alleviate problems of access to health and dental care under the County Medical Services Program and to compensate hospitals and other emergency health service providers for emergency treatment of out-of-county indigent patients and shall not be used to fund existing levels of service.

(c) Funds available from appropriations for the purposes of this chapter may be utilized to fund increased program costs due to caseload increases and provider rate increases.

SEC. 80. Section 16909 of the Welfare and Institutions Code is amended to read:

16909. (a) Any county which receives funds pursuant to this part shall deposit them in a special revenue fund or trust fund established solely for this purpose, in a hospital services account, a physician services account, and other county health services account, and any other account or subaccount the department may require, before transferring or expending them for any of the uses allowed in this part.

(b) Any county subject to the requirements of subdivision (a) shall deposit the funds in the special revenue fund or trust fund before transferring the funds to the county emergency medical services fund, as provided in subdivision (c) of Section 16933 and Section 16951.

(c) (1) Interest on each fund, account, or subaccount shall accrue to the benefit of the fund, account, or subaccount, and shall be expended for the same purposes as the other funds in the account or subaccount.

(2) Interest or other increments resulting from funds transferred to the county for noncounty hospitals pursuant to paragraph (1) or (2) of subdivision (b) of Section 16946 shall be expended under paragraph (1) or (2) of subdivision (b) of Section 16946.

(d) Counties shall submit a report that displays cost and utilization data for each account in the trust fund established pursuant to this section, to the department on a semiannual, preliminary annual, and final annual basis, in a form prescribed by the department.

(e) Data required by subdivision (d) shall include, but not be limited to, all of the following:

(1) For the Hospital Services Account, the data shall include all of the following:

(A) Inpatient stay, including child health and disability prevention followup treatment, including the following information:

(i) Facility name.

(ii) Amount paid by the county.

(iii) Number of discharges.

(iv) Patient days.

(B) Outpatient visits, including child health and disability prevention followup treatment, including the following information:

(i) Facility name.

(ii) Amount paid by the county.

(iii) Number of visits.

(C) Emergency room.

(i) Facility name.

(ii) Amount paid by the county.

(iii) Number of visits.

(2) For the Physician Services Account, the data shall include all of the following:

(A) Emergency services, including the following information:

(i) The number of providers.

(ii) The number of visits.

(iii) The amount paid by the county.

(B) Obstetrics, including the following information:

(i) The number of providers.

(ii) The number of visits.

(iii) The amount paid by the county.

(C) Pediatrics, including the following information:

(i) The number of providers.

(ii) The number of visits.

(iii) The amount paid by the county.

(D) Child health and disability prevention followup treatment, including the following information:

(i) The number of providers.

(ii) The number of visits.

(iii) The amount paid by the county.

(3) For the other county health services account, the data shall include all of the following:

(A) For funds expended for hospital services, those data in paragraph (1) of subdivision (e).

(B) For funds expended for physician services, those data in paragraph (2) of subdivision (e).

(C) For funds expended for services other than those provided and billed for by a hospital or physician, the data shall include:

(i) The number of providers by type of service.

(ii) The number of visits or units, or both, by type of service.

(iii) The amount paid by the county by type of service.

(D) Child health and disability prevention followup treatment, including the following information:

(i) The number of providers.

(ii) The number of visits.

(iii) The amount paid by the county.

(f) The Director of Health Services shall withhold, in part or in whole, payment of moneys governed by Chapter 4 (commencing with Section 16930) and Chapter 5 (commencing with Section 16940) of this part to a county, until the reports specified in this section have been submitted to the department in the form and according to the procedures established by the department.

SEC. 81. Section 16945 of the Welfare and Institutions Code is amended to read:

16945. (a) The department shall annually verify and transmit to each MISP county and each CMSP county the figures specified in subdivision (c), using data supplied by the office.

(b) (1) For purposes specified in subdivision (c), the office shall use data from the quarterly reports required by Section 128740 of the Health and Safety Code.

(2) For the 1989–90 fiscal year computations, the office shall use the 1988 calendar year data, as adjusted by the office, existing on the statewide file on September 1, 1989.

(3) For the computations for fiscal years after the 1989–90 fiscal year, the office shall use the data from the quarterly reports for the calendar year preceding the computational fiscal year, as adjusted by the office, existing on the statewide file on April 15 immediately preceding the computational fiscal year.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), the definitions, procedures, and data elements specified in Chapter 3 (commencing with Section 16920) shall be used in all computations required in subdivision (c).

(B) For the 1991–92 fiscal year, the following definitions shall be used in all computations required in subdivision (c):

(i) "Uncompensated care charges" means the sum of the charges related to patients falling within the charity-other category in the 1990 calendar year and 25 percent of the charges related to patients falling within the bad debts category in the first two quarters of the 1990 calendar year, as both categories of charges are reported quarterly to the office pursuant to Section 128740 of the Health and Safety Code.

(ii) "Uncompensated care costs" means that amount calculated by applying an overall hospital cost-to-charge ratio, calculated by dividing gross operating expenses by gross inpatient and outpatient revenue, as reported quarterly to the office, to uncompensated care charges.

(C) For the 1992–93 fiscal year, the following definitions shall be used in all computations required in subdivision (c):

(i) "Uncompensated care charges" means the charges related to patients falling within charity-other, as reported quarterly to the office pursuant to Section 128740 of the Health and Safety Code.

(ii) "Uncompensated care costs" means that amount calculated by applying an overall hospital cost-to-charge ratio, calculated by dividing gross operating expenses by gross inpatient and outpatient revenue, as reported quarterly to the office, to uncompensated care charges.

(D) For the 1993–94, 1994–95, 1995–96, 1996–97 and subsequent fiscal years, the following definitions shall be used in all computations required in subdivision (c):

(i) (I) For county hospitals and for all hospitals operating in counties with no county hospital, "uncompensated care charges" means the charges related to patients falling within charity-other, gross inpatient revenue-county indigent programs and gross outpatient revenue-county indigent programs, as reported quarterly to the office pursuant to Section 128740 of the Health and Safety Code.

(II) For noncounty hospitals operating in a county with a county hospital, "uncompensated care charges" means the charges related to patients falling within charity-other and county indigent programs contractual adjustments, as reported quarterly to the office pursuant to Section 128740 of the Health and Safety Code.

(ii) "Uncompensated care costs" means that amount calculated by applying an overall hospital cost-to-charge ratio, calculated by dividing gross operating expenses less other operating revenue by gross inpatient and outpatient revenue, as reported quarterly to the office, to uncompensated care charges.

(c) The office shall compute the following data on uncompensated care costs reported by hospitals located within each MISP county and each CMSP county:

(1) The sum of uncompensated care costs for all hospitals.

(2) The sum of uncompensated care costs for all noncounty hospitals.

(3) The sum of uncompensated care costs for all county hospitals.

(4) The uncompensated care costs of each hospital within the county.

(5) The percentage derived from dividing the result of paragraph (2) by the result of paragraph (1).

(6) The percentage derived from dividing the result of paragraph (3) by the result of paragraph (1).

(7) The percentage for each individual hospital derived from dividing each noncounty hospital's uncompensated care cost in paragraph (4) by the amount in paragraph (2).

(d) The office shall transmit to the department the data specified in subdivision (c) within 30 days of the dates specified in paragraph (2) of subdivision (b) and paragraph (3) of subdivision (b) of this section.

SEC. 82. Section 16990.5 of the Welfare and Institutions Code is amended to read:

16990.5. (a) The following definitions shall govern the construction of this section, unless the context requires otherwise:

(1) "Capital outlay" means net disproportionate share hospital revenues used for projects that involve the acquisition, construction, renovation, improvement, modernization, expansion, or replacement of a plant, building, or fixed or movable equipment, including debt service for facilities used in the provision of county health care services or mental health services.

(2) "County health care services" means those services described in subdivision (a) of Section 16801.

(3) "County financial maintenance of effort" means the level of financial support required of a county pursuant to Section 16990.

(4) "Net disproportionate share hospital revenues" means the amount determined by subtracting the total intergovernmental transfers made by a county pursuant to Sections 14163 and 14164 from the total amount of the payment adjustments paid to the county's hospital or hospitals pursuant to Section 14105.98. This calculation shall reflect any amendment to Sections 14163 and 14164, including amendments to paragraph (2) of subdivision (d) of Section 14163.

(5) "Mental health services" means those programs transferred or otherwise financed pursuant to Chapters 89 and 91 of the Statutes of 1991.

(b) (1) Each county shall deposit all net disproportionate share hospital revenues into a fund or funds other than the county general fund, and shall retain those revenues until utilized for the purposes described in this section.

(2) All disproportionate share hospital revenues are intended to support health care services rendered by disproportionate share hospitals, including, but not limited to, health or mental health services and health or mental health capital outlays. Net disproportionate share hospital revenues shall not be used to supplant or offset county general funds or other funds that were expended or encumbered for those purposes prior to July 1, 1991.

(3) Net disproportionate share hospital revenues shall be included in computing county financial maintenance of effort only as set forth in subdivision (c).

(c) For the 1991–92 fiscal year, and for each fiscal year thereafter, for purposes of computing county financial maintenance of effort, net disproportionate share hospital revenues deposited in accordance with subdivision (b) shall be treated as follows:

(1) Net disproportionate share hospital revenues utilized for a county for mental health services, or for capital outlay for health or mental health services, shall not be counted as revenue in the computation of county financial maintenance of effort.

(2) Net disproportionate share hospital revenues that are not utilized as described in paragraph (1) shall be counted as revenue in the computation of a county's financial maintenance of effort only to the extent that by not counting those revenues for a particular fiscal year, a county's net county costs for county health care services exceeds the amount of county funds required to satisfy the requirements of Section 16990 for the particular fiscal year.

(3) Net disproportionate share hospital revenues counted as revenue in the calculation of county financial maintenance of effort for a particular year pursuant to paragraph (2) shall not be counted as revenue in the calculation of county financial maintenance of effort relating to any subsequent fiscal year.

(d) Net disproportionate share hospital revenues may not be used for deposits required by Sections 17608.05 and 17608.10 or as county funds required by Section 16990.

SEC. 83. Section 16997.1 of the Welfare and Institutions Code is repealed:

SEC. 84. Section 17000.51 is added to the Welfare and Institutions Code, to read:

17000.51. (a) Notwithstanding the decision in Caulk v. Superior Court, CO15355, June 27, 1997, a county's discretion granted pursuant to Section 17000.5 to include, as part of a general assistance aid grant, in-kind aid with a monthly actuarial value of up to forty dollars ($40) per month of medical care, was not intended, and shall not be construed, to do any of the following:

(1) Satisfy, in whole or in part, the duty of a county or a city or county to provide health care services to indigent and dependent poor persons under Section 17000.

(2) Permit a county or a city and county to cease providing health care services under Section 17000.

(3) Affect the eligibility of indigent and dependent poor persons for health care services under Section 17000.

(b) Subdivision (a) shall cease to be implemented if, and only to the extent that, a final court decision holds that subdivision (a) imposes a state-mandated local program.

(c) Subdivision (a) confirms, and is declarative of, rather than a change in, existing law, as provided for in Chapter 6 of the Statutes of 1996, which was intended only to provide a county or city and county with the discretion to reduce its general assistance grant level by up to forty dollars ($40) per month.

SEC. 85. (a) (1) Of the amount appropriated in Item 4260-111-0001 of the Budget Act of 1997, the State Department of Health Services may use the sum of one million six hundred thousand

dollars ($1,600,000) for the extension of the term of contracts with entities receiving funds in the 1996–97 fiscal year to provide HIV testing services.

(2) Notwithstanding any other provision of law, the State Department of Health Services may enter into amendments to the contracts described in paragraph (1) for the 1997–98 fiscal year, to be effective as of June 30, 1997. Any such amendment shall be exempt from the approval of the Director of General Services and from the provisions of the Public Contract Code.

(3) The department may make advance payments, not to exceed 25 percent of the expected amount of funding for the particular contract amendment, prior to the execution of the amendment. These advance payments shall be made only for services specified in the particular contract that was in effect prior to June 30, 1997, and that are provided after June 30, 1997.

(b) This section shall become inoperative on July 1, 1998, and, as of January 1, 1999, is repealed.

SEC. 86. In the event that funds in the Cigarette and Tobacco Products Surtax Fund are insufficient to support the Budget Act appropriations for the programs affected by this act, the Director of Finance may authorize the augmentation or reduction of the amounts appropriated in the Budget Act for the programs affected by this act pursuant to Section 27 of the Budget Act or any other provision of the Budget Act that governs deficiencies.

SEC. 87. Moneys in the Hospital Services Account, the Physician Services Account, the Health Education Account, and the Unallocated Account in the Cigarette and Tobacco Products Surtax Fund shall not be transferred to any other fund or account in the State Treasury, except as provided in this act or other legislation, and except for purposes of investment as provided in Article 4 (commencing with Section 16470) of Chapter 3 of Part 2 of Division 4 of Title 2 of the Government Code. All interest or other increment resulting from investment shall be deposited to the respective account.

SEC. 88. (a) Notwithstanding any provision of law, funds appropriated by the Budget Act of 1997 for the tobacco use competitive grants program set forth in Section 104385 of the Health and Safety Code and the tobacco prevention media campaign set forth in subdivision (e) of Section 104375 of the Health and Safety Code shall be available for expenditure without regard to fiscal year until July 1, 2000.

(b) Notwithstanding any provision of law, funds appropriated by the Budget Act of 1997 for the evaluation of the State Department of Education's tobacco use prevention education program pursuant to subdivision (c) of Section 104375 of the Health and Safety Code, for the State Department of Education's allocation of funds for school-based tobacco use prevention pursuant to Sections 104425 and

104430 of the Health and Safety Code, for the tobacco use prevention program set forth in Section 104400 of the Health and Safety Code, and for the rural health improvement grants established in Section 1179.3 of the Health and Safety Code, shall be available for expenditure without regard to fiscal year until July 1, 1999.

SEC. 89. Due to the necessity to implement the mandates of Article 2 (commencing with Section 30121) of Chapter 2 of Part 13 of Division 2 of the Revenue and Taxation Code, any contract made pursuant to any provision of this act referred to in Section 91 shall not be subject to Part 2 (commencing with Section 10100) of the Public Contract Code.

SEC. 90. In the event that this act is not enacted until after July 1, 1997, all programs authorized or amended by this act by the amendment of Sections 16909 and 16945 of the Welfare and Institutions Code, and by those sections referred to in the following sentence, shall be deemed to be operative for the entire 1997–98 fiscal year. Also, by repealing Sections 349.109, 104485, 104550, 104569, and 124950 of the Health and Safety Code, Section 12699.50 of the Insurance Code, Sections 14148.99 and 16997.1 of the Welfare and Institutions Code, and by deleting subdivision (e) of Section 16809.5 of the Welfare and Institutions Code, it is the intent of the Legislature to continue the effect and operation of the provisions affected by those repealed and deleted provisions. If this act is not enacted until after July 1, 1997, those affected provisions shall again become operative on the effective date of this act.

SEC. 91. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

SEC. 92. (a) The State Department of Health Services may adopt emergency regulations to implement this act in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(b) (1) The State Department of Health Services may adopt emergency regulations to implement any new Medi-Cal benefits established by the Budget Act of 1997 in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

(2) In the regulations described in paragraph (1), the department may define terms and prescribe requirements applicable to those benefits, including, but not limited to, the following:

(A) The provider types and size of provider office that are eligible for payment for providing this benefit.

(B) The criteria required to be met for payment.

(C) The reimbursement rates for the services.

(D) Any certificate or license requirements that are required to be met by individuals providing the services.

(c) The initial adoption of emergency regulations described in subdivisions (a) and (b) following the effective date of this section and one readoption of those initial regulations shall be deemed to be emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare. Initial emergency regulations and the first readoption of those regulations shall be exempt from review by the Office of Administrative Law. The emergency regulations authorized by this section and the readoption of those regulations shall be submitted to the Office of Administrative Law for filing with the Secretary of State and publication in the California Code of Regulations and shall remain in effect for no more than 180 days.

SEC. 93. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Notwithstanding Section 17580 of the Government Code, unless otherwise specified, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

SEC. 94. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to timely provide for the administration of this act relating to public health for the entire 1997–98 fiscal year, it is necessary that this act take effect immediately.

O

Senate Bill No. 362

CHAPTER 116

An act to amend Section 121361 of the Health and Safety Code, relating to communicable diseases.

[Approved by Governor July 27, 1997. Filed with Secretary of State July 28, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

SB 362, Maddy. Tuberculosis: health facility.

Existing law prohibits a health facility, local detention facility, or state correctional institution from discharging, releasing, or transferring any person known to have or when the facility or institutional medical staff have reasonable grounds to believe the person has active tuberculosis, unless notification and a written treatment plan have been received by the local health officer, except as specified.

This bill would provide that no health facility that declines to discharge, release, or transfer a person pursuant to that provision shall be civilly or criminally liable or subject to administrative sanction as a result, if the health facility complies with that provision and acts in good faith. The bill would also provide that the local health officer under this provision is not relieved of any other duty imposed under state law governing tuberculosis control.

The people of the State of California do enact as follows:

SECTION 1. Section 121361 of the Health and Safety Code is amended to read:

121361. (a) (1) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(A) A person known to have active tuberculosis disease.

(B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.

(2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 121362 is approved by a local health officer of the jurisdiction in which the health facility is located. Treatment plans submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of receipt of the plans.

(3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due

to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges described in this paragraph shall occur only after the notification and treatment plan required by Section 121362 have been received by the local health officer.

(4) This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(b) No health facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility unless subdivision (e) is complied with. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) All discharges, releases, or transfers described in subdivisions (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 121362 has been received by the local health officer. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution, then the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

(f) No health facility that declines to discharge, release, or transfer a person pursuant to this section shall be civilly or criminally liable or subject to administrative sanction therefor. This subdivision shall apply only if the health facility complies with this section and acts in good faith.

(g) Nothing in this section shall relieve a local health officer of any other duty imposed by this chapter.

O

Senate Bill No. 843

CHAPTER 763

An act to amend Sections 121361 and 121362 of, and to add and repeal Section 121360.5 of, the Health and Safety Code, relating to communicable diseases.

[Approved by Governor September 20, 2002. Filed with Secretary of State September 21, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 843, Perata. Omnibus Tuberculosis Control and Prevention Act of 2002.

Existing law establishes various communicable disease prevention and control programs, including one for tuberculosis. That program provides for testing of various persons for tuberculosis by prescribed licensed health professionals.

This bill would enact the Omnibus Tuberculosis Control and Prevention Act of 2002.

This bill would until January 1, 2006, permit any local health department to provide for certification, by the local health officer, of tuberculin skin test technicians, as defined, in accordance with specified requirements.

Existing law requires each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease to promptly provide a disease notification report and written treatment plan to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease.

Existing law prohibits a health facility, local detention facility, or state correctional institution from discharging or releasing a person known to have active tuberculosis disease or a person the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease, unless the notification report and individual treatment plan requirements specified above have been met.

This bill would provide that when a person described above is released on parole from a state correctional institution, the notification and written treatment plan shall be provided to both the local health officer for the county in which the parolee intends to reside and the local health officer for the county in which the state correctional institution is

located. It would require the Department of Corrections to inform the parole agent, and other parole officials as necessary, that the person has active or suspected active tuberculosis disease and provide information regarding the need for evaluation or treatment. In addition, the bill would require the parole agent and other parole officials to coordinate with the local health officer in supervising the person's compliance with medical evaluation or treatment related to tuberculosis, and to notify the local health officer if the person's parole is suspended as a result of having absconded from supervision. The imposition of new duties on local health officers in connection with these provisions would create a state-mandated local program.

Existing law provides that in the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the medical officer of the parole region or the physician and surgeon designated by the Director of Corrections when there are reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis.

This bill would instead require the local health officer to notify the assigned parole agent, when known, or the regional parole administrator.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Each year, approximately 3,000 Californians develop tuberculosis (TB). Tuberculosis is a contagious disease transmitted through the air by bacteria when a person with active tuberculosis disease coughs or sneezes, and another person breathes in the tuberculosis bacteria.

(2) For each reported case of active tuberculosis disease, public health officials identify 10 or more individuals who have been directly exposed to the disease and are at risk of developing latent tuberculosis infection. These individuals who have been exposed to the disease are

at the highest risk of developing active tuberculosis disease soon after exposure. Finding and screening individuals who have been recently exposed to active tuberculosis disease, referred to as "contact investigation," is essential in preventing outbreaks of tuberculosis in communities.

(3) Public health officials estimate that as many as 3.4 million Californians may now be infected (latent tuberculosis infection) with the bacteria that can cause active tuberculosis disease. If undetected and untreated, an estimated 5 to 10 percent of persons in California, or 170,000 to 340,000 people, with latent tuberculosis infection will, throughout the course of their lives, develop active tuberculosis disease, thus continuing the cycle of transmission.

(4) Because persons with latent tuberculosis infection have no symptoms, the only way to detect their infection is by a tuberculin skin test.

(5) Tuberculin skin tests may now be placed and measured only by certain licensed health professionals, which do not include public health tuberculosis workers who are not licensed health professionals, but who are employed by, or under contract with, a city or county health department.

(6) The National Institute of Medicine's report on tuberculosis clearly recommends increased efforts at contact investigation, targeted skin testing, and bringing under treatment those individuals with latent tuberculosis infection in order to prevent the progression to active, transmissible, tuberculosis disease.

(b) It is the intent of the Legislature to enact legislation to permit any city or county health department to provide for certification, by the local health officer, of tuberculin skin test technicians, who are public health tuberculosis workers, and to authorize tuberculin skin test technicians to place and measure skin tests for tuberculosis for the local health department, in order to increase the number of persons qualified to administer tests and to thereby more effectively, and more cost-effectively, control the spread and contagion of this communicable disease.

SEC. 2. This act shall be known, and may be cited, as the Omnibus Tuberculosis Control and Prevention Act of 2002.

SEC. 3. Section 121360.5 is added to the Health and Safety Code, to read:

121360.5. (a) Any city or county health department may provide for one-year certification of tuberculin skin test technicians by local health officers.

(b) For purposes of this section, a "certified tuberculin skin test technician" is an unlicensed public health tuberculosis worker

employed by, or under contract with, a local public health department, and who is certified by a local health officer to place and measure skin tests in the local health department's jurisdiction.

(c) A certified tuberculin skin test technician may perform the functions for which he or she is certified only if he or she meets all of the following requirements:

(1) The certified tuberculin skin test technician is working under the direction of the local health officer or the tuberculosis controller.

(2) The certified tuberculin skin test technician is working under the supervision of a licensed health professional.

(d) A certified tuberculin skin test technician may perform intradermal injections only for the purpose of placing a tuberculin skin test and measuring the test result.

(e) A certified tuberculin skin test technician may not be certified to interpret, and may not interpret, the results of a tuberculin skin test.

(f) In order to be certified as a tuberculin skin test technician by a local health officer, a person shall meet all of the following requirements, and provide to the local health officer appropriate documentation establishing that he or she has met those requirements:

(1) The person has a high school diploma, or its equivalent.

(2) The person has completed a standardized course approved by the California Tuberculosis Controllers Association (CTCA), which shall include at least 24 hours of instruction in all of the following areas: Didactic instruction on tuberculosis control principles and instruction on the proper placement and measurement of tuberculin skin tests, equipment usage, basic infection control, universal precautions, and appropriate disposal of sharps, needles, and medical waste, client preparation and education, safety, communication, professional behavior, and the importance of confidentiality.

A certification of satisfactory completion of this CTCA-approved course shall be dated and signed by the local health officer, and shall contain the name and social security number of the tuberculin skin test technician, and the printed name, the jurisdiction, and the telephone number of the certifying local health officer.

(3) The person has completed practical instruction including placing at least 30 successful intradermal tuberculin skin tests, supervised by a licensed physician or registered nurse at the local health department, and 30 correct measurements of intradermal tuberculin skin tests, at least 15 of which are deemed positive by the licensed physician or registered nurse supervising the practical instruction. A certification of the satisfactory completion of this practical instruction shall be dated and signed by the licensed physician or registered nurse supervising the practical instruction.

(g) The certification may be renewed, and the local health department shall provide a certificate of renewal, if the certificate holder has completed inservice training, including all of the following:

(1) At least three hours of a CTCA-approved standardized training course to assure continued competency. This training shall include, but not be limited to, fundamental principles of tuberculin skin testing.

(2) Practical instruction, under the supervision of a licensed physician or registered nurse at the local health department, including the successful placement and correct measurement of 10 tuberculin skin tests, at least five of which are deemed positive by the licensed physician or registered nurse supervising the practical instruction.

(h) The local health officer or the tuberculosis controller may deny or revoke the certification of a tuberculin skin test technician if the local health officer or the tuberculosis controller finds that the technician is not in compliance with this section.

(i) This section shall remain in effect only until January 1, 2006, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2006, deletes or extends that date.

SEC. 4. Section 121361 of the Health and Safety Code is amended to read:

121361. (a) (1) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(A) A person known to have active tuberculosis disease.

(B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.

(2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 121362 is approved by a local health officer of the jurisdiction in which the health facility is located. Any treatment plan submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of receipt of that plan.

(3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges described in this paragraph shall occur only after the notification and treatment plan required by Section 121362 have been received by the local health officer.

(4) This subdivision shall not apply to any transfer within the state correctional system or to any interfacility transfer occurring within a local detention facility system.

(b) No health facility shall, without first complying with subdivision (e), transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility. This subdivision shall not apply to any transfer within the state correctional system or to any interfacility transfer occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) (1) Any discharge, release, or transfer described in subdivisions (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 121362 has been received by the local health officer. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution, the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

(2) When a person described in paragraph (1) of subdivision (a) is released on parole from a state correctional institution, the notification and written treatment plan specified in this subdivision shall be provided to both the local health officer for the county in which the parolee intends to reside and the local health officer for the county in which the state correctional institution is located.

(3) Notwithstanding any other provision of law, the Department of Corrections shall inform the parole agent, and other parole officials as necessary, that the person described in paragraph (1) of subdivision (a) has active or suspected active tuberculosis disease and provide information regarding the need for evaluation or treatment. The parole agent and other parole officials shall coordinate with the local health officer in supervising the person's compliance with medical evaluation or treatment related to tuberculosis, and shall notify the local health officer if the person's parole is suspended as a result of having absconded from supervision.

(f) No health facility that declines to discharge, release, or transfer a person pursuant to this section shall be civilly or criminally liable or subject to administrative sanction therefor. This subdivision shall apply

only if the health facility complies with this section and acts in good faith.

(g) Nothing in this section shall relieve a local health officer of any other duty imposed by this chapter.

SEC. 5. Section 121362 of the Health and Safety Code is amended to read:

121362. Each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease shall promptly report to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or discontinues care. The initial disease notification report shall include an individual treatment plan that includes the patient's name, address, date of birth, tuberculin skin test results, pertinent radiologic, microbiologic, and pathologic reports, whether final or pending, and any other information required by the local health officer. Subsequent reports shall provide updated clinical status and laboratory results, assessment of treatment adherence, name of current care provider if the patient transfers care, and any other information required by the local health officer. A facility discharge, release, or transfer report shall include all pertinent and updated information required by the local health officer not previously reported on any initial or subsequent report, and shall specifically include a verified patient address, the name of the medical provider who has specifically agreed to provide medical care, clinical information used to assess the current infectious state, and any other information required by the local health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plan. Nothing in this section shall authorize the disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 7 (commencing with Section 120975) of, Chapter 8 (commencing with Section 121025) of, and Chapter 10 (commencing with Section 121075) of Part 4 of Division 105.

In the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the assigned parole agent, when known, or the regional parole administrator, when there are

reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the local health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

SEC. 6. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

O

EXHIBIT B

DEPARTMENT OF FINANCE

GRAY DAVIS, GOVERNOR

915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

November 3, 2003

Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms Higashi:

As requested in your letter of October 7, 2003, the Department of Finance has reviewed the test claim submitted by the County of Santa Clara (claimant) asking the Commission to determine whether specified costs incurred under Chapter 676, Statutes of 1993 (AB 803, Gotch), as amended by Chapter 685, Statutes of 1994 (AB 804, Gotch), Chapter 116, Statutes of 1997 (SB 362, Maddy), and Chapter 763, Statutes of 2002 (SB 843, Perata), are reimbursable state mandated costs (Claim No. CSM-03-TC-14 "Tuberculosis Control").

Commencing with Page 1 of the test claim, the claimant has identified a number of new activities related to the manner in which local health officers manage and control the spread and treatment of Tuburculosis within the State of California, which it asserts are reimbursable state mandates. As the result of our review, we have concluded that the referenced statutes may have resulted in a new State mandated program on the county. If the Commission reaches the same conclusion at its scheduled hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines, which will then have to be developed for the program. We note that in our review of the proposed Parameters and Guidelines, we expect that the County will be very specific regarding actual activities necessary to comply with existing law, especially since the statutes are nearly ten years old.

As required by the Commission's regulations, we are including a "Proof of Service" indicating that the parties included on the mailing list, which accompanied your October 7, 2003 letter, have been provided with copies of this letter via either United States Mail or, in the case of other state agencies, Interagency Mail Service.

If you have any questions regarding this letter, please contact Mr. Tom Lutzenberger, Principal Program Budget Analyst at (916) 445-6423, or Mr. Keith Gmeinder, state mandates claims coordinator for the Department of Finance, at (916) 445-8913.

Sincerely,

Terrie G. Tatosian
Program Budget Manager

Attachment A

DECLARATION OF TOM LUTZENBERGER
DEPARTMENT OF FINANCE
CLAIM NO. CSM-03-TC-14

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. We concur that the Chapter 676, Statutes of 1993, (AB 803, Gotch), as amended by Chapter 685, Statutes of 1994 (AB 804, Gotch), Chapter 116, Statutes of 1997 (SB 362, Maddy), and Chapter 763, Statutes of 2002 (SB 843, Perata), sections relevant to this claim are accurately quoted in the test claim submitted by claimants and, therefore, we do not restate them in this declaration.

I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

11/3/03
at Sacramento, CA

Tom Lutzenberger

PROOF OF SERVICE

Test Claim Name: Tuberculosis Control
Test Claim Number: 03-TC-14

I, the undersigned, declare as follows:
I am employed in the County of Sacramento, State of California, I am 18 years of age or older and not a party to the within entitled cause; my business address is 915 L Street, 9th Floor, Sacramento, CA 95814.

On November 3, 2003, I served the attached recommendation of the Department of Finance in said cause, by facsimile to the Commission on State Mandates and by placing a true copy thereof: (1) to claimants and nonstate agencies enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Sacramento, California; and (2) to state agencies in the normal pickup location at 915 L Street, 9th Floor, for Interagency Mail Service, addressed as follows:

A-16
Ms. Paula Higashi, Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
Facsimile No. 445-0278

B-29
Legislative Analyst's Office
Attention: Ms. Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

A-22
Department of Health Services
Attention: Mr. Dwight Nelson
1501 Capitol Avenue
Sacramento, CA 95814

David Wellhouse & Associates, Inc.
Attention: Mr. David Wellhouse
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Mandated Cost Systems, Inc.
Attention: Mr. Steve Smith
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Cost Recovery Systems
Attention: Ms. Annette Chinn
705-2 East Bidwell Street, #294
Folsom, CA 95630

B-08
State Controller's Office
Division of Accounting & Reporting
Attention: Mr. Michael Havey
3301 C Street, Room 500
Sacramento, CA 95816

Mr. Steve Shields
Shields Consulting Group, Inc
1536 36th Street
Sacramento, CA 95816

SixTen & Associates
Attention: Mr. Keith B. Peterson
5252 Balboa Avenue, Suite 807
San Diego, CA 92117

Spector, Middleton, Young & Minney, LLP
Attention: Mr. Paul Minney
7 Park Center Drive
Sacramento, CA 95825

Mandate Resource Services
Attention: Ms. Harmeet Barkschat
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

County of Los Angeles
Attention: Mr. Leonard Kaye, Esq.
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Centration, Inc.
Attention: Ms. Cindy Sconce
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

MAXIMUS
Attention: Mr. Allan Burdick
4320 Auburn Blvd., Suite 2000
Sacramento, CA 95841

County of Santa Clara
Attention: Dave Elledge
1553 Berger Drive
San Jose, CA 95112

Mr. J. Bradley Burgess
Public Resource Management Group
1380 Lead Hill Boulevard, Suite #106
Roseville, CA 95661

E-08
Mr. Gerald Shelton
California Department of Education
Fiscal and Administrative Services Division
1430 N Street, Suite 2213
Sacramento, CA 95814

E-22
Ms. Diane Van Maren
Senate Budget & Fiscal Review Committee
California State Senate
State Capitol, Room 5066
Sacramento, CA 95814

Mr. Dan Souza
County of Stanislaus
Behavioral Health and Recovery Systems
800 Scenic Dr
Modesto, CA 95350

Mr. John Ryan
County of Riverside
Department of Mental Health
P.O. Box 7549
Riverside, CA 92513

Mr. Mark Sigman
Riverside County Sheriff's Office
4095 Lemon Street
Riverside, CA 92502

A-31
Deputy Director of Administrative Services
Department of Mental Health
1600 9th Street, Room 150
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 3, 2003 at Sacramento, California.

Anh Tham

Anh Tham

RESPONSE TO DEPARTMENT OF FINANCE

On Original Test Claim
Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002
Claim no. CSM-03-TC-14

Tuberculosis Control

The following are comments and responses to the letters of the Department of Finance, dated November 3, 2003, regarding the original test claim as submitted by the County of Santa Clara.

A. Department of Finance's Comments

"As the result of our review, we have concluded that the referenced statutes may have resulted in a new State mandated program and cost on the county. If the Commission reaches the same conclusion at its scheduled hearing on the matter, the nature and extent of the specific activities required can be addressed in the parameters and guidelines, which will then have to be developed for the program."

The Department of Finance has taken the position that a new state-mandated program may exist and thus is not in opposition to the position of the claimants.

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 29 day of January, 2004, at San Jose, California, by:

Dave Elledge
Controller-Treasurer
County of Santa Clara

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento, and I am over the age of 18 years and not a party to the within action. My place of employment is 4320 Auburn Blvd., Suite 2000, Sacramento, CA 95841.

On February 5, 2004, I served:

RESPONSE TO DEPARTMENT OF FINANCE

On Original Test Claim
Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002
Claim no. CSM-03-TC-14

Tuberculosis Control

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the Untied States mail at Sacramento, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 5th day of February, 2004, at Sacramento, California.

Declarant

Legislative Analyst's Office
Attention: Marianne O'Malley
925 L Street, Suite 1000
Sacramento, CA 95814

State Controller's Office
Division of Accounting & Reporting
Attn: Michael Havey
3301 C Street, Suite 500
Sacramento, CA 95816

Mr. Keith Gmeinder
Department of Finance
915 L Street, 8th Floor
Sacramento, CA 95814

Mr. Dwight Nelson
Department of Health Services
714 P Street, Room 350
Sacramento, CA 95814

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 West Temple Street, Room 603
Los Angeles, CA 90012

Mr. Keith B. Peterson, President
Six Ten and Associates
5252 Balboa Avenue; Suite 807
San Diego, CA 92117

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd. #307
Sacramento, CA 95842

Mr. Paul Minney
Spector, Middleton, Young & Minney
7 Park Center Drive
Sacramento, CA 95825

Mr. David Wellhouse
David Wellhouse & Associates
9175 Kiefer Blvd, Suite 121
Sacramento, CA 95826

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Mr. Steve Smith
Mandated Cost Systems
11130 Sun Center Drive, Suite 100
Rancho Cordova, CA 95670

Ms. Cindy Sconce
Centration
12150 Tributary Point Drive, Suite 140
Gold River, CA 95670

Ms. Bonnie Ter Keurst
County of San Bernardino
222 West Hospitality Lane
San Bernardino, CA 92415-0018

EXHIBIT D

MARK HAGIYA
Assistant Chief Counsel
JEANETTE L. SMITH
Sr. Staff Counsel
Office of Legal Services
Department of Health Services
MS 0010
P. O. Box 942713
Sacramento, California 95899-7413
Telephone: (916) 440-7792

Attorneys for the State
Department of Health Services

RECEIVED
AUG 2 5 2004
COMMISSION ON
STATE MANDATES

BEFORE THE COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

In the Matter of The Test Claim of the County of Santa Clara Tuberculosis Control September 23, 2003	DEPARTMENT'S HEARING BRIEF Claim No. 03-TC-14

Chapters 60, 102, 103, 104 & 106, Statutes of 1939; Chapter 205, Statutes of 1957; Chapter 676, Statutes of 1993, Chapter 685; Statutes of 1994, Chapter 294; Statutes of 1997; Chapter 116, Statutes of 1997; Chapter 763, Statutes of 2002

The Department contends that the test claim should fail for the following reasons:

1. Many of the claims do not meet the definition of "costs mandated by the state" (Gov. Code §17514), because many of the statutory requirements of the tuberculosis control program predate January 1, 1975. Much of the program was in place by 1957.

2. The county, through HOAC, requested this legislation (Gov. Code §17556(a). The Health Officer's Association of California (HOAC), the separate non-profit lobby body of the statutorily established California Conference of Local Health Officers (CCLHO), sponsored the Gotch Bill and three of the five subsequent amendments. All the statutory provisions at issue in this test claim were sponsored by HOAC, which could not have

sponsored them without the consent of the member counties. HOAC's request should be imputed to its member counties, under Government Code §17556(a).

3. The 1993 statute, and following revisions, require those due process rights, under the federal and state constitutions, which had been declared law by action of the courts. The 1993 statute sets forth due process rights that courts have concluded are required under Art. 1 §7(a) of the California Constitution and the Fifth and Fourteenth Amendment to the United States Constitution. (Gov. Code §17556(b)(c).) See Bloom v. State of Ill., U.S. Ill.1968, 88 S.Ct. 1477, 391 U.S. 194, 20 L.Ed.2d 522; U.S. v. Crouch, C.A.5("Tex.) 1966, 84F.3d 1497, certiorari denied 117 S.Ct. 736, 519 U.S. 1076, 136 L.Ed.2d 676.)

4. Non-criminal detention proceedings are discretionary (Health & Safety Code §§ 121365, 121366, 121367, 121368, 121369). Hearing costs that are incurred as a result of discretionary actions do not constitute a "new program or higher level of service" which would trigger the right to state reimbursement. (Gov. Code §17556(c).) (San Diego Unified School District v. Commission on State Mandates, 16 Cal.Rptr.3d. 466, 2004 WL 1715008 (Cal.) See also Department of Finance v. Commission on State Mandates, May 22, 2003, 30 Cal.4th 727.)

5. Offsetting savings in several areas may result in no net cost to the local agency (Gov. Code §17556(e)), for example, outpatient treatment instead of patient confinement in a facility, as required by 1939 and 1957 law; reduction in the number of TB examinations performed by the local health officer; Medi-Cal or Medicare subsidized health examinations for eligible beneficiaries; reduced exposure to monetary damages resulting from violation of due process rights.

6. Should the Commission determine that there is a "new program or higher level of service," cost to the local agency is minimal, (or drastically reduced) because the State has provided instructions, model documents & materials (hard copy and fill-in forms) both in hard copy and on-line.

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I. THE COUNTIES ARE BARRED FROM RECOVERY OF COSTS BECAUSE THEY HAVE REQUESTED STATUTORY AUTHORITY TO IMPLEMENT THE TUBERCULOSIS PROGRAM (Gov. Code §17556(a))

HOAC (Health Officer's Association of California) sponsored the Gotch Bill (Ch. 676, Stat. 1993, AB 803) and three of the five subsequent amendments (Ch. 685, Stat. 1994, AB 804; Ch. 116, Stat. 1997, SB 362; Ch 763. Stat. 2002, SB 843).

Some of the provisions of the Gotch Bill, and these subsequent amendments, are the subject of this test claim.

HOAC (Health Officers Association of California) is the separate non-profit lobbying body of the California Conference of Local Health Officers (CCLHO), composed of all the CCLHO members. CCLHO is the statutorily established organization of all the Local Health Officers from the California counties (Health & Safety Code §§100925-100950).

HOAC could not have sponsored these bills without the consent of the member counties. Thus the Counties, through HOAC, sponsored the Gotch Bill.

Although there is no case law yet on this point, Gov. Code § 17556(a) should be imputed to the counties, because the statutory amendments were requested by their lobbying association, which represents them in the California Legislature.

II. EXAMINATIONS AND REVIEW OF REPORTS DOES NOT CONSTITUTE A NEW PROGRAM OR HIGHER LEVEL OF CARE (Gov. Code §17514)

(Health & Safety Codes §§ 121361, 121362, 121363, 121364)
(Cited statutes dated1993 to 2002.)

The local health officer (hereafter "LHO"), in most instances, is relieved of the responsibility to personally perform the examinations, but retains his authority to ensure all patients are treated. 1957 law directed the LHO to make examinations of persons known to be infected, or suspected of being infected with TB. (See Health & Safety Code

§3285(a) which remained unchanged in the l961 and l965 amendments, and until 1993.) Pre-1975 law also permitted persons to be examined by a licensed physician "under such terms and conditions as the health officer shall determine..." (§3285(c).

Health & Safety Code § 121361, in very broad outline, prohibits a health facility, local detention facility, or state correctional institution from transferring, discharging or releasing a known or suspected TB patient without a written treatment plan approved by the LHO. The LHO must review the treatment plans within 24 hours in most instances. Certain exceptions apply to transfers between facilities, correctional institutions, etc. Correctional institutions must notify the LHO and provide treatment plans for parolees released.

The requirement that the LHO review treatment plans and other documents is less burdensome than the previous requirement to examine the patients.

Health & Safety Code § 121362 sets forth, in detail, the required content of the reports which the LHO will review (the initial disease notification, including treatment plan, lab results, etc; subsequent reports, and facility discharge; release or transfer reports, etc.), and the records that must be maintained by the health care provider.

If the LHO were required to examine suspected TB patients, the LHO would, as a physician, write treatment plans meeting the standards described in §121362 (patient identifying information, observations, symptoms, lab results, etc.)

Health & Safety Code §121363 requires health care providers either to examine the patient for active TB or to refer him/her to the local health officer and to notify the local health officer of the referral. Non-household contacts & household contacts not examined by the health care provider shall be required to submit to examination by the LHO if so required by the LHO.

Likewise, it is not a higher level of service to require an LHO to examine patients referred by health care providers. Pre-1975 law (H&S §3285(a)(c)) required the

LHOs to examine persons suspected of infection with TB, and permitted examination by health care providers.

Health & Safety Code §121364 permits the LHO to order examinations (rather than perform them) and requires that order to be in writing. This may be a reduction in cost, since the LHO would not have to write a treatment plan, etc.

As stated above, pre-1975 law required the LHO to examine persons suspected of infection with TB. Even if some examinations are performed at publicly supported clinics, there may be an offsetting savings for those persons eligible for non-county public benefits such as Medi-Cal and Medicare.

III. DUE PROCESS RIGHTS UNDER NON-CRIMINAL PROCEEDINGS ARE NOT COSTS MANDATED BY THE STATE (Gov. Code §17556(b)(c))

Health & Safety Codes §§121365-121369 set forth the requirements for civil detention. Prior law permitted only criminal sanctions (prosecution for a misdemeanor) for violation of a LHO order in violation of quarantine, etc. (Health & Saf. §2602 (1939 law) and Health & Saf. Code § 3285(e), (pre-1975 law.) Due process rights under state and U.S. constitutions, would be enforced by an application for habeas corpus. In such an application, the court held that a tuberculosis patient is entitled to due process of law. (Application of Eric Halko, (App.2 Dist. 1966) 54 Cal.Rptr.661, 246 Cal.App.2d 553, 1966.)

Due process requirements of criminal law, as it has developed, including the notice, time limits, right to counsel, right to an interpreter, etc., are set forth in the new civil detention statutes. However, these rights would also apply today in the criminal courts. The due process rights set forth in these non-criminal proceedings are similar to those now required in criminal proceedings. Other than a clarification of court-established due process rights, the only significant difference between 1993 and

pre-1975 statutes is that mandatory detention may be provided in a civil (non-criminal) setting.

There should be no increased costs to provide due process rights in the civil proceeding, instead of the criminal setting. Even should it be found that it is more costly than criminal prosecution, the number of tuberculosis patients requiring such actions should be minimal.

Additionally, most of §121365 is included in pre-1975 law. (See Health & Saf. Code §§3285(b)(c)(d)(f).)

Costs may potentially be reduced under the new non-criminal procedure.

IV. HEARINGS COSTS THAT ARE INCURRED AS A RESULT OF DISCRETIONARY ACTIONS ARE NOT A "NEW PROGRAM OR HIGHER LEVEL SERVICE" (Gov. Code §17556(b)(c))

Costs resulting from the discretionary action of the LHO in civil detention of a tuberculosis patient would not constitute a "new program or higher level of service." (See (San Diego Unified School District v. Commission on State Mandates, 16 Cal.Rptr.3d. 466, 2004 WL 1715008 (Cal.) See also Department of Finance v. Commission on State Mandates, May 22, 2003, 30 Cal.4th 727.)

Civil detention of tuberculosis patients is a series of discretionary actions by the LHO. (Health & Saf. Code §§121365-121369.) The LHO still has available to him/her the criminal enforcement provisions. (Health & Saf. §§2600, 2602(1939 law); §3285(d)(e)(f)(pre-l975 law), §121365 current law).)

Health & Safety Code §121365 requires the LHO to investigate reported or suspected TB. The LHO **shall** follow applicable local and state law in doing so (See §2555, §3285(b) (1957). The LHO **may** issue any orders he/she deems necessary and **may** apply to the court for enforcement of the order. (See also §3285(d)(e), §3350, 3351, 3354, 3355) (1957).)

The LHO **shall** advise the district attorney of violations in writing and submit all the information to the district attorney. This mandatory language is contained in 1957 law (§3285(e)). The order **may** include various listed measures. The order **may** include various listed measures. Other requirements of §121365 are triggered by the LHO's discretionary action: "...the LHO **may** issue any orders he deems necessary... **may** apply to court for enforcement of the order(s)...If the order is violated, the LHO **shall** advise the district attorney."

Health & Safety Code §121366 states that the LHO **may** detain a person in a hospital or other appropriate place. Due process rights are listed here.

Health & Safety Code §121367 describes the (minimum) required contents of an order pursuant to §121365, and includes time limits for review, notice of right to counsel, etc., should the LHO choose to exercise his discretion under §121366.

Health & Safety Code §121368 states that **if** a person is detained pursuant to §121365(a) (for examination) the person cannot be detained, without a court order, beyond the minimum time required for examination, unless he/she meets the requirements of §121365(d)(e), without obtaining a court order.

Health & Safety Code §121369 requires language interpreters and persons skilled in communicating with vision/hearing impaired individuals, in accordance with applicable law. This requirement is triggered only by the discretionary action of the local health officer pursuant to §§121365.

V. OFFSETTING SAVINGS RESULT IN NO NEW COSTS (Gov. Code §17556(e))

1. Costs of the mandated services are wholly or partially offset by reduction in costs of other services. These include:

a. Outpatient treatment of TB patients without the cost of confinement will reduce costs per patient. Confinement was the only option under 1939, 1957 (pre-1975) law.

b. Reduction in TB examinations performed by LHO (with requirement under good medical practice of creating treatment plans, etc.).

c. Advent of Medi-Cal, Medicare, subsequent to 1957 law, will reduce cost burden of examination, outpatient treatment for indigents.

2. Delineation of due process rights in statute decreases potential liability to the local jurisdiction.

The case of Souvannarath v. Hadden (95 Cal. App.4th, 1115(2002) cost Fresno County several million dollars or more. That case was decided on more narrow grounds, but the court commented unfavorably on the complete lack of due process.

3. Documents, model forms, resource materials, etc., provided by the State, mostly through contractors, reduce requirements to generate documents from scratch, ensure accurate information, thus reducing costs. (Exhibit 9 contains a sample of materials developed by the Public Health Institute (PHI) under a contract with the state. See www.phlaw.org.) These include a Model Civil Detention Order, and related forms. Additionally, in 2000 DHS has sent hard copy or email model forms and other documents (the CDHS/CTCA Joint Guidelines, Civil Detention Plan, Informational Binder). Binder included the current statues, requirements and forms to claim reimbursement from the state (these documents not attached). Sample Patient Assessments and sample orders are supplied for use by local health officers in writing their own patient assessments and orders. Model Legal Orders for TB (2004) includes (1) model legal order form for civil detention of persistently non-adherent tuberculosis (TB) patients and

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(2) recommendations concerning constitutional protections that could be afforded TB patients who receive legal orders for work exclusion and home isolation. (Not all documents are attached.)

Respectfully submitted,

DEPARTMENT OF HEALTH SERVICES

Dated: August 24, 2004

Jeanette L Smith

JEANETTE L. SMITH
Staff Counsel

LIST OF EXHIBITS

Exhibit 1:	Chapters 60, 102, 103, 104 & 106, Statutes of 1939
Exhibit 2:	Chapter 205, Statutes of 1957
Exhibit 3:	Tuberculosis statutes from West's Annotated California Codes, §§1600–4599, Vol. 39, 1990 edition, which includes the following: Ch. 205, Statutes of 1957; Chapter 1736, Statutes of 1957; Chapter 489, Statutes of 1959; Chapter 30, Statutes of 1961; Chapter 185, Statutes of 1963; Chapter 1344, Statutes of 1965; Chapter 1552, Statutes of 1965; Chapter 1593, Statutes of 1971; Chapter 1212, Statutes of 1973; Chapter 671, Statutes of 1975, Chapter 1252, Statutes of 1977; Chapter 1092, Statutes of 1983.
Exhibit 4:	Chapter 676, Statutes of 1993 with Senate Floor Analysis 9/7/93
Exhibit 5:	Chapter 685, Statutes of 1994 with Senate Floor Analysis 8/19/94
Exhibit 6:	Chapter 116, Statutes of 1997 with Senate Floor Analysis 7/1/97
Exhibit 7:	Chapter 294, Statutes of 1997 with Senate Floor Analysis 8/12/97
Exhibit 8:	Chapter 763, Statutes of 2002 with Senate Rules Committee Report 8/16/02
Exhibit 9:	Resource materials (supplied to local jurisdictions by the State)

Commission on State Mandates Claim No. 03-TC-14, Tuberculosis Control

DECLARATION OF SERVICE BY OVERNIGHT DELIVERY

I, MARY E. McCREARY, declare as follows:

I am over the age of 18 years. My place of employment is California Department of Health Services, Office of Legal Services, 1501 Capitol Avenue, Ste. 71.5001, Sacramento, California 95814.

On August 24, 2004, I personally provided to Golden State Overnight for delivery within 24 hours, one copy of the Department of Health Services' Hearing Brief for service on the listed individuals at the addresses indicated:

Mr. Dave Elledge
County of Santa Clara
1553 Berger Drive
San Jose, CA 95112

Mr. Keith B. Petersen
SixTen & Associates
5252 Balboa Avenue, Ste. 807
San Diego, CA 92117

Mr. David Wellhouse
David Wellhouse & Associates, Inc.
9175 Kiefer Blvd., Ste. 121
Sacramento, CA 95826

Mr. Paul Minney
Spector, Middleton, Young & Minney, LLP
7 Park Center Drive
Sacramento, CA 95825

Ms. Harmeet Barkschat
Mandate Resource Services
5325 Elkhorn Blvd., #307
Sacramento, CA 95842

Mr. Steve Smith
Steve Smith Enterprises, Inc.
4633 Whitney Avenue, Ste. A
Sacramento, CA 95821

Mr. Leonard Kaye, Esq.
County of Los Angeles
Auditor-Controller's Office
500 W. Temple Street, Room 603
Los Angeles, CA 90012

Mr. Allan Burdick
MAXIMUS
4320 Auburn Blvd., Ste. 2000
Sacramento, CA 95841

Mr. Keith Gmeinder
Department of Finance (A-15)
915 L Street, 8th Floor
Sacramento, CA 95814

Ms. Annette Chinn
Cost Recovery Systems
705-2 East Bidwell Street, #294
Folsom, CA 95630

Mr. Joe Rombold
MCS Education Services
11130 Sun Center Drive, Ste. 100
Rancho Cordova, CA 95670

Mr. Jim Jaggers
Centration, Inc.
12150 Tributary Point Drive, Ste. 140
Gold River, CA 95670

Commission on State Mandates
Claim No. 03-TC-14, Tuberculosis Control
DECLARATION OF SERVICE BY
OVERNIGHT DELIVERY – page 2

Ms. Ginny Brummels
State Controller's Office (B-08)
Div. of Accounting & Reporting
3301 C St., Ste. 500
Sacramento, CA 95816

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of August, 2004, at Sacramento, California.

Mary E. McCreary

MARY E. McCREARY

Commission on State Mandates Claim No. 03-TC-14, Tuberculosis Control

DECLARATION OF PERSONAL SERVICE

I, JEANETTE L. SMITH, declare as follows:

I am over the age of 18 years. My place of employment is California Department of Health Services, Office of Legal Services, 1501 Capitol Avenue, Ste. 71.5001 Sacramento, California 95814.

On August 25, 2004, I personally delivered the following documents to the Commission on State Mandates:

> Original and two copies of the Department of Health Services' Hearing Brief, Claim No. 03-TC-14.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of August, 2004, at Sacramento, California.

Jeanette L Smith

JEANETTE L. SMITH

Ex. 1

CHAPTER 6. QUARANTINE OF DISEASES.

Article 1. Definitions.

"Health officer."

2500. "Health officer," as used in this chapter, includes county, town, city, and district health officers, and city and district health boards, but does not include advisory health boards.

Article 2. Functions of State Department.

Places of quarantine.

2521. The State department may establish and maintain places of quarantine or isolation.

2522. The State department may quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, other property, places, cities, or localities, whenever in its judgment such action is necessary to protect or preserve the public health. Persons and objects.

2523. The State department may destroy bedding, carpets, household goods, furnishings, materials, clothing, or animals, which, in its judgment, are an imminent menace to the public health. Destruction of objects.

2524. Upon being informed by a health officer of any contagious, infectious, or communicable disease the State department may take such measures as are necessary to ascertain the nature of the disease and prevent its spread. To that end, the State department may, if it considers it proper, take possession or control of the body of any living person, or the corpse of any deceased person. Additional measures.

Article 3. Functions of Health Officers.

2554. Each health officer and coroner, knowing or having reason to believe that any case of cholera, plague, yellow fever, malaria, leprosy, diphtheria, scarlet fever, smallpox, typhus fever, typhoid fever, paratyphoid fever, anthrax, glanders, epidemic cerebro-spinal meningitis, tuberculosis, pneumonia, dysentery, erysipelas, uncinariasis or hookworm, trachoma, dengue, tetanus, measles, German measles, chickenpox, whooping cough, mumps, pellagra, beriberi, Rocky Mountain spotted (or tick) fever, syphilis, gonococcus infection, rabies, poliomyelitis, or any other contagious or infectious disease exists, or has recently existed, within the territory under his jurisdiction, shall take such measures as may be necessary to prevent the spread of the disease. Duty to prevent spread of certain diseases.

2555. Every health officer shall enforce all orders, rules, and regulations concerning quarantine prescribed or directed by the State department. Enforcement of laws and rules.

2556. Each health officer, whenever required by the State department, shall establish and maintain places of quarantine or isolation that shall be subject to the special directions of the State department. Places of quarantine.

2557. No quarantine shall be established by a county or city against another county or city without the written consent of the State department. Quarantine against another city or county.

2558. Whenever in the judgment of the State department it is necessary for the protection or preservation of the public health, each health officer shall, when directed by the State department, do the following: Instructions of State department.

(a) Quarantine and disinfect persons, animals, houses or rooms, in accordance with general and specific instructions of the State department.

(b) Destroy bedding, carpets, household goods, furnishings, materials, clothing, or animals, when ordinary means of disinfection are considered unsafe, and when the property is, in the judgment of the State department, an imminent menace to the public health.

Compensation for destroyed property.

When property is destroyed pursuant to this section, the governing body of the locality in which the destruction occurs may make adequate provision for compensation in proper cases for those injured thereby.

Quarantine.

2559. Upon receiving information of the existence of: Asiatic cholera, yellow fever, typhus fever, plague, smallpox, scarlet fever, diphtheria, or any other contagious, infectious, or communicable disease that the State department may from time to time declare quarantinable, each health officer shall:

(a) Quarantine each case.

(b) Follow local rules and regulations, and all general and special rules, regulations, and orders of the State department, in carrying out the quarantine.

Report of quarantine.

2560. Each health officer who establishes any quarantine shall promptly transmit to the State department a copy of all quarantine rules, orders, and regulations, and of all subsequent changes in them, adopted by him.

Notice of quarantine.

2561. When all or any part of a building, house, structure, tent, or other place is quarantined because of a contagious, infectious, or communicable disease, the health officer shall fasten firmly on its most conspicuous part a yellow placard, upon which shall be printed the following words:

"Keep out. These premises have been quarantined by order of the ------. Note—Under the provisions of the Health and Safety Code of the State of California anyone entering or leaving these premises without the permission of the health officer is guilty of a misdemeanor."

The word "quarantined" shall be printed in plain and legible letters at least two and one-half inches in height.

The placard shall not be removed except by the health officer, nor shall it be defaced or obscured.

Quarantine rules.

2562. When quarantine is established by a health officer, all persons shall obey his rules, orders, and regulations.

Obedience to quarantine.

2563. A person subject to quarantine, residing or in a quarantined building, house, structure, or tent, shall not go beyond the lot upon which the building, house, structure, or tent is situated, nor put himself in immediate communication with any person not subject to quarantine, other than the health officer and the physician. The health officer main-

taining the quarantine shall appoint, or have appointed, a suitable person to perform necessary outside services for the necessary wants of the persons quarantined. The person appointed shall not enter the building, house, structure, or tent, nor shall he come in personal contact with any of the persons quarantined. He shall leave at the entrance of the building, house, structure, or tent, or at such other place as may be designated by the health officer, all articles that he may bring thereto. He shall strictly observe the orders of the health officer.

Exclusion of diseased person from school.

2564. No instructor, teacher, pupil, or child affected with any contagious, infectious, or communicable disease that is quarantined, or that is subject to being quarantined or reported, or who resides in any house, building, structure, tent, or other place where the disease exists or has recently existed, shall be permitted by any superintendent, principal, or teacher of any college, seminary, or public or private school to attend the college, seminary, or school, except by the written permission of the health officer.

Disinfection.

2565. No quarantine shall be raised until every exposed room, together with all personal property in the room, has been thoroughly disinfected, or, if necessary, destroyed, by or under the direction of the health officer; and until all persons quarantined have taken a thorough antiseptic bath and have put on clothing free from contagion.

Removal of milk bottles from quarantined area.

2566. No milk man shall remove milk bottles or other receptacles for milk from any building, house, structure, tent, or other place in which a contagious, infectious, or communicable disease exists or has existed, nor from any place within any quarantined district, nor at any time after a quarantine has been removed, without the written permission of the health officer; and until the milk bottles or other receptacles have been disinfected and cleaned to the satisfaction of that officer.

Person from quarantined place not to deal in milk.

2567. It is unlawful for any milkman, milk dealer, or milk distributor in whose house any case of cholera, typhus fever, plague, scarlet fever, diphtheria, membranous croup, leprosy, anthrax, glanders, cerebro-spinal meningitis, whooping cough, typhoid fever, dysentery, trachoma, or tetanus exists, to continue the sale or distribution of milk until the health officer has appointed, at the expense of the county where the milkman, dealer, or distributor lives, a person to superintend his dairy, or other place where or from which he sells, delivers, or distributes milk, and all his cows, bottles, vessels, and milk utensils. The person appointed shall strictly require that any person attending to the cows, dairy, sheds, milk cans, bottles, vessels, and milk utensils, shall not have access to, nor have any communication with the persons who reside in, the

infected house, except with the permission and under the inspection of the health officer.

Reports.

2568. In case of a local epidemic of disease, the health officer shall report at such times as are requested by the State department all facts concerning the disease, and the measures taken to abate and prevent its spread.

Telegraphic reports.

2569. Each health officer shall immediately report by telegraph to the State department every discovered or known case of plague, Asiatic cholera, yellow fever, or typhus fever. Within twenty-four hours after investigation he shall report the cause, source, and extent of contagion and infection, and all acts done and measures adopted. He shall also make such further reports as the State department may require.

Report of new cases.

2570. Each health officer placing any case under quarantine shall, within twenty-four hours thereafter, report it fully, in writing, to the State department.

Reportable diseases.

2571. The following shall be properly reported in writing to the State department by the health officer:

Chicken-pox, erysipelas, pneumonia, epilepsy, uncinariasis, or hookworm, epidemic cerebro-spinal meningitis, trachoma, whooping-cough, mumps, dengue, dysentery, tuberculosis, typhoid fever, tetanus, malaria, leprosy, measles, German measles, glanders and anthrax affecting human beings, rabies, pellagra, beri-beri, syphilis, gonococcus infection, poliomyelitis, and any other disease which appears to have become epidemic.

This list of reportable diseases may be changed at any time by the State department.

When to be quarantined.

The diseases enumerated in this section, and such others as from time to time may be added by the State department, shall be quarantined whenever in the opinion of the State department that action is necessary for the protection of the public health, and shall be isolated whenever in the opinion of the department or health officer, isolation is necessary for the protection of the public health.

(Amended by Stats. 1939, Ch. 375.)

[ORIGINAL SECTION.]

2571. The following shall be properly reported in writing to the State department by the health officer:

Chicken-pox, erysipelas, pneumonia, uncinariasis or hookworm, epidemic cerebro-spinal meningitis, trachoma, whooping-cough, mumps, dengue, dysentery, tuberculosis, typhoid fever, tetanus, malaria, leprosy, measles, German measles, glanders and anthrax affecting human beings, rabies, pellagra, beri-beri, syphilis, gonococcus infection, poliomyelitis, and any other disease which appears to have become epidemic.

This list of reportable diseases may be changed at any time by the State department.

The diseases enumerated in this section, and such others as from time to time may be added by the State department, shall be quarantined whenever in the opinion of the State department that action is necessary for the protection of the public health, and shall be isolated whenever in the opinion of the department or health officer, isolation is necessary for the protection of the public health.

Written report.

2572. Each health officer, other than a county health officer, in the county shall transmit to the county health officer at least weekly in writing a report showing the number and character of infectious, contagious, or communicable diseases reported, and their location.

Report to health officer.

2573. All physicians, nurses, clergymen, attendants, owners, proprietors, managers, employees, and persons living, or visiting any sick person, in any hotel, lodging house, house, building, office, structure, or other place where any person is ill of any infectious, contagious, or communicable disease, shall promptly report that fact to the health officer, together with the name of the person, if known, the place where he is confined, and the nature of the disease, if known.

Application of sections to quarantine.

2574. Unless otherwise directed by the State department, sections 2559, 2561 to 2563, inclusive, 2565 to 2567 inclusive, and 2569 to 2571, inclusive, of this chapter shall be strictly observed in all cases of quarantine.

Article 4. Violations.

Penalty for violation of rule.

2600. Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the State department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor.

Wilful exposure.

2601. Except in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who wilfully exposes himself; and any person who wilfully exposes another person afflicted with such disease in any public place or thoroughfare is guilty of a misdemeanor.

Penalty.

2602. Any person who violates any section in article 3 of this chapter, with the exception of 2555, is guilty of a misdemeanor, punishable by a fine of not less than twenty-five nor more than five hundred dollars, or by imprisonment for a term of not more than ninety days, or by both. He is guilty of a separate offense for each day that the violation continues.

Chapter 8. Pest Abatement Districts.

Article 1. Definitions and General Provisions.

"Pest."

2800. "Pest," as used in this chapter includes any plant, animal, insect, fish, or other matter or material, not under human control, which is offensive to the senses or interferes with the comfortable enjoyment of life, and is not protected under any other provision of law, and includes any plant that

Withdrawal of funds.

2873. The funds of the district shall be withdrawn from the treasury upon the warrant of the district board.

Transfer of funds.

2874. The board of supervisors, from time to time, may order a temporary transfer of money from other available funds in the county treasury to the credit of the district fund. The transfer shall be made only upon resolution adopted by the board of supervisors directing the treasurer to make the transfer. It shall not exceed eighty-five per cent of the taxes accruing to the district, and shall not be made prior to the first day of the fiscal year nor after the last Monday in April of the current fiscal year. Any funds transferred shall be replaced from the taxes accruing to the district before any other obligation of the district is met from those taxes.

Article 5. Annexation.

Annexation.

2900. At any time after the incorporation of a district, land contiguous to it may be annexed upon a petition of the owner, if the board of supervisors finds that the annexation will benefit both the land to be annexed and the district.

Article 6. Dissolution.

Petition.

2920. Upon the application of registered voters in the district equal to the number required for a petition to initiate proceedings for the formation of the district, the board of supervisors may, after notice of hearing published in the manner prescribed in this chapter for the notice of a hearing on the organization petition, dissolve the district, if it appears to the board that the dissolution is proper. The dissolution of a district shall not have any effect on any taxes previously levied.

Ex-officio board.

2921. Upon the dissolution the board of supervisors shall succeed to all the powers and jurisdiction of the district board for the purpose of winding up the affairs of the district. It may continue to levy such taxes as are necessary in winding up the affairs of the district.

Obligations.

2922. No district shall be finally dissolved until all outstanding obligations of the district, including the repayment of funds transferred to the credit of the district from other funds of the county, have been fully paid and discharged.

DIVISION IV. TUBERCULOSIS.

CHAPTER 1. PREVENTORIA.

Expenditures declared proper.

3099. Pulmonary tuberculosis is an infectious and communicable disease, dangerous to the public health, and all proper expenditures that may be made by any county, pur-

suant to this chapter, are necessary for the preservation of the public health of the county, within the meaning of sections 450 to 456.

Subsidy.

3100. Each city, county, or group of counties which maintains a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis and maintains a preventorium in conjunction therewith, shall receive from the State the sum of three dollars per week for each patient cared for in the preventorium at public expense who:

(a) Is susceptible to tuberculosis.

(b) Is unable to pay for his support.

(c) Has no relative legally liable and financially able to pay for his support.

(d) Has been for one year a bona fide resident of the city, county, or of one of the counties of the group of counties.

(e) Is a citizen of the United States.

No city, county, or group of counties shall be entitled to receive the State aid unless the tuberculosis preventorium conforms to the regulations of, and is approved by, the State department.

(Amended by Stats. 1939, Ch. 1070.)

[ORIGINAL SECTION.]

3100. Each city, county, or group of counties which maintains a tuberculosis ward or hospital for the treatment of persons in the active stages of tuberculosis and maintains a preventorium in conjunction therewith, shall receive from the State the sum of three dollars per week for each patient cared for in the preventorium at public expense who:

(a) Is susceptible to tuberculosis.

(b) Is unable to pay for his support.

(c) Has no relative legally liable and financially able to pay for his support.

(d) Has been for one year a bona fide resident of the city, county, or of one of the counties of the group of counties.

(e) Is a citizen of the United States.

No city, county, or group of counties shall be entitled to receive the State aid unless the tuberculosis preventorium conforms to the regulations of, and is approved by, the State department.

Reports.

3101. The medical superintendent of each preventorium receiving State aid under this chapter shall render semi-annually to the State department a report under oath showing for the period covered by the report:

(a) The number of persons susceptible to tuberculosis cared for at public expense and unable to pay for care.

(b) The number of weeks each such patient has been treated.

CHAPTER 2. HOSPITALS.

Subsidy.

3300. Each city, county, or group of counties may establish and maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis. Each city, county, or group of counties that establishes and maintains a tuberculosis ward or hospital shall receive from the State the sum of three dollars per week for each person suffering from tuberculosis, cared for therein at public expense, who

is unable to pay for his support and who has no relative legally liable and financially able to pay for his support and who has been a bona fide resident of the State for one year; except that the city, county, or group of counties is not entitled to receive this State aid unless the tuberculosis ward or hospital conforms to the regulations of and is approved by the Bureau of Tuberculosis.

The hospitals shall be allowed to receive pay patients. Pay patients.

(Amended by Stats. 1939, Ch. 1070.)

[ORIGINAL SECTION.]

3300. Each city, county, or group of counties may establish and maintain a tuberculosis ward or hospital for the treatment of persons in the active stages of tuberculosis. Each city, county, or group of counties that establishes and maintains a tuberculosis ward or hospital shall receive from the State the sum of three dollars per week for each person suffering from tuberculosis, cared for therein at public expense, who is unable to pay for his support and who has no relative legally liable and financially able to pay for his support and who has been a bona fide resident of the State for one year; except that the city, county, or group of counties is not entitled to receive this State aid unless the tuberculosis ward or hospital conforms to the regulations of and is approved by the bureau of tuberculosis.

The hospitals shall be allowed to receive pay patients.

3301. The medical superintendent of each hospital receiving State aid under this chapter shall render semiannually to the bureau of tuberculosis a report under oath showing, for the period covered by the report: Reports.

(a) The number of patients suffering from tuberculosis cared for at public expense, and unable to pay for care.

(b) The number of weeks of treatment of each such patient.

With the consent of the respective cities, counties, or groups of counties, an exchange of patients may be arranged through the bureau of tuberculosis without expense to the county except for transportation when the exchange seems necessary or desirable to assist in the patients' recovery. Exchange of patients.

3302. Each group of counties desiring to establish and maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis shall appoint, by its board of supervisors, one supervisor as a delegate, who shall attend the general meetings of the delegates of each county in the group. The necessary expense incurred in attending such meetings is a county charge. The body thus formed shall be called the hospital central committee. Hospital central committee.

3303. Each group of counties maintaining a tubercular hospital under this chapter may by unanimous agreement provide for a different number of delegates to the hospital central committee than the number provided for in this chapter and may provide for a method of deciding a tie vote of the hospital central committee. Number of delegates.

3304. The hospital central committee shall designate a county within the group maintaining the hospital as the place Depository.

where the business of the hospital is to be transacted and where funds of the hospital are to be kept and deposited. All county officers selected for the business of the hospital shall render all necessary assistance required by the committee in keeping with the duties of their respective offices.

Cost.

3305. The delegates from each county may enter into an agreement with delegates from the other counties, on behalf of the county appointing them, binding the county to the joint enterprise and apportioning the cost of constructing, establishing, and maintaining the hospital. Money due from any county under the agreement may be collected by the hospital central committee or, on its behalf, by the board of supervisors of any county in the group, by action in the county in which the hospital is situated.

Building committee.

3306. The hospital central committee may appoint a committee to supervise the construction of the hospital, approve the bills, and do the usual things required of a building committee.

Powers of hospital central committee.

The hospital central committee is the governing body of the hospital. It has the same powers and duties in regard to the hospital that a board of supervisors has over a county hospital. It shall adopt rules for its government, which shall include provisions for holding meetings and for the addition of other counties to the group. It may appoint such committees as are necessary, and shall prescribe their duties.

Land.

3307. Any land required may be acquired or disposed of by the hospital central committee in such manner as may be determined by a three-fourths vote of its members, if all counties comprising a group shall have had notice of the intention to acquire or dispose of the land. Title to land may be held in the name of the entire group or in the name of any county composing the group, as trustee for the use and benefit of all, as may be determined by the hospital central committee.

Expenses.

3308. Each county in the group shall pay its proportionate share to the hospital central committee of an amount designated by the committee to constitute a cash revolving fund to carry on the usual work and expense of the hospital. Each month a statement of the expenses of the hospital shall be sent to the board of supervisors of each county, together with a claim for its proportionate share of the expenses. The amounts when collected shall be paid into the cash revolving fund.

Admission of patients.

3309. The hospital central committee may determine and pass upon the right of admission to the hospital of applicants, subject to the limitations of this chapter.

CHAPTER 3. CONVALESCENT COLONIES.

(Ch. 3 added by Stats. 1939, Ch. 919.)

Subsidy. 3325. Each city, city and county, county or group of counties which maintains a convalescent colony for the care and treatment of persons suffering from tuberculosis shall receive from the State the sum of $3 per week for each person suffering from tuberculosis, cared for in the convalescent colony at public expense, who is unable to pay for his own support and who has no relative legally liable and financially able to pay for his support, and who has been a bona fide resident of the State for one year.

No city, city and county, county or group of counties shall be entitled to receive the State aid unless the convalescent colony conforms to the regulations of, and is approved by the Bureau of Tuberculosis in the Department of Public Health.

(Added by Stats. 1939, Ch. 919.)

Reports. 3326. The superintendent of each convalescent colony receiving State aid under this chapter, shall render semi-annually to the Bureau of Tuberculosis in the Department of Public Health a report under oath showing for the period covered by the report:

a. The number of persons suffering from tuberculosis cared for therein at public expense and unable to pay for their care.

b. The number of weeks each such person has been cared for.

(Added by Stats. 1939, Ch. 919.)

CHAPTER 4. PAYMENT AND EXPENDITURES OF SUBSIDY FUNDS.

(Ch. 4 added by Stats. 1939, Ch. 919.)

Fund. 3340. In order to be eligible to receive State funds made available by this division on or after July 1, 1940, the governing body of each city, county, city and county, or group of counties entitled thereto shall establish a "special tuberculosis subsidy fund."

(Added by Stats. 1939, Ch. 919.)

Use of fund. 3341. All amounts paid to any city, county, city and county or group of counties in accordance with the provisions of this division shall be deposited in the "special tuberculosis subsidy fund." Such moneys shall be expended by the city, county, city and county or group of counties receiving it exclusively for the care and treatment of persons suffering from tuberculosis, and in the maintenance, construction or acquisition of facilities or supplies necessary for the care and treatment of such persons.

(Added by Stats. 1939, Ch. 919.)

Cause for denial of subsidy.

3342. The failure to comply with any of the provisions of this chapter shall constitute sufficient reason to deny further payments of State funds accruing to any city, county, city and county or group of counties under this division.

(Added by Stats. 1939. Ch. 919.)

DIVISION V. SANITATION.

PART 1. SANITARY PROVISIONS.

CHAPTER 1. COMMON DRINKING CUPS.

Common drinking cups.

3700. No person conducting, having charge of, or control of, any hotel, restaurant, saloon, soda fountain, store, theater, public hall, public or private school, church, hospital, club, office building, park, playground, lavatory or washroom, barber shop, railroad train, boat, or any other public place, building, room, or conveyance, shall provide or expose for common use, or permit to be so provided or exposed, or allow to be used in common, any cup, glass, or other receptacle used for drinking purposes.

"Common use."

3701. For the purposes of this chapter the term "common use" when applied to a drinking receptacle is defined as its use for drinking purposes by, or for, more than one person without its being thoroughly cleansed and sterilized in boiling water or steam between consecutive uses thereof; except, that the State Department of Public Health may prescribe other acceptable methods of sterilization that may be used in place of the methods specified in this chapter.

Sterilization.

Water containers.

3702. No cask, water cooler, or other receptacle shall be used for storing or supplying drinking water to the public or to employees unless it is covered and protected so as to prevent persons from dipping the water therefrom or contaminating the water. All containers shall be provided with a faucet or other suitable device for drawing the water; except that jugs, cans, buckets, and similar receptacles without faucets or other devices for withdrawing water may be used if the water is protected against contamination and is withdrawn by pouring only.

Enforcement.

3703. The State department and all health officers of counties, cities, and health districts shall enforce the provisions of this chapter.

Penalties.

3704. Violation of any provision of this chapter is a misdemeanor punishable by a fine not exceeding twenty-five dollars for each offense.

Ex. 2

CHAPTER 205

An act to repeal Sections 112, 114, 252.6, 252.7, 301, 375, 376, 377, 401, 451.5, 453, 455, 478, 486, 505, 506, 507, 508, 509, 28477, and 28714, and Article 7 (Sections 410-414, inclusive) of Chapter 2 of Part 1 of Division 1; Article 3 (Sections 491-493, inclusive) of Chapter 1 of Part 2 of Division 1; Chapter 4 (Sections 800-811, inclusive) of Part 2 of Division 1, Chapters 1 (Sections 1700-1703, inclusive) and 6 (Sections 2500-2603, inclusive) of Division 3, Division 4 (Sections 3099-3342, inclusive), Division 16 (Sections 21000-21409, inclusive), and Chapter 3 (Sections 24380-24385, inclusive) of Division 20, of the Health and Safety Code; to amend and renumber Sections 116, 204, 212, 302, 303, and 304 of said code; to amend Sections 211, 300, 374, 400, 450, 500, 502, 1602, 1603, 1605, 1622, 3701, 3702, 3801, 3901, 3954, 4001, 4002, 25003, 26235, 26366.5, 26472, 26541, 26542, 26586.5, 28224, and 28295, and the title of Article 3, Chapter 2, Part 1, Division 1, and the title of Article 5, Chapter 2, Part 1, Division 1, and the title of Division 3, of said code; to add Article 7 (Section 410) to Chapter 2, Part 1, Division 1, Chapter 6 (Sections 1685 and 1686) to Division 2, Division 4 (Sections 3000-3355, inclusive), to said code; relating to the preservation of the public health and safety, including the health and safety of persons, the custody and disposition of dead bodies, the safety and protection of property, and matters incidental thereto.

(Prepared pursuant to Senate Resolution 101, General Session of 1955, to revise and consolidate the public health statutes.)

In effect September 11, 1957

[Approved by Governor April 23, 1957. Filed with Secretary of State April 24, 1957.]

The people of the State of California do enact as follows:

Repeals

SECTION 1. Sections 112, 114, 252.6, 252.7, 301, 375, 376, 377, 401, 451.5, 453, 455, 478, 486, 505, 506, 507, 508, 509, 28477, and 28714, and Article 7 (Sections 410-414, inclusive) of Chapter 2 of Part 1 of Division 1, Article 3 (Sections 491-493, inclusive) of Chapter 1 of Part 2 of Division 1, Chapter 4 (Sections 800-811, inclusive) of Part 2 of Division 1, Chapters 1 (Sections 1700-1703, inclusive) and 6 (Sections 2500-2603, inclusive) of Division 3, Division 4 (Sections 3099-3342, inclusive), Division 16 (Sections 21000-21409, inclusive), and Chapter 3 (Sections 24380-24385, inclusive) of Division 20, of the Health and Safety Code are repealed.

SEC. 2. Section 204 of the Health and Safety Code is renumbered and amended to read:

Biological products

375. It may prepare or purchase biological products and distribute them at cost.

SEC. 3. Section 211 of said code is amended to read:

Special investigations

211. It shall cause special investigations of the sources of morbidity and mortality and the effects of localities, employ-

DIVISION 3. PEST ABATEMENT

SEC. 20. Division 4, comprising Sections 3000 to 3355, inclusive, is added to said code, to read:

DIVISION 4. COMMUNICABLE DISEASE PREVENTION AND CONTROL

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

"Health officer"

3000. "Health officer," as used in this division, includes county, city, and district health officers, and city and district health boards, but does not include advisory health boards.

"Venereal diseases"

3001. As used in this division, "venereal diseases" means syphilis, gonorrhea, chancroid, lymphopathia venereum, and granuloma inguinale.

CHAPTER 2. FUNCTIONS OF STATE DEPARTMENT

Quarantine Places

3050. The state department may establish and maintain places of quarantine or isolation.

Same Persons, etc.

3051. The state department may quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, other property, places, cities, or localities, whenever in its judgment such action is necessary to protect or preserve the public health.

Destruction of contaminated objects, animals, etc

3052. The state department may destroy such objects as bedding, carpets, household goods, furnishings, materials, clothing, or animals, when ordinary means of disinfection are considered unsafe, and when the property is in its judgment, an imminent menace to the public health.

Investigation

3053. Upon being informed by a health officer of any contagious, infectious, or communicable disease the state department may take such measures as are necessary to ascertain the nature of the disease and prevent its spread. To that end, the state department may, if it considers it proper, take possession or control of the body of any living person, or the corpse of any deceased person.

CHAPTER 3. FUNCTIONS OF HEALTH OFFICERS

Prevention of epidemic or recurrence

3110. Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the Board of Public Health, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his jurisdiction, shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.

Orders, etc., of state department

3111. Each health officer shall enforce all orders, rules, and regulations concerning quarantine or isolation prescribed or directed by the state department.

Quarantine Places

3112. Each health officer, whenever required by the state department, shall establish and maintain places of quarantine or isolation that shall be subject to the special directions of the state department.

Limitation

3113. No quarantine shall be established by a county or city against another county or city without the written consent of the state department.

State department directives

3114. Whenever in the judgment of the state department it is necessary for the protection or preservation of the public health, each health officer shall, when directed by the state department, do the following:

(a) Quarantine or isolate and disinfect persons, animals, houses or rooms, in accordance with general and specific instructions of the state department.

(b) Destroy bedding, carpets, household goods, furnishings, materials, clothing, or animals, when ordinary means of disinfection are considered unsafe, and when the property is, in the judgment of the state department, an imminent menace to the public health.

When the property is destroyed pursuant to this section, the governing body of the locality in which the destruction occurs may make adequate provision for compensation in proper cases for those injured thereby.

Strict isolation, etc

3115. Upon receiving information of the existence of contagious, infectious, or communicable disease for which the state department may from time to time declare the need for strict isolation or quarantine, each health officer shall:

(a) Insure the adequate isolation of each case, and appropriate quarantine of the contacts and premises

(b) Follow local rules and regulations, and all general and special rules, regulations, and orders of the state department, in carrying out the quarantine or isolation.

3116. When quarantine or strict isolation is established by a health officer, all persons shall obey his rules, orders, and regulations.

Persons

3117. A person subject to quarantine or strict isolation, residing or in a quarantined building, house, structure, or other shelter, shall not go beyond the lot upon which the building, house, structure, or other shelter is situated, nor put himself in immediate communication with any person not subject to quarantine, other than the physician, the health officer or persons authorized by the health officer.

Schools

3118. No instructor, teacher, pupil, or child who resides where any contagious, infectious, or communicable disease exists or has recently existed, which is subject to strict isolation or quarantine of contacts, shall be permitted by any superintendent, principal, or teacher of any college, seminary, or public or private school to attend the college, seminary, or school, except by the written permission of the health officer.

Raising of quarantine

3119. No quarantine shall be raised until every exposed room, together with all personal property in the room, has been adequately treated, or, if necessary, destroyed, under the direction of the health officer; and until all persons having been under strict isolation are considered noninfectious.

Diseases transmitted by milk, dairies, etc.

3120. When there occurs in the household of any dairy worker, milkman, milk dealer, milk distributor, creamery worker, or pasteurizing plant operator, a case or a suspected case of diphtheria, salmonellosis, shigellosis (dysentery), typhoid fever, streptococcal infection, or any other disease known to be or suspected of being transmitted by milk, the sale or distribution of milk from those premises shall be prohibited unless written authorization for its sale or distribution is given by the health officer.

A case or suspected case of any disease known to be transmitted by milk which occurs in the household of any of the above-mentioned persons, shall be reported immediately to the health officer.

Reports Epidemic

3121. In the case of a local epidemic of disease, the health officer shall report at such times as are requested by the state department all facts concerning the disease, and the measures taken to abate and prevent its spread.

Diseases

3122. Each health officer shall immediately report by telegraph or telephone to the state department every discovered or known case or suspect case of those diseases designated for immediate reporting by the state department. Within 24 hours after investigation each health officer shall make such reports as the state department may require.

Quarantine, etc State department rules

3123. The state department may establish a list of reportable diseases and this list may be changed at any time by the

state department. Those diseases listed as reportable shall be properly reported as required to the state department by the health officer.

The state department may from time to time adopt and enforce rules and regulations requiring isolation (strict or modified) or quarantine for any of the contagious, infectious, or communicable diseases if in the opinion of the state department such action is necessary for the protection of the public health.

The health officer may require isolation (strict or modified) or quarantine for any case of contagious, infectious, or communicable disease when such action is necessary for the protection of the public health.

Reports Health officer

3124. Each health officer, other than a county health officer, in the county shall transmit to the county health officer at least weekly in writing a report showing the number and character of infectious, contagious, or communicable diseases reported, and their location.

Physician, etc

3125. All physicians, nurses, clergymen, attendants, owners, proprietors, managers, employees, and persons living, or visiting any sick person, in any hotel, lodginghouse, house, building, office, structure, or other place where any person is ill of any infectious, contagious, or communicable disease, shall promptly report that fact to the health officer, together with the name of the person, if known, the place where he is confined, and the nature of the disease, if known.

CHAPTER 4. VENEREAL DISEASE

Article 1. Prevention and Control

Program

3180. The state department shall develop and review plans and provide leadership and consultation for, and participate in, a program for the prevention and control of venereal disease.

Department cooperation with physicians, etc

3181. The state department shall cooperate in the prevention, control, and cure of venereal diseases with physicians and surgeons; medical schools: public and private hospitals, dispensaries, and clinics; public and private school, college and university authorities; penal and charitable institutions; reform and industrial schools; detention homes; federal, state, local and district health officers, and boards of health, and all other health authorities; institutions caring for the mentally ill; and with any other persons, institutions, or agencies.

Investigations, etc

3182. The state department shall investigate conditions affecting the prevention and control of venereal diseases and approved procedures for such prevention and control, and shall disseminate educational information relative thereto.

Education and publicity

3183. The state department shall conduct such educational and publicity work as it may deem necessary; and, from time to time, shall cause to be issued, free of charge, copies of such rules and regulations, pamphlets, and other literature as it deems reasonably necessary.

Clinics, etc. 3184. The state department may establish, maintain, and subsidize clinics, dispensaries, and prophylactic stations for the diagnosis, treatment, and prevention of venereal diseases, and may provide medical, advisory, financial, or other assistance to such clinics, dispensaries, and stations as may be approved by it. No clinic, dispensary, or prophylactic station shall be approved unless it meets the requirements of the board and complies with its rules and regulations.

Rural counties and cities 3185. The state department may furnish treatment for a case or for a group of cases in rural counties or cities upon the recommendation of the local health officer if adequate facilities for such treatment are not available in the county or city.

Acute cases 3186. Any state agency conducting a public hospital shall admit acute venereal disease cases, when, in the opinion of the state department or the local health officer having jurisdiction, persons infected with venereal disease may be a menace to public health.

Physician to submit specimen 3187. The state department may require any physician in attendance on a person infected or suspected of being infected with a venereal disease infection to submit such specimens as may be designated for examination, when in its opinion such procedure is reasonably necessary to carry out the provisions and purposes of this article.

Place of examinations 3188. The examination may be made in the state laboratory or in a local public health laboratory designated by the state department or in a clinical laboratory which is under the immediate supervision and direction of a clinical laboratory technologist or a licensed physician and surgeon

Additional examination 3189. Nothing in this article limits any person's freedom to have additional examinations made elsewhere than specified in this article.

Diseased persons information 3190. Every diseased person shall give all information required by this article, including the name and address of any person from whom the disease may have been contracted and to whom the disease may have been transmitted.

Periodic examination 3191. Every diseased person shall from time to time submit to approved examinations to determine the condition of the disease.

Control measures 3192. If any person subject to proper venereal disease control measures discontinues any control procedure required by this article, the agency administering the procedure prior to such discontinuance shall make reasonable efforts to determine whether such person is continuing to comply with the procedure elsewhere.

Report of cases failing to comply 3193. If it appears reasonably likely that such person is not complying with such procedure elsewhere, the agency which was administering the procedure prior to the discontinuance shall make all reasonable efforts to induce such person to comply; and if it thereafter appears reasonably likely that he has failed to comply, shall report his name and address to

the local health officer or board of health, or to the state department where there is no such local health officer or board.

Local health officers

3194. It is the duty of the local health officers to use every available means to ascertain the existence of cases of infectious venereal diseases within their respective jurisdictions, to investigate all cases that are not, or probably are not, subject to proper control measures approved by the board, to ascertain so far as possible all sources of infection, and to take all measures reasonably necessary to prevent the transmission of infection.

Inspection and quarantine

3195. Local health officers may inspect and quarantine any place or person when such procedure is necessary to enforce the rules and regulations of the board or the state department.

Prosecution by district attorney

3196 It is the duty of the district attorney of the county in which a violation of this article may occur to prosecute the person accused of the violation.

Competent testimony

3197. In any prosecution for a violation of any provision of this article, or any rule or regulation of the board made pursuant to this article, or in any quarantine proceeding authorized by this article, or in any habeas corpus or other proceeding in which the legality of such quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom such prosecution or other proceeding was instituted, and the provisions of subsections 1 and 4 of Section 1881 of the Code of Civil Procedure shall not be applicable to or in any such prosecution or proceeding.

Violations Misdemeanor

3198. Any person who refuses to give any information to make any report, to comply with any proper control measure or examination, or to perform any other duty or act required by this article, or who violates any provision of this article or any rule or regulation of the state board issued pursuant to this article, or who exposes any person to or infects any person with any venereal disease; or any person infected with a venereal disease in an infectious state who knows of such condition and who marries or has sexual intercourse, is guilty of a misdemeanor.

Exception

3199. Nothing in this article shall be construed to interfere with the freedom of any adherent of teachings of any well-recognized religious sect, denomination, or organization to depend exclusively upon prayer for healing in accordance with the teachings of such religious sect, denomination, or organization. Any such person, along with any person treating him, shall be exempt from all provisions of this article regarding venereal diseases, except that the provisions of this code and the rules and regulations of the board regarding compulsory reporting of communicable diseases and the quarantine of such diseases, and regarding callings in which a person with venereal disease may not engage, shall apply.

Article 2. Prenatal Syphilitic Tests

"Approved laboratory"

3220. "Approved laboratory" as used in this article means a laboratory approved by the state department, or any other laboratory the director of which is licensed by the state department according to law.

"Standard laboratory blood test"

3221. "Standard laboratory blood test" as used in this article means a test for syphilis approved by the state department.

Blood specimen

3222. Every licensed physician and surgeon or other person engaged in prenatal care of a pregnant woman, or attending such woman at the time of delivery, shall obtain or cause to be obtained a blood specimen of such woman at the time of the first professional visit or within 10 days thereafter.

Submission for test

3223. The blood specimen thus obtained shall be submitted to an approved laboratory for a standard laboratory test for syphilis.

Designation of specimen

3224. In submitting a specimen to a laboratory the physician shall designate it as a prenatal test or a test following recent delivery.

Report form

3225. The state department shall issue a "prenatal test laboratory report form" to be distributed upon application to all laboratories approved to do tests required by this article.

Same: Triplicate copies

3226. Any laboratory doing a test required by this article shall prepare the report in triplicate.

The original shall be transmitted by the laboratory doing the test to the physician submitting the specimen.

The duplicate shall be forwarded at weekly intervals to the state department.

The triplicate shall be retained by the laboratory in its file, and shall be open at any time for inspection by an authorized representative of the state department.

Reports confidential

3227 All laboratory reports are confidential, and are not open to public inspection.

Accuracy of test

3228. In case of question concerning the accuracy of a test required by this article, it is mandatory upon the state department to accept specimens for checking purposes from any district in the State.

Violation Misdemeanor

3229. Any licensed physician and surgeon, or other person engaged in attendance upon a pregnant woman or a recently delivered woman, or any representative of a laboratory who violates any provision of this article, is guilty of a misdemeanor. However, a licensed physician and surgeon, or other person engaged in attendance upon a pregnant or recently delivered woman, whose request for a specimen is refused, is not guilty of a misdemeanor for failure to obtain it.

CHAPTER 5. TUBERCULOSIS

Program

3279. The department shall maintain a program for the control of tuberculosis and shall administer the funds made available by the State for the care of tuberculosis patients.

3280. Pulmonary tuberculosis is an infectious and communicable disease, dangerous to the public health, and all proper expenditures that may be made by any county, pursuant to this chapter, are necessary for the preservation of the public health of the county. Pulmonary tuberculosis: Proper expenses

3285. Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction and to ascertain the sources of such infections. In carrying out such investigations, each health officer is hereby invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed: Health officer

(a) To make such examinations as are deemed necessary of persons reasonably suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of the public health.

(b) Follow local rules and regulations, and all general and special rules, regulations, and orders of the state department in carrying out such quarantine or isolation.

(c) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be isolated, the period of time during which the order shall remain effective, the place of isolation or quarantine, and such other terms and conditions as may be necessary to protect the public health.

(d) Upon the making of an isolation or quarantine order as provided in this section, a copy of such order shall be served upon the person named in such order.

(e) Upon the receipt of information that any quarantine or isolation order, made and served as herein provided, has been violated, the health officer shall advise the district attorney of the county in which such violation has occurred, in writing, and shall submit to such district attorney the information in his possession relating to the subject matter of such isolation or quarantine order, and of such violation or violations thereof.

3286. No examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination or organization and claims exemption on such ground, except that the provisions of this code regarding compulsory reporting of communicable diseases and isolation and quarantine shall apply where there is probable cause to suspect that such person is infected with the disease in a communicable stage. Such person shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he can be safely Exception

quarantined and/or isolated in his own home or other suitable place of his choice.

Records

3287. The department may inspect and have access to all records of all institutions and clinics, both public and private, where tuberculosis patients are treated.

Advice

3288. The department may advise officers of state educational, correctional, and medical institutions regarding the control of tuberculosis and the care of tuberculosis patients.

Subsidy

3294. Each city, county, or group of counties may establish and maintain a tuberculosis ward, hospital, or sanatorium for the treatment of persons suffering from tuberculosis. Each city or county that establishes and maintains a tuberculosis ward, hospital, or sanatorium shall receive from the State the sum provided in Section 3300, and each county that participates jointly with one or more other counties in the establishment and maintenance of a tuberculosis ward, hospital, or sanatorium shall receive from the State the sum specified in Section 3300, for persons suffering from tuberculosis, cared for therein at public expense, who are unable to pay for their support and who have no relatives legally liable and financially able to pay for their support; except that the city or county is not entitled to receive this state aid unless the tuberculosis ward, hospital, or sanatorium conforms to the regulations of and is approved by the state department.

Pay patients

The hospitals shall be allowed to receive pay patients.

Leased facilities for violation of order

3295. The state department shall lease any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer as provided in Section 3351 of the Health and Safety Code. The county referring such person for such care shall not be eligible to receive subsidy for such person under the provisions of this chapter, and the State shall deduct from the subsidy payments to be made to such county an amount computed at the rate of three dollars ($3) for each patient-day the person is cared for in such facility.

Burial expenses

3296. Whenever any person confined in any state institution, as provided in Section 3351 of this code, subject to the jurisdiction of the Director of Corrections, dies, and any personal funds or personal property of such person remains in the hands of the Director of Corrections, such funds may be applied in an amount not exceeding three hundred dollars ($300) to the payment of expenses relating to burial; provided, however, that if no such funds are available, the State Department of Public Health shall reimburse the Director of Corrections for such expenses in an amount not exceeding three hundred dollars ($300).

Release

3297. If the place of confinement of a person confined under the provisions of Section 3351 is in a county other than the county in which he was convicted, upon release he shall be released in the custody of the sheriff of the county in which he was convicted, and the sheriff shall forthwith return him to the place where he was convicted. The sheriff shall prior to the

return of the person notify the health officer having jurisdiction of the area to which he will be returned of the date he will reach said area.

State aid for city or county

3298. Each city or county shall receive from the State the sum provided in Section 3300 of this code for each person suffering from tuberculosis, cared for at public expense in private hospitals or sanatoriums under contract with the city or county or who is unable to pay for his support and who has no relative legally liable and financially able to pay for his support; except that the city or county is not entitled to receive this state aid unless the tuberculosis ward, hospital or sanatorium conforms to the regulations of and is approved by the state department.

The hospitals and sanatoriums shall be allowed to receive pay patients.

Subsidy report

3299. The medical superintendent of each hospital for which state aid is received under this chapter shall render semiannually to the state department a report under oath showing, for the period covered by the report:

(a) The number of patients suffering from tuberculosis cared for at public expense, and unable to pay for care.

(b) The number of days of treatment of each such patient.

In the case of hospitals, wards, or sanatoriums operated jointly by two or more counties, the patients whose admission and care have been authorized by each county shall be reported separately.

Patient exchange

With the consent of the respective cities, counties, or groups of counties, an exchange of patients may be arranged without expense to the county except for transportation when the exchange seems necessary or desirable to assist in the patients' recovery.

County contract

Counties may contract for the care and treatment of tuberculosis patients through their boards of supervisors, after consultation with the state department, with cities, counties, or groups of counties, who maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis, which conforms to the regulations of, and is approved by, the state department, and may receive from the State the tuberculosis subsidy provided by Section 3300.

Amount of subsidy

3300. The amount of the tuberculosis subsidy provided by the State to cities or counties separately providing care under this chapter for persons suffering from tuberculosis and the amount of the tuberculosis subsidy provided by the State to each county participating jointly with one or more other counties in the establishment and maintenance of a tuberculosis ward, hospital or sanatorium shall be based upon the patient days of care provided to persons whose admission and care have been authorized by that county, as follows:

(a) For the first thirty-six thousand five hundred (36,500) patient days of care during a year, the amount shall be two dollars and sixty cents ($2.60) per patient day.

(b) For the second thirty-six thousand five hundred (36,500) patient days of care during a year, the amount shall be two dollars and thirty cents ($2.30) per patient day.

(c) For all patient days of care in excess of seventy-three thousand (73,000) patient days during a year, the amount shall be one dollar and seventy-five cents ($1.75) per patient day.

(d) In addition to the amounts specified in subsections (a), (b) and (c), there shall be provided any additional amounts specified in any appropriation made therefor.

"Patient day"

As used in this section "patient day" means the period of in-patient service rendered a patient between the census taking hours on two consecutive days, and "a year" means a period of 12 months commencing on the first day of July.

Legislative intent

3301. It is the intention of the Legislature to adjust from time to time state participation in the care of persons suffering from tuberculosis in accordance with changes in the cost of caring for such patients.

Hospital central committee

3302. Each group of counties desiring to establish and maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis shall appoint, by its board of supervisors, one supervisor as a delegate, who shall attend the general meetings of the delegates of each county in the group. The necessary expense incurred in attending such meetings is a county charge. The body thus formed shall be called the hospital central committee.

Delegates

3303. Each group of counties maintaining a tuberculosis hospital under this chapter may by unanimous agreement provide for a different number of delegates to the hospital central committee than the number provided for in this chapter and may provide for a method of deciding a tie vote of the hospital central committee.

Depository

3304. The hospital central committee shall designate a county within the group maintaining the hospital as the place where the business of the hospital is to be transacted and where funds of the hospital are to be kept and deposited. All county officers selected for the business of the hospital shall render all necessary assistance required by the committee in keeping with the duties of their respective offices.

Cost

3305. The delegates from each county may enter into an agreement with delegates from the other counties, on behalf of the county appointing them, binding the county to the joint enterprise and apportioning the cost of constructing, establishing, and maintaining the hospital. Money due from any county under the agreement may be collected by the hospital central committee or, on its behalf, by the board of supervisors of any county in the group, by action in the county in which the hospital is situated.

Building committee

3306. The hospital central committee may appoint a committee to supervise the construction of the hospital, approve the bills, and do the usual things required of a building committee.

Powers of hospital central committee

The hospital central committee is the governing body of the hospital. It has the same powers and duties in regard to the hospital that a board of supervisors has over a county hospital. It shall adopt rules for its government, which shall include provisions for holding meetings and for the addition of other counties to the group. It may appoint such committees as are necessary, and shall prescribe their duties.

Land

3307. Any land required may be acquired or disposed of by the hospital central committee in such manner as may be determined by a three-fourths vote of its members, if all counties comprising a group shall have had notice of the intention to acquire or dispose of the land Title to land may be held in the name of the entire group or in the name of any county composing the group, as trustee for the use and benefit of all, as may be determined by the hospital central committee.

Expenses

3308. Each county in the group shall pay its proportionate share to the hospital central committee of an amount designated by the committee to constitute a cash revolving fund to carry on the usual work and expense of the hospital. Each month a statement of the expenses of the hospital shall be sent to the board of supervisors of each county, together with a claim for its proportionate share of the expenses. The amounts when collected shall be paid into the cash revolving fund.

Admission of patients

3309. The hospital central committee may determine and pass upon the right of admission to the hospital of applicants, subject to the limitations of this chapter.

Chapter 6. Violations

Violation Misdemeanor

3350. Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the state department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor.

Violation of order Confinement and probation

3351. Any person who, after service upon him of an order of a health officer directing his isolation as provided in Section 3285, violates or fails to comply with the same or any provision thereof, is guilty of a misdemeanor, and, upon conviction thereof, in addition to any and all other penalties which may be imposed by law upon such conviction, may be ordered by the court confined until such order of such health officer shall have been fully complied with or terminated by such health officer, but not exceeding six months from the date of passing judgment upon such conviction; further provided, that the court, upon suitable assurances that such order of such health officer will be complied with, may place any person convicted of a violation of such order of such health officer upon probation for a period not to exceed two years, upon condition that the said order of said health officer be fully complied with; and provided further, that upon any subsequent violation of such order of such health officer, such probation shall be terminated and confinement as herein provided ordered by the court.

Subsequent conviction

3352. Upon any subsequent conviction under the provisions of Section 3351, the court may order the person confined for a period not exceeding one year for such subsequent conviction, or such other penalty as provided by said section.

Exposure: Misdemeanor

3353. Except in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who wilfully exposes himself, and any person who wilfully exposes another person afflicted with such disease, is guilty of a misdemeanor.

Violation: Communicable or infectious disease

3354. Any person who violates any section in Chapter 3 of this division, with the exception of Section 3111, is guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars ($25) nor more than five hundred dollars ($500), or by imprisonment for a term of not more than 90 days, or by both. He is guilty of a separate offense for each day that the violation continued.

Prosecution by district attorney

3355. The district attorney of the county in which a violation of Sections 3285 and 3351 may be committed, shall prosecute all such violations and, upon the request of a health officer, shall prosecute, as provided in Section 3351, violations of any isolation order of a health officer made and served as provided in Section 3285.

SEC. 21. Section 3701 of said code is amended to read:

Drinking cups: "Common use"

3701. For the purposes of this chapter the term "common use" when applied to a drinking receptacle is defined as its use for drinking purposes by, or for, more than one person without its being thoroughly cleansed and sterilized between consecutive uses thereof by methods prescribed by or acceptable to the State Department of Public Health.

Sterilization

SEC. 22. Section 3702 of said code is amended to read:

Water containers

3702. No cask, water cooler, or other receptacle shall be used for storing or supplying drinking water to the public or to employees unless it is covered and protected so as to prevent persons from dipping the water therefrom or contaminating the water. All such containers shall be provided with a faucet or other suitable device for drawing the water.

SEC. 23. Section 3801 of said code is amended to read:

Towel "Common use"

3801. For the purpose of this chapter the term "common use" when applied to a towel means its use by, or for, more than one person without its being laundered between consecutive uses of such towel by methods prescribed by or acceptable to the State Department of Public Health.

SEC. 24. Section 3901 of said code is amended to read:

Wiping rags

3901. No person shall supply or furnish to his employees for wiping rags, or sell or offer for sale for wiping rags, any soiled wearing apparel, underclothing, bedding, or parts of soiled or used underclothing, wearing apparel, bedclothes, bedding, or soiled rags or cloths unless they have been sterilized by methods prescribed by or acceptable to the State Department of Public Health.

SEC. 25. Section 3954 of said code is amended to read:

3954. No machinery or appliances used for laundering clothing and articles for personal wear or household use shall be used for laundering soiled rags or soiled cloth material for wiping rags. Laundering

SEC. 26. Section 4001 of said code is amended to read:

4001. Unless water from an approved municipal supply is used in the manufacture of ice, the manufacturer shall obtain a bacterial analysis by an approved laboratory of the water used, quarterly. The analysis shall be submitted to the state or local department of public health, indicating whether the water is pure and wholesome. Water analysis

SEC. 27. Section 4002 of said code is amended to read:

4002. All tanks or containers storing water for the manufacture of ice shall be provided with covers which exclude all contamination or pollution of external origin. Tank covers

SEC. 28. Section 25003 of said code is amended to read:

25003. All applications for registration under this chapter shall be filed with the local health officer in the city, town, county, or city and county in which it is desired to carry on the business. The application shall state the name in full, if a partnership then names of each of the partners, the relation of the applicant to the firm or partnership, the place of business and place of residence of the applicant for registration and of each of the partners in the business, if a partnership, and shall state the exact location of the place at which it is proposed to dispose of cleanings. The application shall be signed by the authorized officer of a corporation, if a corporation; or by the managing partner, if a partnership. Application for registration

SEC. 29. Section 26235 of said code is amended to read:

26235. A drug shall be deemed to be adulterated (1) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; (2) if it bears or contains, for purposes of coloring only, a coal-tar color other than one from a batch certified by the United States Department of Health, Education, and Welfare, Food and Drug Administration; (3) if it is not subject to the provisions of Section 26230 and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess; or (4) if any substance has been (a) mixed or packed therewith so as to reduce its quality or strength; or (b) substituted wholly or in part therefor. Adulterated drug: Components coloring, etc

SEC. 30. Section 26366.5 of said code is amended to read:

26366.5. If, within 30 days after detention or quarantine of any article under this article, the board has not commenced a proceeding under Section 26366, then the person in possession of such article, or the owner thereof or any claimant thereto, may commence a proceeding in the superior court of the county or city and county in which the article is detained or quarantined, by petitioning said court for a judgment to release said article or for relief under Sections 26368 and Petition

26369. Upon the filing of such petition, the clerk of the court shall fix a time and place for the hearing thereof, and cause notices thereof to be prepared notifying all persons who may claim an interest in the article of the time and place of the hearing. A copy of the petition and notice shall be posted for 14 days in at least three public places in the town, city or city and county where the court is held, and in a conspicuous place where such article is detained or quarantined. A copy of the petition and notice shall also be served upon the board by serving it upon the executive officer of said board. Service may be made by personal service or by registered mail addressed to the board at the office of the executive officer, Berkeley, California.

At the time set for the hearing the court shall commence to hear the proceeding but may, for good cause shown, continue the hearing to a day certain; provided, the court shall finally determine all the issues presented in the proceeding within 60 days after the date when the matter was first set for hearing.

SEC. 31. Section 26472 of said code is amended to read:

Adulterated food

26472. A food shall be deemed to be adulterated:

(a) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or

(2) If any substance has been substituted wholly or in part therefor; or

(3) If damage or inferiority has been concealed in any manner; or

(4) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is.

(b) If it is confectionery and it bears or contains any alcohol or nonnutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of 1 per centum, harmless natural gum and pectin. This subsection shall not apply to any confectionery by reason of its containing less than one-half of 1 per centum by volume of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.

(c) If it bears or contains a coal tar other than one from a batch which has been certified by the United States Department of Health, Education, and Welfare, Food and Drug Administration

(d) If any mineral oil has been added thereto or mixed or packed therewith.

(e) If it be fresh meat and it contains any chemical substance containing sulphites, sulphur dioxide, benzoate of soda or any other chemical preservative, or any substance which is not approved by the United States Department of Agriculture, Agricultural Research Service, or the Division of Animal In-

dustry of the California State Department of Agriculture, or the California State Board of Public Health.

(f) If it be chopped or ground beef, or hamburger containing any substance other than the striated muscle of fresh beef, except those substances approved by the State Department of Public Health, or if the total fat content (determined by ether extract method of analysis) of chopped or ground beef, or hamburger is in excess of 30 percent.

Nothing in this subdivision shall be deemed to prohibit the use of monosodium glutamate in such chopped or ground beef and hamburger.

(g) Notwithstanding the provisions of Section 26461, nothing in this article shall be deemed to prohibit the use of common salt, sugar, wood smoke, a vinegar, pure spices, spice oils, flavorings, saltpeter, nitrate of soda, nitrite of soda and potassium nitrite in meat food products such as sausage, corned, brined or pickled meats, hams, bacon and the like. No such substances shall increase the green or original weight by more than 10 percent of products which are not smoked or cooked, with the exception of fresh uncured beef brisket in which case the finished cured product may exceed the weight of the fresh uncured brisket by 20 percent, nor shall any such substance increase the green or original weight by more than 1 percent of the green or original weight of products which are cooked or smoked. In the case of meat food products such as sausage, 10 percent added water shall be permitted and allowed in smoked or cooked products of such nature and 3 percent in said products which are not cooked or smoked.

(h) If it be alimentary paste and contains any artificial color derived from coal tar or vegetable substances.

(i) If it contains any saccharine or other nonnutritive sweetening agent.

(j) If it be pork sausage or breakfast sausage and the total fat content (determined by the ether extract method of analysis) is in excess of 50 percent.

SEC. 32. Section 26541 of said code is amended to read:

26541. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the board shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. All definitions and standards promulgated pursuant to this chapter shall not in any instance require a higher standard than the standards required pursuant to the definitions currently promulgated by the United States Department of Health, Education, and Welfare, Food and Drug Administration or by the United States Department of Agriculture, Agricultural Research Service Such definitions and standards of identity promulgated by the board for distilled spirits shall not be inconsistent with similar standards promulgated by the United States Internal Revenue Service, Alcohol and Tobacco Tax

Optional ingredients

Exception

Division, or other federal agency; provided, however, that the provisions of this section shall not apply to wine.

SEC. 33. Section 26542 of said code is amended to read:

State and federal regulation

26542. The authority to promulgate regulations for the efficient enforcement of this chapter is vested in the board. The board shall promulgate regulations exempting from the provisions of this chapter food which is in accordance with the normal practice of the trade introduced or offered for introduction into trade and which is being delivered to an establishment where it is to be processed, labeled or packed on condition that such food shall conform with the provisions of this act upon its removal from such processing, labeling or packing establishment. The regulations promulgated and the definitions and standards prescribed pursuant to this chapter shall not require higher standards and shall not be more restrictive than the definitions, standards and regulations which are in force, or promulgated by the United States Department of Health, Education, and Welfare, Food and Drug Administration, under the provisions of the federal act or by the United States Department of Agriculture, Agricultural Research Service, in the event that any such definitions, standards, or regulations

Violations

are in force thereunder. The violation of a regulation promulgated under this chapter shall be deemed to be a violation of this chapter.

SEC. 34. Section 26586.5 of said code is amended to read:

Petition for release

26586.5. If, within 30 days after detention or quarantine of any article under this article, the board has not commenced a proceeding under Section 26586, then the person in possession of such article, or the owner thereof or any claimant thereto, may commence a proceeding in the superior court of the county or city and county in which the article is detained or quarantined, by petitioning said court for a judgment to release said article or for relief under Sections 26588 and 26589. Upon the filing of such petition, the clerk of the court shall fix a time and place for the hearing thereof, and cause notices thereof to be prepared notifying all persons who may claim an interest in the article of the time and place of the hearing. A copy of the petition and notice shall be posted for 14 days in at least three public places in the town, city or city and county where the court is held, and in a conspicuous place where such article is detained or quarantined. A copy of the petition and notice shall also be served upon the board by serving it upon the executive officer of said board. Service may be made by personal service or by registered mail addressed to the board at the office of the executive officer, Berkeley, California.

At the time set for the hearing the court shall commence to hear the proceeding but may, for good cause shown, continue the hearing to a day certain; provided, the court shall finally determine all the issues presented in the proceeding within 60 days after the date when the matter was first set for hearing.

SEC. 35. Section 28224 of said code is amended to read:

28224. No employee or other person who is infected with any contagious, infectious, or communicable disease, which can be transmitted by the food involved, shall work or be permitted to work in any bakery or handle any of the products therein or delivered therefrom. Diseased bakery personnel

Any person knowingly infected with any such contagious, infectious, or communicable disease who engages in the work mentioned, or any employer who knowingly employs such a person, is guilty of violating this section.

SEC. 36. Section 28295 of said code is amended to read:

28295. No employer shall require or permit any person to work, in a food processing establishment or vehicle used for the production, preparation, manufacture, sale, or transportation of food if the person is infected with any contagious, infectious, or communicable disease which can be transmitted by the food involved. Diseased food processing employees

SEC. 37. The provisions of the Health and Safety Code added by this act, insofar as they are substantially the same as the provisions of said code repealed by this act, shall be construed as a restatement and continuation of the existing law and not as a new enactment. No action or proceeding relating to or arising out of the provisions of said code repealed by this act commenced before the effective date of this act, and no right accrued pursuant to said provisions, are affected by the repeal of said provisions by this act, but any step thereafter taken in such action or proceeding shall conform to the provisions added to said code by this act so far as possible. Construction

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CHAPTER 206

An act to amend Sections 137.3 and 137.5 of the Civil Code, relating to attorneys' fees in civil actions.

[Approved by Governor April 23, 1957. Filed with Secretary of State April 24, 1957.]

In effect September 11, 1957

The people of the State of California do enact as follows:

SECTION 1. Section 137.3 of the Civil Code is amended to read:

137.3. During the pendency of any action for annulment in which costs and attorney's fees are authorized by Section 87 of this code and of any action for divorce or for separate maintenance, or for the custody, support, maintenance or education of children upon an order to show cause or motion, and if such relief is requested in the complaint, cross complaint or answer, the court may order the husband or wife, or father or mother, as the case may be, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the action and for attorney's fees, and from time to time and before entry of judgment upon application as aforesaid, the Divorce, etc., actions Costs and fees

SEC. 35. Section 28224 of said code is amended to read:

28224. No employee or other person who is infected with any contagious, infectious, or communicable disease, which can be transmitted by the food involved, shall work or be permitted to work in any bakery or handle any of the products therein or delivered therefrom. Diseased bakery personnel

Any person knowingly infected with any such contagious, infectious, or communicable disease who engages in the work mentioned, or any employer who knowingly employs such a person, is guilty of violating this section.

SEC. 36. Section 28295 of said code is amended to read:

28295. No employer shall require or permit any person to work, in a food processing establishment or vehicle used for the production, preparation, manufacture, sale, or transportation of food if the person is infected with any contagious, infectious, or communicable disease which can be transmitted by the food involved. Diseased food processing employees

SEC. 37. The provisions of the Health and Safety Code added by this act, insofar as they are substantially the same as the provisions of said code repealed by this act, shall be construed as a restatement and continuation of the existing law and not as a new enactment. No action or proceeding relating to or arising out of the provisions of said code repealed by this act commenced before the effective date of this act, and no right accrued pursuant to said provisions, are affected by the repeal of said provisions by this act, but any step thereafter taken in such action or proceeding shall conform to the provisions added to said code by this act so far as possible. Construction

Ex. 3

Chapter 5

TUBERCULOSIS

Section
3279. Program for control; administration of available funds.
3279.1. Election of county to pay its share of health care cost; ineligibility for tuberculosis study or reimbursement.
3280. Legislative declaration.
3281 to 3284. Blank.

TUBERCULOSIS
Ch. 5

Section

Chapter 5 was added by Stats.1957, c. 205, p. 858, § 20.

Cross References

Tests for tuberculosis, see § 3450 et seq.

Code of Regulations References

Reportable diseases and conditions, see 17 Cal. Code of Regs. 2624.

Library References

Health and Environment ⇐22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment § 18.
Rehabilitation of disabled and dependent persons. Report of Senate Interim Committee on the Education and Rehabilitation of Handicapped Children and Adults, 1957, p. 21. Vol. 2 of Appendix to Journal of the Senate, Reg.Sess.1957.

§ 3279. Program for control; administration of available funds

The department shall maintain a program for the control of tuberculosis. The department shall administer the funds made available by the state for the care of tuberculosis patients.

(Added by Stats.1957, c. 205, p. 858, § 20. Amended by Stats.1973, c. 1212, p. 2750, § 49, operative July 1, 1974; Stats.1975, c. 671, p. 1464, § 1, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Operative date exception to Stats.1973, c. 1212, p. 2733, and implementation of the Act by the secretary of health and welfare agency after Jan. 1, 1974, see Historical and Statutory Notes under § 249.

Inoperability of provisions of Stats.1973, c. 1212, p. 2733, not in conformity with federal requirements, see Historical and Statutory Notes under § 249.

Derivation: Former §§ 410, 413, added by Stats.1939, c. 60, p. 492, §§ 410, 413.

Stats.1915, c. 766, p. 1530, § 1.

Library References

Health and Environment ⇐23.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 18 to 21.

Notes of Decisions

1. Validity of prior law

Stats.1915, p. 1530 (repealed; now, this section) was a valid exercise of the sovereign power and police power of the state to take all the necessary steps for the promotion of the health and comfort of its inhabitants and to make regulations essential to the protection of the state and the people thereof against the prevalence of disease, as the true purpose of county government organizations, is to perform functions which belong to the state itself, and the state may employ them jointly with itself or alone as instrumentalities in aid of the administration or carrying out of its own general governmental functions and policy. Sacramento County v. Chambers (1917) 164 P. 613, 33 C.A. 142.

2. Construction and application

In order to accomplish purpose for which this chapter dealing with tuberculosis was enacted, court should give chapter a broad and liberal construction. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

Legislature is vested with broad discretion in determining what are contagious and infectious diseases and in adopting means for preventing the spread thereof. Id.

§ 3279.1. Election of county to pay its share of health care cost; ineligibility for tuberculosis study or reimbursement

Notwithstanding any other provision of this chapter a county which has elected to come under the provisions of Section 14150.1 of the Welfare and Institutions Code [1] shall not receive any tuberculosis subsidy or reimbursement from the state under the provisions of this chapter.

(Added by Stats.1969, c. 811, p. 1634, § 1, operative July 1, 1970.)

[1] Repealed.

Historical and Statutory Notes

Section 2 of Stats.1969, c. 811, p. 1634, provides:

"This act shall become operative on July 1, 1970."

§ 3280. Legislative declaration

Pulmonary tuberculosis is an infectious and communicable disease, dangerous to the public health, and all proper expenditures that may be made by any county, pursuant to this chapter, are necessary for the preservation of the public health of the county.

(Added by Stats.1957, c. 205, p. 859, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 3099, added by Stats. 1961, c. 60, p. 546, § 3099.

Stats.1935, c. 20, p. 80, § 6.

Library References

Health and Environment ⇐23.
Hospitals ⇐2.
WESTLAW Topic Nos. 199, 204.

C.J.S. Health and Environment §§ 18 to 21.
C.J.S. Hospitals § 4.

§§ 3281 to 3284. [Blank]

§ 3285. Duty of health officers; investigation of reported or suspected cases; powers of inspection, examination, quarantine or isolation

Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction and to ascertain the sources of such infections. In carrying out such investigations, each health officer is hereby invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed:

(a) To make such examinations as are deemed necessary of persons reasonably suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of the public health.

(b) Follow local rules and regulations regarding examinations, quarantine, or isolation, and all general and special rules, regulations, and orders of the state department in carrying out such examination, quarantine or isolation.

(c) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of the public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to protect the public health. Nothing contained in this subdivision shall be construed to prevent any person whom the health officer determines should have an examination for infectious tuberculosis from having such an examination made by a physician of his own choice who is licensed to practice medicine under the provisions of Chapter 5 (commencing with Section 2000), Division 2 of the Business and Professions Code under such terms and

conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.

(d) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be isolated, the period of time during which the order shall remain effective, the place of isolation or quarantine, and such other terms and conditions as may be necessary to protect the public health.

(e) Upon the making of an examination, isolation, or quarantine order as provided in this section, a copy of such order shall be served upon the person named in such order.

(f) Upon the receipt of information that any examination, quarantine, or isolation order, made and served as herein provided, has been violated, the health officer shall advise the district attorney of the county in which such violation has occurred, in writing, and shall submit to such district attorney the information in his possession relating to the subject matter of such examination, isolation, or quarantine order, and of such violation or violations thereof.

(g) Any and all orders authorized under this section shall be made by the health officer and his authority to make such orders shall be delegated only pursuant to Section 7. The health officer shall not make any orders incorporating by reference any other rules or regulations.

(Added by Stats.1957, c. 205, p. 859, § 20. Amended by Stats.1961, c. 30, p. 936, § 2; Stats.1965, c. 1344, p. 3230, § 1; Stats.1965, c. 1552, p. 3645, § 1.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

Derivation: Former § 2559.5, added by Stats.1945, c. 21, p. 689, § 1, amended by Stats. 1949, c. 305, p. 592, § 1; Stats.1955, c. 93, p. 558, § 1.

Cross References

Prosecution of violations of this section, see § 3355.

Code of Regulations References

Isolation and quarantine, see 17 Cal. Code of Regs. 2515 et seq.
Notification by laboratories of communicable disease evidence, see 17 Cal. Code of Regs. 2505.

Library References

Health and Environment ⇐7(3), 23, 24. WESTLAW Topic No. 199.

C.J.S. Health and Environment §§ 13, 18 to 25.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

1. Validity

Provision of this section providing that health officer may make isolation or quarantine order of person with tuberculosis whenever health officer shall determine in particular case that quarantine or isolation is necessary for protection of public health, and that isolation or quarantine order shall be in writing, setting forth name of person to be isolated, period of time during which order shall remain effective, place of isolation or quarantine, and such other terms and conditions as may be necessary to protect public health does not deprive person having tuberculosis of his liberty without due process of law. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

2. In general

Provisions of this section dealing with duties of health officers in issuing tuberculosis quarantine orders make those duties discretionary rather than mandatory. Jones v. Czapkay (1960) 6 Cal.Rptr. 182, 182 C.A.2d 192.

This section does not apply to officers of the state department of public health. Id.

3. Quarantine orders

Consecutive orders of health officer for quarantine of person having tuberculosis may issue so long as person continues to be infected with tuberculosis and so long as health officer on reasonable grounds believes such person to be dangerous to public health. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

A health officer may institute an action to compel examination of person suspected of having tuberculosis who refuses to submit to an examination by the health officer or may issue a quarantine order, a violation of which may be prosecuted criminally. 36 Ops.Atty. Gen. 28.

A health officer has the power to quarantine and isolate an individual with active and contagious tuberculosis in any local jail when he finds that it is reasonably necessary to employ security measures to enforce the quarantine and to protect the public from contagion and no more suitable facility is available for such purpose. 30 Ops.Atty.Gen. 229, 11–8–57.

Where a patient quarantined in a sanatorium for the treatment of tuberculosis, demands that he be permitted to leave, reasonable physical force may be employed to prevent him from doing so. 6 Ops.Atty.Gen. 184.

4. Liability of officers

Exposure of plaintiff to known tubercular victim was sole proximate cause of plaintiff's acquiring the disease, and any breach of duty by health officers in failing to conduct proper or adequate investigation to insure strict compliance by patient with quarantine orders could constitute only a remote cause which could not form basis for imposition of liability upon them. Jones v. Czapkay (1960) 6 Cal. Rptr. 182, 182 C.A.2d 192.

5. Habeas corpus

Person, who is confined pursuant to quarantine order issued by health officer under this section is not entitled to relief on habeas corpus, where evidence shows reasonable cause to believe that person is infected, but person quarantined without reasonable grounds is entitled to relief by habeas corpus. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

§ 3286. Religious freedom; exemption from provisions

No examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination or organization and claims exemption on such ground, except that the provisions of this code regarding compulsory reporting of communicable diseases and isolation and quarantine shall apply where there is probable cause to suspect that such person is infected with the disease in a communicable stage. Such person shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he can be safely quarantined and/or isolated in his own home or other suitable place of his choice.

(Added by Stats.1957, c. 205, p. 859, § 20.)

§§ 3289 to 3291. Repealed by Stats.1975, c. 671, p. 1464, §§ 3 to 5, eff. Sept. 10, 1975

Historical and Statutory Notes

The repealed sections, added by Stats.1973, c. 1212, pp. 2750, 2751, §§ 51 to 53, provided for the succession by the department of benefits payments to the duties, purposes, responsibilities, jurisdiction, records, equipment, supplies and officers and employees of the department of health under this chapter.

§§ 3292, 3293. [Blank]

§ 3294. Establishment of wards, hospitals and sanatoriums

Each city, county, or group of counties may establish and maintain a tuberculosis ward, hospital, or sanatorium for the treatment of persons suffering from tuberculosis.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1975, c. 671, p. 1464, § 6, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 3300, added by Stats. 1939, c. 60, p. 547, § 3300, amended by Stats. 1939, c. 1070, p. 2996; Stats.1945, c. 1447, p. 2724, § 1; Stats.1947, c. 1000, p. 2266, § 3. Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐2.
Social Security and Public Welfare ⇐241.
WESTLAW Topic Nos. 204, 356A.

C.J.S. Hospitals § 4.
C.J.S. Social Security and Public Welfare § 126.

Notes of Decisions

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1. In general

Former § 3300 (now this section), which provided that counties might establish and maintain a tuberculosis hospital for treatment of persons suffering from tuberculosis was permissive with respect to county assuming state's burden of caring for indigent persons, but was mandatory in its declaration that for such facility it should receive from state a sum prescribed. Los Angeles County v. State Dept. of Public Health (1958) 322 P.2d 968, 158 C.A.2d 425.

2. Agreement for joint care

A city and county might contract to provide for the care of their tuberculosis patients in a neighboring county sanatorium by proceeding under Stats.1921, p. 542, providing for the joint exercise of powers by counties, cities or both, notwithstanding Stats.1921, p. 1641, providing for the joint construction, ownership and management of tuberculosis hospitals, to be approved by the state bureau of tuberculosis, as a condition precedent to receiving state aid. City and County of San Francisco v. Boyle (1923) 215 P. 549, 191 C. 172.

3. Termination of agreement

Where three counties in 1918 entered into agreement to establish and maintain a tuberculosis hospital, and in 1953, the counties entered into an agreement for the withdrawal by one of the counties from participation in maintenance of the hospital, the counties could terminate the agreement for joint operation by agreement of a majority of each of the boards of supervisors, and without following the procedure for sale of county realty in accordance with Gov.C. 25520 et seq. 28 Ops.Atty.Gen. 349.

§ 3295. State care of persons who violate quarantine or isolation orders; lease of facilities

The state department shall lease any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer as provided in Section 3351 of the Health and Safety Code.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1975, c. 671, p. 1464, § 7, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 3300.4, added by Stats.1949, c. 1091, p. 1990, § 1.

§ 3296. Burial expenses of persons confined in state institutions

Whenever any person confined in any state institution, as provided in Section 3351 of this code, subject to the jurisdiction of the Director of Corrections, dies, and any personal funds or personal property of such person remains in the hands of the Director of Corrections, such funds may be applied in an amount not exceeding three hundred dollars ($300) to the payment of expenses relating to burial; provided, however, that if no such funds are available, the State Department of Health Services shall reimburse the Director of Corrections for such expenses in an amount not exceeding three hundred dollars ($300).

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1971, c. 1593, p. 3276, § 174, operative July 1, 1973; Stats.1977, c. 1252, § 272, operative July 1, 1978.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Operative effect of amendment by Stats.1971, c. 1593, see Historical and Statutory Notes under § 20.

Derivation: Former § 3300.45, added by Stats.1953, c. 28, p. 632, § 1.

Cross References

Director of corrections, see Penal Code § 5050 et seq.

Library References

Social Security and Public Welfare ⇐241 WESTLAW Topic No. 356A.

C.J.S. Social Security and Public Welfare § 126.

§ 3297. Release of person confined in county other than county of conviction

If the place of confinement of a person confined under the provisions of Section 3351 is in a county other than the county in which he was convicted, upon release he shall be released in the custody of the sheriff of the county in which he was convicted, and the sheriff shall forthwith return him to the place where he was convicted without the necessity of a court order or other process. The sheriff shall prior to the return of the person notify the health

officer having jurisdiction of the area to which he will be returned of the date he will reach said area.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1957, c. 1736, p. 3120, § 1.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

This section first took effect in its 1957 amended form since the 1957 addition and the 1957 amendment became effective on the same date.

Derivation: Former § 3300.46, added by Stats.1953, c. 331, p. 1600, § 1.

§§ 3298 to 3300.1. Repealed by Stats.1975, c. 671, p. 1464, §§ 8 to 11, eff. Sept. 10, 1975

Historical and Statutory Notes

Section 3298, added by Stats.1957, c. 205, p. 861, § 20, related to a state subsidy for patients cared for at public expense in private institutions. The section was derived from former § 3300a, added by Stats.1945, c. 601, p. 1132, § 1, renumbered § 3300.5 and amended by Stats.1947, c. 1000, p. 2267, § 4; Stats.1953, c. 550, p. 1810, § 1; Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Section 3299, added by Stats.1957, c. 205, p. 861, § 20, amended by Stats.1973, c. 1212, p. 2751, § 54, related to hospital reports and exchange of patients and contracts for care by other cities and counties. The section was derived from former § 3301, added by Stats. 1939, c. 60, p. 548, § 3301, amended by Stats. 1945, c. 1447, p. 2724, § 2; Stats.1947, c. 1000, p. 2267, § 5.

Section 3300, added by Stats.1957, c. 205, p. 861, § 20, amended by Stats.1959, c. 1579, p. 3910, § 1; Stats.1961, c. 1243, p. 3004, § 1, related to the amount of the state subsidy and also defined patient day and year. The section was derived from former §§ 3301.5, 3301.6, added by Stats.1947, c. 1000, p. 2268, § 6, amended by Stats.1949, c. 1242, p. 2195, §§ 1, 2; Stats.1953, c. 1513, p. 3175, §§ 1, 2.

Former § 3300, enacted by Stats.1939, c. 60, p. 547, § 3300, amended by Stats.1939, c. 1070, p. 2996; Stats.1945, c. 1447, p. 2724, § 1; Stats. 1947, c. 1000, p. 2266, § 3, and repealed by Stats.1957, c. 205, p. 861, § 1, related to establishment of tuberculosis hospitals by cities and counties, a state subsidy for public patients and admittance of pay patients.

Section 3300a, added by Stats.1945, c. 601, § 1 was renumbered § 3300.5 and amended by Stats.1947, c. 1000, § 4.

Section 3300.1, added by Stats.1961, c. 1243, p. 3005, § 2, amended by Stats.1963, c. 278, p. 1036, § 1, related to a city or county's use of contributions from nonstate sources to offset any state subvention.

§§ 3300.4 to 3300.5. Repealed by Stats.1957, c. 205, p. 848, § 1

Historical and Statutory Notes

Section 3300.4, added by Stats.1949, c. 1091, p. 1990, § 1, related to state care of tubercular persons who violate quarantine or isolation orders. See, now, § 3295.

Section 3300.45, added by Stats.1953, c. 28, p. 632, § 1, provided for burial expenses of persons confined to state tuberculosis treatment institutions. See, now, § 3296.

Section 3300.46, added by Stats.1953, c. 331, p. 1600, § 1, related to release of a person confined in a state tuberculosis treatment institution other than in the county of conviction.

Section 3300.5, added as § 3300a by Stats. 1945, c. 601, p. 1132, § 1, renumbered § 3300.5 and amended by Stats.1947, c. 1000, p. 2267, § 4; Stats.1953, c. 550, p. 1810, § 1, related to the state subsidy for patients cared for at public expense in private institutions.

§ 3301. Repealed by Stats.1975, c. 671, p. 1464, § 12, eff. Sept. 10, 1975

Historical and Statutory Notes

The repealed section, added by Stats.1957, c. 205, p. 862, § 20, derived from former § 3301.7, added by Stats.1953, c. 1513, p. 3176, § 3, related to the legislature's intention to adjust state participation from time to time.

Former § 3301, enacted by Stats.1939, c. 60, p. 548, § 3301, amended by Stats.1945, c. 1447, p. 2724, § 2; Stats.1947, c. 1000, p. 2267, § 5, derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, and repealed by Stats.1957, c. 205, p. 848, § 1, related to hospital reports, exchange of patients by counties and cities, and contracts for care of patients by other cities and counties.

§§ 3301.5 to 3301.7. Repealed by Stats.1957, c. 205, p. 848, § 1

Historical and Statutory Notes

The repealed sections, added by Stats.1947, c. 1000, p. 2268, § 6; Stats.1953, c. 1513, p. 3176, § 3, amended by Stats.1949, c. 1242, pp. 2195, 2196, §§ 1, 2; Stats.1953, c. 1513, pp. 3175, 3176, §§ 1, 2, fixed the amount of subsidy for tuberculosis treatment provided by the state to counties, cities, and cities and counties.

§ 3302. Joint establishment of ward or hospital; hospital central committee; appointment of delegates; expenses as county charge

Each group of counties desiring to establish and maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis shall appoint, by its board of supervisors, one supervisor as a delegate, who shall attend the general meetings of the delegates of each county in the group. The necessary expense incurred in attending such meetings is a county charge. The body thus formed shall be called the hospital central committee.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3302, enacted by Stats.1939, c. 60, p. 548, § 3302, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section provided for a hospital central committee for each group of counties which established a tuberculosis hospital.

Derivation: Former § 3302, enacted by Stats.1939, c. 60, p. 548, § 3302.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Cross References

Hospital central committee, powers and duties, see § 3306.

Library References

Hospitals ⇐2, 6.
WESTLAW Topic No. 204.
C.J.S. Hospitals §§ 4, 5 et seq.

Notes of Decisions

1. In general

Under former §§ 3302 to 3309, authorizing group of counties to join to establish and main-

tain tuberculosis hospital to be supervised by a hospital central committee, the employees of such hospital are employees of hospital's central committee and not employees of various counties maintaining the hospital, and are consequently not local miscellaneous members of state employees' retirement system and are not subject to compulsory retirement at 70, under provisions of Gov.C. § 20983 (repealed; see, now, § 20981) pertaining to such local miscellaneous members. 25 Ops.Atty.Gen. 47.

2. Termination of agreement

Where three counties in 1918 entered into agreement to establish and maintain a tuberculosis hospital, and in 1953 the counties entered into an agreement for the withdrawal by one of the counties from participation in maintenance of the hospital, the counties could terminate the agreement for joint operation of the hospital by agreement of a majority of each of the boards of supervisors, and without following the procedure for the sale of county realty in accordance with the Gov.C. § 25520 et seq. 28 Ops.Atty.Gen. 349.

§ 3303. Change in number of delegates; unanimous agreement

Each group of counties maintaining a tuberculosis hospital under this chapter may by unanimous agreement provide for a different number of delegates to the hospital central committee than the number provided for in this chapter and may provide for a method of deciding a tie vote of the hospital central committee.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law see Historical and Statutory Notes under § 410.

Former § 3303 enacted by Stats.1939, c. 60, p. 548, § 3303, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to a change in the number of delegates to the hospital central committee.

Derivation: Former § 3303, enacted by Stats.1939, c. 60, p. 548, § 3303.

Stats.1915, c. 766, p. 1530, § 3a, added Stats. 1935, c. 366, p. 1319, § 1.

§ 3304. Designation of place of business; assistance of county officers

The hospital central committee shall designate a county within the group maintaining the hospital as the place where the business of the hospital is to be transacted and where funds of the hospital are to be kept and deposited. All county officers selected for the business of the hospital shall render all necessary assistance required by the committee in keeping with the duties of their respective offices.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3304, enacted by Stats.1939, c. 60, p. 548, § 3304, and derived from Stats.1915, c. 766, p. 1530, § 3a; Stats.1935, c. 366, p. 1319, § 1, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to designation of place of business and assistance to be rendered by county officers.

Derivation: Former § 3304, enacted by Stats.1939, c. 60, p. 548, § 3304.

Stats.1915, c. 766, p. 1530, § 3a, added Stats. 1935, c. 366, p. 1319, § 1.

Notes of Decisions

In general 1

1. In general

Weimar Sanatorium, a tuberculosis hospital operated by a number of counties in the Sacramento area, is an entity separate from its constituent counties and the hospital rather than the constituent counties is the employer of those persons who compose the hospital staff. 36 Ops.Atty.Gen. 237, 11-9-60.

§ 3305. Contracts among delegates; effect upon counties; apportionment of costs; collection of money due from counties

The delegates from each county may enter into an agreement with delegates from the other counties, on behalf of the county appointing them, binding the county to the joint enterprise and apportioning the cost of constructing, establishing, and maintaining the hospital. Money due from any county under the agreement may be collected by the hospital central committee or, on its behalf, by the board of supervisors of any county in the group, by action in the county in which the hospital is situated.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3305, enacted by Stats.1939, c. 60, p. 549, § 3305, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to contracts among delegates and collection of money due from counties.

Derivation: Former § 3305, enacted by Stats.1939, c. 60, p. 549, § 3305.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Notes of Decisions

In general 1

1. In general

A city's contract to advance money to a neighboring county for the construction of additional hospital units for the care and treatment of the city's tuberculosis patients, was not invalid because the county retained supervisory control of the entire hospital, including the right to reject or remove patients, there being no presumption that unreasonable rules will be adopted or arbitrary authority exercised. City and County of San Francisco v. Boyle (1923) 215 P. 549, 191 C. 172.

That a gross sum set aside by a city to cover the cost of construction and deterioration of additional hospital units to be constructed by a neighboring county for the care and treatment of the city's tuberculosis patients as provided by a contract between the city and county may be wholly consumed on expiration of the contract term, would not be conclusive proof of a bad bargain and does not invalidate the contract, the presumption being that the city governing body, whose judgment is conclusive in the absence of a showing of want of jurisdiction, bad faith, gross extravagance, or some fact sufficient to vitiate the contract considered the wisdom and policy of the whole plan in the light of the objects to be attained. Id.

§ 3306. Building committee; powers of hospital central committee

The hospital central committee may appoint a committee to supervise the construction of the hospital, approve the bills, and do the usual things required of a building committee.

The hospital central committee is the governing body of the hospital. It has the same powers and duties in regard to the hospital that a board of supervisors has over a county hospital. It shall adopt rules for its govern-

ment, which shall include provisions for holding meetings and for the addition of other counties to the group. It may appoint such committees as are necessary, and shall prescribe their duties.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3306, enacted by Stats.1939, c. 60, p. 549, § 3306, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to the building committee and powers of the hospital central committee.

Derivation: Former § 3306, enacted by Stats.1957, c. 205, p. 862, § 20.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐2.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 4.

§ 3307. Acquisition and disposition of land; required vote; notice of intention; title

Any land required may be acquired or disposed of by the hospital central committee in such manner as may be determined by a three-fourths vote of its members, if all counties comprising a group shall have had notice of the intention to acquire or dispose of the land. Title to land may be held in the name of the entire group or in the name of any county composing the group, as trustee for the use and benefit of all, as may be determined by the hospital central committee.

(Added by Stats.1957, c. 205, p. 863, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3307, enacted by Stats.1939, c. 60, p. 549, § 3307, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to acquisition and disposition of land.

Derivation: Former § 3307, enacted by Stats.1939, c. 60, p. 549, § 3307.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐2.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 4.

Notes of Decisions

Termination of agreement 1

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1. Termination of agreement

Three counties operating a tuberculosis sanitorium might terminate agreement for joint operation by agreement of a majority of each board of supervisors, and the sanitorium may be transferred to two of the counties, eliminating the third, as incident of such agreement, without complying with requirements of Gov.C. § 25520 et seq. for sale of county real property. 28 Ops.Atty.Gen. 349, 12-21-56.

§ 3308. Payment of expenses by counties; deposit in cash revolving fund

Each county in the group shall pay its proportionate share to the hospital central committee of an amount designated by the committee to constitute a cash revolving fund to carry on the usual work and expense of the hospital. Each month a statement of the actual expenses of the hospital shall be sent to the board of supervisors of each county, together with a claim for the county's proportionate share of the expenses. Monthly claims shall be reduced to the extent of any remaining balance of a county's quarterly payments. The amounts when collected shall be paid into the cash revolving fund.

(Added by Stats.1957, c. 205, p. 863, § 20. Amended by Stats.1959, c. 1489, p. 3781, § 1.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3308, enacted by Stats.1939, c. 60, p. 549, § 3308, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to payment of expenses by counties and deposit of amounts collected in the cash revolving fund.

Derivation: Former § 3308, enacted by Stats.1939, c. 60, p. 549, § 3308.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

§ 3309. Admission of patients

The hospital central committee may determine and pass upon the right of admission to the hospital of applicants, subject to the limitations of this chapter.

(Added by Stats.1957, c. 205, p. 863, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3309, enacted by Stats.1939, c. 60, p. 549, § 3309, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to admission of patients.

Derivation: Former § 3309, enacted by Stats.1939, c. 60, p. 549, § 3309.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐5.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 7.

§ 3310. Quarterly estimate of amount required to operate hospital; payment of claim

Prior to the beginning of each quarter of the year an estimate of the amount required to operate the hospital for the subsequent quarter may be sent by the hospital central committee to the board of supervisors of each county, together with a claim for the county's proportionate share of the quarterly expenses of the hospital, and, upon approval of the board of supervisors, the county shall pay such claim.

(Added by Stats.1959, c. 1489, p. 3781, § 2.)

Library References

Hospitals ⇐2.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 4.

§ 3315. Annual subvention for control program; local health departments; use; additional funds

The State Department of Health Services may distribute for the purpose of tuberculosis control an annual subvention, paid quarterly, to any local health department that maintains a tuberculosis control program consistent with standards and procedures established by the department. This annual subvention shall be used primarily for the strengthening of tuberculosis prevention activities by local health departments. Further, the department may allocate additional funds to selected local health departments based on high disease incidence, or other standards established by the department. These additional funds shall be expended primarily for the cost of diagnosis, treatment, and followup services required for an effective tuberculosis control program. Services rendered under this section may not be made dependent on status of residence.

(Added by Stats.1975, c. 671, p. 1464, § 13, eff. Sept. 10, 1975. Amended by Stats.1977, c. 1252, § 273, operative July 1, 1978.)

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

§ 3316. Local control programs; standards and procedures

The State Department of Health Services may establish standards and procedures for the operation of local tuberculosis control programs. Such standards shall include, but not be limited to, the maintenance of records and reports relative to services rendered and to expenditures made which shall be reported semiannually to the State Department of Health Services in such manner as it may specify.

(Added by Stats.1975, c. 671, p. 1465, § 14, eff. Sept. 10, 1975. Amended by Stats.1977, c. 1252, § 274, operative July 1, 1978.)

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

§ 3317. Administrative costs; limitation; laboratory services and hospitalization facilities

Of the annual appropriation made to the department for tuberculosis control, the department may expend a sum not to exceed 7.5 percent of the total, for administrative costs. In addition, it may, if it deems necessary, withhold a portion of the appropriation to pay for the cost of regional

laboratory services and regional hospitalization facilities for patients whose care cannot be reasonably accomplished in facilities available within a local health department, or it may contract with physicians to supervise the medical care of tuberculosis patients in areas where such specialized care is not available. Further, the appropriation shall be available to purchase materials or drugs used in tuberculosis control for distribution to local health departments.

(Added by Stats.1975, c. 671, p. 1465, § 15, eff. Sept. 10, 1975.)

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

§§ 3325, 3326. Repealed by Stats.1947, c. 1000, § 8, eff. June 30, 1947, operative July 1, 1947

Historical and Statutory Notes

The repealed sections, added by Stats.1939, c. 919, related to convalescent colonies for tuberculosis patients.

§§ 3340 to 3342. Repealed by Stats.1957, c. 205, p. 848, § 1

Historical and Statutory Notes

The repealed sections, added by Stats.1939, c. 919, p. 2589, related to payment and expenditure of tuberculosis subsidy funds.

Chapter 6

VIOLATIONS

Section

Chapter 6 was added by Stats.1957, c. 205, p. 863, § 20.

Cross References

Prosecution of violations of venereal disease prevention and control provisions, see § 3196.

§ 3350. Violation of rule, order, or regulation of state department; misdemeanor

Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the state department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor.

(Added by Stats.1957, c. 205, p. 863, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2600, added by Stats. 1939, c. 60, p. 542, § 2600.

Pen.C. § 377a, added Stats.1905, c. 144, p. 143, § 1.

Cross References

Misdemeanors,
Defined, see Penal Code § 17.
Punishment, see Penal Code §§ 19, 19.2.

Library References

Criminal Law ⇐27.
Health and Environment ⇐37, 43.
WESTLAW Topic Nos. 110, 199.

C.J.S. Criminal Law § 5 et seq.
C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

§ 3351. Refusal to comply with isolation order; misdemeanor; confinement by court order; probation

Inasmuch as the order provided for by Section 3285 is for the protection of the public health, any person who, after service upon him of an order of a health officer directing his isolation or examination as provided in Section 3285, violates or fails to comply with the same or any provision thereof, is guilty of a misdemeanor, and, upon conviction thereof, in addition to any and all other penalties which may be imposed by law upon such conviction, may be ordered by the court confined until such order of such health officer shall have been fully complied with or terminated by such health officer, but not exceeding six months from the date of passing judgment upon such conviction; further provided, that the court, upon suitable assurances that such order of such health officer will be complied with, may place any person convicted of a violation of such order of such health officer upon probation for a period not to exceed two years, upon condition that the said order of said health officer be fully complied with; and provided further, that upon any subsequent violation of such order of such health officer, such probation shall be terminated and confinement as herein provided ordered by the court.

(Added by Stats.1957, c. 205, p. 863, § 20. Amended by Stats.1961, c. 30, p. 937, § 3; Stats.1965, c. 1552, p. 3646, § 2.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1961 amendment included an examination as provided in § 3285 as subject to the provisions of this section.

The 1965 amendment added the introductory phrase "Inasmuch as the order provided for by § 3285 is for the protection of the public health".

Derivation: Former § 2600.5, added by Stats.1949, c. 305, p. 592, § 1.

Cross References

Misdemeanor,
Defined, see Penal Code § 17.
Punishment, see Penal Code §§ 19, 19.2.
Prosecution of violations, see § 3355.

Library References

Health and Environment ⇐37, 43.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

Notes of Decisions

In general 1

1. In general

If a person suspected of having tuberculosis refuses to submit to an examination by the health officer, an action may be instituted to compel such examination or a quarantine order may be issued, a violation of which may be prosecuted criminally. 36 Ops.Atty.Gen. 28, 7–14–60.

§ 3352. Subsequent convictions; punishment

Upon any subsequent conviction under the provisions of Section 3351, the court may order the person confined for a period not exceeding one year for such subsequent conviction, or such other penalty as provided by said section.

(Added by Stats.1957, c. 205, p. 864, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2600.6, added by Stats.1953, c. 331, p. 1600, § 2.

Cross References

Prior convictions, form of allegations, see Penal Code § 969.

Library References

Health and Environment ⇐43.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 51, 156.

Notes of Decisions

Jurisdiction 1

1. Jurisdiction

Municipal courts, have jurisdiction to enforce provisions of this section providing that for a second violation of tuberculosis quarantine, a recalcitrant tuberculosis patient may be confined for a period of one year in facilities provided by the state department of public health, but justice courts do not have jurisdiction to do so. 23 Ops.Atty.Gen. 275.

§ 3353. Wilful exposure to disease; misdemeanor

Except in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who wilfully exposes himself, and any

person who wilfully exposes another person afflicted with such disease, is guilty of a misdemeanor.

(Added by Stats.1957, c. 205, p. 864, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2601, added by Stats. 1939, c. 60, p. 542, § 2601.

Pen.C. former § 394.

Cross References

Misdemeanor,
Defined, see Penal Code § 17.
Punishment, see Penal Code §§ 19, 19.2.

Library References

Health and Environment ⇐37, 43.
WESTLAW Topic No. 199.

C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

§ 3354. Violations of chapter 3; misdemeanor; penalty

Any person who violates any section in Chapter 3 of this division, with the exception of Section 3111, is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or by imprisonment for a term of not more than 90 days, or by both. He is guilty of a separate offense for each day that the violation continued.

(Added by Stats.1957, c. 205, p. 864, § 20. Amended by Stats.1983, c. 1092, § 151, eff. Sept. 27, 1983, operative Jan. 1, 1984.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1983 amendment increased the minimum fine from $25 to $50; and increased the maximum fine from $500 to $1,000.

Derivation: Former § 2602, added by Stats. 1939, c. 60, p. 542, § 2602.

Stats.1907, c. 492, p. 902, § 21; Stats.1911, c. 339, p. 571, § 4.

Library References

Criminal Law ⇐27.
Health and Environment ⇐37, 43.
WESTLAW Topic Nos. 110, 199.

C.J.S. Criminal Law § 5 et seq.
C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

§ 3355. Prosecution of violations

The district attorney of the county in which a violation of Sections 3285 and 3351 may be committed, shall prosecute all such violations and, upon the request of a health officer, shall prosecute, as provided in Section 3351, violations of any isolation or examination order of a health officer made and served as provided in Section 3285 or Section 3002.

(Added by Stats.1957, c. 205, p. 864, § 20. Amended by Stats.1961, c. 30, p. 938, § 4; Stats.1963, c. 278, p. 1037, § 2.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1961 amendment included any examination order of a health officer as subject to prosecution for violation and added service according to § 3002 as a valid method of service.

The 1963 amendment eliminated duplications added by the 1961 amendment.

Derivation: Former § 2603, added by Stats. 1949, c. 305, p. 594, § 3.

Library References

Health and Environment ⇐39 to 43.
WESTLAW Topic No. 199.

C.J.S. Health and Environment §§ 51, 114, 155 to 157.

Notes of Decisions

In general 1

1. In general

If a person suspected of having tuberculosis refused to submit to an examination by the health officer, an action may be instituted to compel such examination or, a quarantine order may be issued, a violation of which may be prosecuted criminally. 36 Ops.Atty.Gen. 28, 7-14-60.

§ 3356. Illegal possession of intoxicating liquor

Every person who possesses any intoxicating liquor in or on any public hospital or sanatorium providing for the treatment of tuberculosis or within the boundaries of the grounds belonging thereto is guilty of a misdemeanor. The provisions of this section shall not prohibit (a) the possession of any intoxicating liquor used for medicinal purposes when issued pursuant to a written order of a physician licensed to practice medicine under the laws of the State of California, (b) the possession of any intoxicating liquor by personnel for his or her own use who resides at such hospital or sanatorium or on the grounds thereof, (c) the possession of any intoxicating liquor used by a minister of the gospel or priest or rabbi in a religious sacrament or ceremony or (d) the service of wine to a patient as part of the hospital's regular menu or bill of fare if the patient is located in a portion of the premises wholly separate and isolated from patients receiving treatment for tuberculosis.

(Added by Stats.1963, c. 185, p. 924, § 1.)

Library References

Criminal Law ⇐27.
Hospitals ⇐3.
WESTLAW Topic Nos. 110, 204.

C.J.S. Criminal Law § 5 et seq.
C.J.S. Hospitals § 5.

Chapter 7

IMMUNIZATION AGAINST COMMUNICABLE DISEASES

Section

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2559.6, added by Stats.1949, c. 305, p. 593, § 1.5.

Law Review Commentaries

Faith healing. (1975) 8 Loyola L.Rev. (Calif.) 396.

Library References

Constitutional Law ⇐84.5(17).
Health and Environment ⇐23.
WESTLAW Topic Nos. 92, 199.

C.J.S. Constitutional Law §§ 527, 528.
C.J.S. Health and Environment §§ 18 to 21.

§ 3287. Inspection of records

The department may inspect and have access to all records of all institutions and clinics, both public and private, where tuberculosis patients are treated.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1973, c. 1212, p. 2750, § 50, operative July 1, 1974; Stats.1975, c. 671, p. 1464, § 2, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1973 amendment, after "The department" added "and the Department of Benefit Payments".

Operative date exception to Stats.1973, c. 1212, and implementation of the Act by the secretary of health and welfare agency after Jan. 1, 1974, see Historical and Statutory Notes under § 249.

Inoperability of provisions of Stats.1973, c. 1212, not in conformity with federal requirements, see Historical and Statutory Notes under § 249.

The 1975 amendment, after "The department", deleted "and the Department of Benefit Payments".

Derivation: Former § 414, added by Stats. 1939, c. 60, p. 492, § 414.

Library References

Health and Environment ⇐34.
Records ⇐58.
WESTLAW Topic Nos. 199, 326.

C.J.S. Health and Environment § 41.
C.J.S. Records § 36.

§ 3288. Advice to officers of state institutions

The department may advise officers of state educational, correctional, and medical institutions regarding the control of tuberculosis and the care of tuberculosis patients.

(Added by Stats.1957, c. 205, p. 860, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 412, added by Stats. 1939, c. 60, p. 492, § 412.

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

Ex. 3

Chapter 5

TUBERCULOSIS

Section
3279. Program for control; administration of available funds.
3279.1. Election of county to pay its share of health care cost; ineligibility for tuberculosis study or reimbursement.
3280. Legislative declaration.
3281 to 3284. Blank.

TUBERCULOSIS
Ch. 5

Section

Chapter 5 was added by Stats.1957, c. 205, p. 858, § 20.

Cross References

Tests for tuberculosis, see § 3450 et seq.

Code of Regulations References

Reportable diseases and conditions, see 17 Cal. Code of Regs. 2624.

Library References

Health and Environment ⇐22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment § 18.
Rehabilitation of disabled and dependent persons. Report of Senate Interim Committee on the Education and Rehabilitation of Handicapped Children and Adults, 1957, p. 21. Vol. 2 of Appendix to Journal of the Senate, Reg.Sess.1957.

§ 3279. Program for control; administration of available funds

The department shall maintain a program for the control of tuberculosis. The department shall administer the funds made available by the state for the care of tuberculosis patients.

(Added by Stats.1957, c. 205, p. 858, § 20. Amended by Stats.1973, c. 1212, p. 2750, § 49, operative July 1, 1974; Stats.1975, c. 671, p. 1464, § 1, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Operative date exception to Stats.1973, c. 1212, p. 2733, and implementation of the Act by the secretary of health and welfare agency after Jan. 1, 1974, see Historical and Statutory Notes under § 249.

Inoperability of provisions of Stats.1973, c. 1212, p. 2733, not in conformity with federal requirements, see Historical and Statutory Notes under § 249.

Derivation: Former §§ 410, 413, added by Stats.1939, c. 60, p. 492, §§ 410, 413.

Stats.1915, c. 766, p. 1530, § 1.

Library References

Health and Environment ⇐23.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 18 to 21.

Notes of Decisions

1. Validity of prior law

Stats.1915, p. 1530 (repealed; now, this section) was a valid exercise of the sovereign power and police power of the state to take all the necessary steps for the promotion of the health and comfort of its inhabitants and to make regulations essential to the protection of the state and the people thereof against the prevalence of disease, as the true purpose of county government organizations, is to perform functions which belong to the state itself, and the state may employ them jointly with itself or alone as instrumentalities in aid of the administration or carrying out of its own general governmental functions and policy. Sacramento County v. Chambers (1917) 164 P. 613, 33 C.A. 142.

2. Construction and application

In order to accomplish purpose for which this chapter dealing with tuberculosis was enacted, court should give chapter a broad and liberal construction. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

Legislature is vested with broad discretion in determining what are contagious and infectious diseases and in adopting means for preventing the spread thereof. Id.

§ 3279.1. Election of county to pay its share of health care cost; ineligibility for tuberculosis study or reimbursement

Notwithstanding any other provision of this chapter a county which has elected to come under the provisions of Section 14150.1 of the Welfare and Institutions Code [1] shall not receive any tuberculosis subsidy or reimbursement from the state under the provisions of this chapter.

(Added by Stats.1969, c. 811, p. 1634, § 1, operative July 1, 1970.)

[1] Repealed.

Historical and Statutory Notes

Section 2 of Stats.1969, c. 811, p. 1634, provides: "This act shall become operative on July 1, 1970."

§ 3280. Legislative declaration

Pulmonary tuberculosis is an infectious and communicable disease, dangerous to the public health, and all proper expenditures that may be made by any county, pursuant to this chapter, are necessary for the preservation of the public health of the county.

(Added by Stats.1957, c. 205, p. 859, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 3099, added by Stats. 1961, c. 60, p. 546, § 3099.

Stats.1935, c. 20, p. 80, § 6.

Library References

Health and Environment ⇐23.
Hospitals ⇐2.
WESTLAW Topic Nos. 199, 204.

C.J.S. Health and Environment §§ 18 to 21.
C.J.S. Hospitals § 4.

§§ 3281 to 3284. [Blank]

§ 3285. Duty of health officers; investigation of reported or suspected cases; powers of inspection, examination, quarantine or isolation

Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction and to ascertain the sources of such infections. In carrying out such investigations, each health officer is hereby invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed:

(a) To make such examinations as are deemed necessary of persons reasonably suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of the public health.

(b) Follow local rules and regulations regarding examinations, quarantine, or isolation, and all general and special rules, regulations, and orders of the state department in carrying out such examination, quarantine or isolation.

(c) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of the public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to protect the public health. Nothing contained in this subdivision shall be construed to prevent any person whom the health officer determines should have an examination for infectious tuberculosis from having such an examination made by a physician of his own choice who is licensed to practice medicine under the provisions of Chapter 5 (commencing with Section 2000), Division 2 of the Business and Professions Code under such terms and

conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.

(d) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be isolated, the period of time during which the order shall remain effective, the place of isolation or quarantine, and such other terms and conditions as may be necessary to protect the public health.

(e) Upon the making of an examination, isolation, or quarantine order as provided in this section, a copy of such order shall be served upon the person named in such order.

(f) Upon the receipt of information that any examination, quarantine, or isolation order, made and served as herein provided, has been violated, the health officer shall advise the district attorney of the county in which such violation has occurred, in writing, and shall submit to such district attorney the information in his possession relating to the subject matter of such examination, isolation, or quarantine order, and of such violation or violations thereof.

(g) Any and all orders authorized under this section shall be made by the health officer and his authority to make such orders shall be delegated only pursuant to Section 7. The health officer shall not make any orders incorporating by reference any other rules or regulations.

(Added by Stats.1957, c. 205, p. 859, § 20. Amended by Stats.1961, c. 30, p. 936, § 2; Stats.1965, c. 1344, p. 3230, § 1; Stats.1965, c. 1552, p. 3645, § 1.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605.

Derivation: Former § 2559.5, added by Stats.1945, c. 21, p. 689, § 1, amended by Stats. 1949, c. 305, p. 592, § 1; Stats.1955, c. 93, p. 558, § 1.

Cross References

Prosecution of violations of this section, see § 3355.

Code of Regulations References

Isolation and quarantine, see 17 Cal. Code of Regs. 2515 et seq.
Notification by laboratories of communicable disease evidence, see 17 Cal. Code of Regs. 2505.

Library References

Health and Environment ⇐7(3), 23, 24. WESTLAW Topic No. 199.

C.J.S. Health and Environment §§ 13, 18 to 25.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

Notes of Decisions

In general 2
Habeas corpus 5
Liability of officers 4

1. Validity

Provision of this section providing that health officer may make isolation or quarantine order of person with tuberculosis whenever health officer shall determine in particular case that quarantine or isolation is necessary for protection of public health, and that isolation or quarantine order shall be in writing, setting forth name of person to be isolated, period of time during which order shall remain effective, place of isolation or quarantine, and such other terms and conditions as may be necessary to protect public health does not deprive person having tuberculosis of his liberty without due process of law. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

2. In general

Provisions of this section dealing with duties of health officers in issuing tuberculosis quarantine orders make those duties discretionary rather than mandatory. Jones v. Czapkay (1960) 6 Cal.Rptr. 182, 182 C.A.2d 192.

This section does not apply to officers of the state department of public health. Id.

3. Quarantine orders

Consecutive orders of health officer for quarantine of person having tuberculosis may issue so long as person continues to be infected with tuberculosis and so long as health officer on reasonable grounds believes such person to be dangerous to public health. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

A health officer may institute an action to compel examination of person suspected of having tuberculosis who refuses to submit to an examination by the health officer or may issue a quarantine order, a violation of which may be prosecuted criminally. 36 Ops.Atty. Gen. 28.

A health officer has the power to quarantine and isolate an individual with active and contagious tuberculosis in any local jail when he finds that it is reasonably necessary to employ security measures to enforce the quarantine and to protect the public from contagion and no more suitable facility is available for such purpose. 30 Ops.Atty.Gen. 229, 11-8-57.

Where a patient quarantined in a sanatorium for the treatment of tuberculosis, demands that he be permitted to leave, reasonable physical force may be employed to prevent him from doing so. 6 Ops.Atty.Gen. 184.

4. Liability of officers

Exposure of plaintiff to known tubercular victim was sole proximate cause of plaintiff's acquiring the disease, and any breach of duty by health officers in failing to conduct proper or adequate investigation to insure strict compliance by patient with quarantine orders could constitute only a remote cause which could not form basis for imposition of liability upon them. Jones v. Czapkay (1960) 6 Cal. Rptr. 182, 182 C.A.2d 192.

5. Habeas corpus

Person, who is confined pursuant to quarantine order issued by health officer under this section is not entitled to relief on habeas corpus, where evidence shows reasonable cause to believe that person is infected, but person quarantined without reasonable grounds is entitled to relief by habeas corpus. Application of Halko (1966) 54 Cal.Rptr. 661, 246 C.A.2d 553.

§ 3286. Religious freedom; exemption from provisions

No examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination or organization and claims exemption on such ground, except that the provisions of this code regarding compulsory reporting of communicable diseases and isolation and quarantine shall apply where there is probable cause to suspect that such person is infected with the disease in a communicable stage. Such person shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he can be safely quarantined and/or isolated in his own home or other suitable place of his choice.

(Added by Stats.1957, c. 205, p. 859, § 20.)

§§ 3289 to 3291. Repealed by Stats.1975, c. 671, p. 1464, §§ 3 to 5, eff. Sept. 10, 1975

Historical and Statutory Notes

The repealed sections, added by Stats.1973, c. 1212, pp. 2750, 2751, §§ 51 to 53, provided for the succession by the department of benefits payments to the duties, purposes, responsibilities, jurisdiction, records, equipment, supplies and officers and employees of the department of health under this chapter.

§§ 3292, 3293. [Blank]

§ 3294. Establishment of wards, hospitals and sanatoriums

Each city, county, or group of counties may establish and maintain a tuberculosis ward, hospital, or sanatorium for the treatment of persons suffering from tuberculosis.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1975, c. 671, p. 1464, § 6, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 3300, added by Stats. 1939, c. 60, p. 547, § 3300, amended by Stats. 1939, c. 1070, p. 2996; Stats.1945, c. 1447, p. 2724, § 1; Stats.1947, c. 1000, p. 2266, § 3. Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐2.
Social Security and Public Welfare ⇐241.
WESTLAW Topic Nos. 204, 356A.

C.J.S. Hospitals § 4.
C.J.S. Social Security and Public Welfare § 126.

Notes of Decisions

1. In general

Former § 3300 (now this section), which provided that counties might establish and maintain a tuberculosis hospital for treatment of persons suffering from tuberculosis was permissive with respect to county assuming state's burden of caring for indigent persons, but was mandatory in its declaration that for such facility it should receive from state a sum prescribed. Los Angeles County v. State Dept. of Public Health (1958) 322 P.2d 968, 158 C.A.2d 425.

2. Agreement for joint care

A city and county might contract to provide for the care of their tuberculosis patients in a neighboring county sanatorium by proceeding under Stats.1921, p. 542, providing for the joint exercise of powers by counties, cities or both, notwithstanding Stats.1921, p. 1641, providing for the joint construction, ownership and management of tuberculosis hospitals, to be approved by the state bureau of tuberculosis, as a condition precedent to receiving state aid. City and County of San Francisco v. Boyle (1923) 215 P. 549, 191 C. 172.

3. Termination of agreement

Where three counties in 1918 entered into agreement to establish and maintain a tuberculosis hospital, and in 1953, the counties entered into an agreement for the withdrawal by one of the counties from participation in maintenance of the hospital, the counties could terminate the agreement for joint operation by agreement of a majority of each of the boards of supervisors, and without following the procedure for sale of county realty in accordance with Gov.C. 25520 et seq. 28 Ops.Atty.Gen. 349.

§ 3295. State care of persons who violate quarantine or isolation orders; lease of facilities

The state department shall lease any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer as provided in Section 3351 of the Health and Safety Code.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1975, c. 671, p. 1464, § 7, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 3300.4, added by Stats.1949, c. 1091, p. 1990, § 1.

§ 3296. Burial expenses of persons confined in state institutions

Whenever any person confined in any state institution, as provided in Section 3351 of this code, subject to the jurisdiction of the Director of Corrections, dies, and any personal funds or personal property of such person remains in the hands of the Director of Corrections, such funds may be applied in an amount not exceeding three hundred dollars ($300) to the payment of expenses relating to burial; provided, however, that if no such funds are available, the State Department of Health Services shall reimburse the Director of Corrections for such expenses in an amount not exceeding three hundred dollars ($300).

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1971, c. 1593, p. 3276, § 174, operative July 1, 1973; Stats.1977, c. 1252, § 272, operative July 1, 1978.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Operative effect of amendment by Stats.1971, c. 1593, see Historical and Statutory Notes under § 20.

Derivation: Former § 3300.45, added by Stats.1953, c. 28, p. 632, § 1.

Cross References

Director of corrections, see Penal Code § 5050 et seq.

Library References

Social Security and Public Welfare ⇐241
WESTLAW Topic No. 356A.

C.J.S. Social Security and Public Welfare § 126.

§ 3297. Release of person confined in county other than county of conviction

If the place of confinement of a person confined under the provisions of Section 3351 is in a county other than the county in which he was convicted, upon release he shall be released in the custody of the sheriff of the county in which he was convicted, and the sheriff shall forthwith return him to the place where he was convicted without the necessity of a court order or other process. The sheriff shall prior to the return of the person notify the health

officer having jurisdiction of the area to which he will be returned of the date he will reach said area.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1957, c. 1736, p. 3120, § 1.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

This section first took effect in its 1957 amended form since the 1957 addition and the 1957 amendment became effective on the same date.

Derivation: Former § 3300.46, added by Stats.1953, c. 331, p. 1600, § 1.

§§ 3298 to 3300.1. Repealed by Stats.1975, c. 671, p. 1464, §§ 8 to 11, eff. Sept. 10, 1975

Historical and Statutory Notes

Section 3298, added by Stats.1957, c. 205, p. 861, § 20, related to a state subsidy for patients cared for at public expense in private institutions. The section was derived from former § 3300a, added by Stats.1945, c. 601, p. 1132, § 1, renumbered § 3300.5 and amended by Stats.1947, c. 1000, p. 2267, § 4; Stats.1953, c. 550, p. 1810, § 1; Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Section 3299, added by Stats.1957, c. 205, p. 861, § 20, amended by Stats.1973, c. 1212, p. 2751, § 54, related to hospital reports and exchange of patients and contracts for care by other cities and counties. The section was derived from former § 3301, added by Stats. 1939, c. 60, p. 548, § 3301, amended by Stats. 1945, c. 1447, p. 2724, § 2; Stats.1947, c. 1000, p. 2267, § 5.

Section 3300, added by Stats.1957, c. 205, p. 861, § 20, amended by Stats.1959, c. 1579, p. 3910, § 1; Stats.1961, c. 1243, p. 3004, § 1, related to the amount of the state subsidy and also defined patient day and year. The section was derived from former §§ 3301.5, 3301.6, added by Stats.1947, c. 1000, p. 2268, § 6, amended by Stats.1949, c. 1242, p. 2195, §§ 1, 2; Stats.1953, c. 1513, p. 3175, §§ 1, 2.

Former § 3300, enacted by Stats.1939, c. 60, p. 547, § 3300, amended by Stats.1939, c. 1070, p. 2996; Stats.1945, c. 1447, p. 2724, § 1; Stats. 1947, c. 1000, p. 2266, § 3, and repealed by Stats.1957, c. 205, p. 861, § 1, related to establishment of tuberculosis hospitals by cities and counties, a state subsidy for public patients and admittance of pay patients.

Section 3300a, added by Stats.1945, c. 601, § 1 was renumbered § 3300.5 and amended by Stats.1947, c. 1000, § 4.

Section 3300.1, added by Stats.1961, c. 1243, p. 3005, § 2, amended by Stats.1963, c. 278, p. 1036, § 1, related to a city or county's use of contributions from nonstate sources to offset any state subvention.

§§ 3300.4 to 3300.5. Repealed by Stats.1957, c. 205, p. 848, § 1

Historical and Statutory Notes

Section 3300.4, added by Stats.1949, c. 1091, p. 1990, § 1, related to state care of tubercular persons who violate quarantine or isolation orders. See, now, § 3295.

Section 3300.45, added by Stats.1953, c. 28, p. 632, § 1, provided for burial expenses of persons confined to state tuberculosis treatment institutions. See, now, § 3296.

Section 3300.46, added by Stats.1953, c. 331, p. 1600, § 1, related to release of a person confined in a state tuberculosis treatment institution other than in the county of conviction.

Section 3300.5, added as § 3300a by Stats. 1945, c. 601, p. 1132, § 1, renumbered § 3300.5 and amended by Stats.1947, c. 1000, p. 2267, § 4; Stats.1953, c. 550, p. 1810, § 1, related to the state subsidy for patients cared for at public expense in private institutions.

§ 3301. Repealed by Stats.1975, c. 671, p. 1464, § 12, eff. Sept. 10, 1975

Historical and Statutory Notes

The repealed section, added by Stats.1957, c. 205, p. 862, § 20, derived from former § 3301.7, added by Stats.1953, c. 1513, p. 3176, § 3, related to the legislature's intention to adjust state participation from time to time.

Former § 3301, enacted by Stats.1939, c. 60, p. 548, § 3301, amended by Stats.1945, c. 1447, p. 2724, § 2; Stats.1947, c. 1000, p. 2267, § 5, derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, and repealed by Stats.1957, c. 205, p. 848, § 1, related to hospital reports, exchange of patients by counties and cities, and contracts for care of patients by other cities and counties.

§§ 3301.5 to 3301.7. Repealed by Stats.1957, c. 205, p. 848, § 1

Historical and Statutory Notes

The repealed sections, added by Stats.1947, c. 1000, p. 2268, § 6; Stats.1953, c. 1513, p. 3176, § 3, amended by Stats.1949, c. 1242, pp. 2195, 2196, §§ 1, 2; Stats.1953, c. 1513, pp. 3175, 3176, §§ 1, 2, fixed the amount of subsidy for tuberculosis treatment provided by the state to counties, cities, and cities and counties.

§ 3302. Joint establishment of ward or hospital; hospital central committee; appointment of delegates; expenses as county charge

Each group of counties desiring to establish and maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis shall appoint, by its board of supervisors, one supervisor as a delegate, who shall attend the general meetings of the delegates of each county in the group. The necessary expense incurred in attending such meetings is a county charge. The body thus formed shall be called the hospital central committee.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3302, enacted by Stats.1939, c. 60, p. 548, § 3302, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section provided for a hospital central committee for each group of counties which established a tuberculosis hospital.

Derivation: Former § 3302, enacted by Stats.1939, c. 60, p. 548, § 3302.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Cross References

Hospital central committee, powers and duties, see § 3306.

Library References

Hospitals ⇐2, 6.
WESTLAW Topic No. 204.
C.J.S. Hospitals §§ 4, 5 et seq.

Notes of Decisions

1. In general

Under former §§ 3302 to 3309, authorizing group of counties to join to establish and main-

tain tuberculosis hospital to be supervised by a hospital central committee, the employees of such hospital are employees of hospital's central committee and not employees of various counties maintaining the hospital, and are consequently not local miscellaneous members of state employees' retirement system and are not subject to compulsory retirement at 70, under provisions of Gov.C. § 20983 (repealed; see, now, § 20981) pertaining to such local miscellaneous members. 25 Ops.Atty.Gen. 47.

2. Termination of agreement

Where three counties in 1918 entered into agreement to establish and maintain a tuberculosis hospital, and in 1953 the counties entered into an agreement for the withdrawal by one of the counties from participation in maintenance of the hospital, the counties could terminate the agreement for joint operation of the hospital by agreement of a majority of each of the boards of supervisors, and without following the procedure for the sale of county realty in accordance with the Gov.C. § 25520 et seq. 28 Ops.Atty.Gen. 349.

§ 3303. Change in number of delegates; unanimous agreement

Each group of counties maintaining a tuberculosis hospital under this chapter may by unanimous agreement provide for a different number of delegates to the hospital central committee than the number provided for in this chapter and may provide for a method of deciding a tie vote of the hospital central committee.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law see Historical and Statutory Notes under § 410.

Former § 3303 enacted by Stats.1939, c. 60, p. 548, § 3303, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to a change in the number of delegates to the hospital central committee.

Derivation: Former § 3303, enacted by Stats.1939, c. 60, p. 548, § 3303.

Stats.1915, c. 766, p. 1530, § 3a, added Stats. 1935, c. 366, p. 1319, § 1.

§ 3304. Designation of place of business; assistance of county officers

The hospital central committee shall designate a county within the group maintaining the hospital as the place where the business of the hospital is to be transacted and where funds of the hospital are to be kept and deposited. All county officers selected for the business of the hospital shall render all necessary assistance required by the committee in keeping with the duties of their respective offices.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3304, enacted by Stats.1939, c. 60, p. 548, § 3304, and derived from Stats.1915, c. 766, p. 1530, § 3a; Stats.1935, c. 366, p. 1319, § 1, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to designation of place of business and assistance to be rendered by county officers.

Derivation: Former § 3304, enacted by Stats.1939, c. 60, p. 548, § 3304.

Stats.1915, c. 766, p. 1530, § 3a, added Stats. 1935, c. 366, p. 1319, § 1.

Notes of Decisions

In general 1

1. In general

Weimar Sanatorium, a tuberculosis hospital operated by a number of counties in the Sacramento area, is an entity separate from its constituent counties and the hospital rather than the constituent counties is the employer of those persons who compose the hospital staff. 36 Ops.Atty.Gen. 237, 11–9–60.

§ 3305. Contracts among delegates; effect upon counties; apportionment of costs; collection of money due from counties

The delegates from each county may enter into an agreement with delegates from the other counties, on behalf of the county appointing them, binding the county to the joint enterprise and apportioning the cost of constructing, establishing, and maintaining the hospital. Money due from any county under the agreement may be collected by the hospital central committee or, on its behalf, by the board of supervisors of any county in the group, by action in the county in which the hospital is situated.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3305, enacted by Stats.1939, c. 60, p. 549, § 3305, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to contracts among delegates and collection of money due from counties.

Derivation: Former § 3305, enacted by Stats.1939, c. 60, p. 549, § 3305.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Notes of Decisions

In general 1

1. In general

A city's contract to advance money to a neighboring county for the construction of additional hospital units for the care and treatment of the city's tuberculosis patients, was not invalid because the county retained supervisory control of the entire hospital, including the right to reject or remove patients, there being no presumption that unreasonable rules will be adopted or arbitrary authority exercised. City and County of San Francisco v. Boyle (1923) 215 P. 549, 191 C. 172.

That a gross sum set aside by a city to cover the cost of construction and deterioration of additional hospital units to be constructed by a neighboring county for the care and treatment of the city's tuberculosis patients as provided by a contract between the city and county may be wholly consumed on expiration of the contract term, would not be conclusive proof of a bad bargain and does not invalidate the contract, the presumption being that the city governing body, whose judgment is conclusive in the absence of a showing of want of jurisdiction, bad faith, gross extravagance, or some fact sufficient to vitiate the contract considered the wisdom and policy of the whole plan in the light of the objects to be attained. Id.

§ 3306. Building committee; powers of hospital central committee

The hospital central committee may appoint a committee to supervise the construction of the hospital, approve the bills, and do the usual things required of a building committee.

The hospital central committee is the governing body of the hospital. It has the same powers and duties in regard to the hospital that a board of supervisors has over a county hospital. It shall adopt rules for its govern-

ment, which shall include provisions for holding meetings and for the addition of other counties to the group. It may appoint such committees as are necessary, and shall prescribe their duties.

(Added by Stats.1957, c. 205, p. 862, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3306, enacted by Stats.1939, c. 60, p. 549, § 3306, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to the building committee and powers of the hospital central committee.

Derivation: Former § 3306, enacted by Stats.1957, c. 205, p. 862, § 20.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐2.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 4.

§ 3307. Acquisition and disposition of land; required vote; notice of intention; title

Any land required may be acquired or disposed of by the hospital central committee in such manner as may be determined by a three-fourths vote of its members, if all counties comprising a group shall have had notice of the intention to acquire or dispose of the land. Title to land may be held in the name of the entire group or in the name of any county composing the group, as trustee for the use and benefit of all, as may be determined by the hospital central committee.

(Added by Stats.1957, c. 205, p. 863, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3307, enacted by Stats.1939, c. 60, p. 549, § 3307, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to acquisition and disposition of land.

Derivation: Former § 3307, enacted by Stats.1939, c. 60, p. 549, § 3307.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐2.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 4.

Notes of Decisions

1. Termination of agreement

Three counties operating a tuberculosis sanitorium might terminate agreement for joint operation by agreement of a majority of each board of supervisors, and the sanitorium may be transferred to two of the counties, eliminating the third, as incident of such agreement, without complying with requirements of Gov.C. § 25520 et seq. for sale of county real property. 28 Ops.Atty.Gen. 349, 12-21-56.

§ 3308. Payment of expenses by counties; deposit in cash revolving fund

Each county in the group shall pay its proportionate share to the hospital central committee of an amount designated by the committee to constitute a cash revolving fund to carry on the usual work and expense of the hospital. Each month a statement of the actual expenses of the hospital shall be sent to the board of supervisors of each county, together with a claim for the county's proportionate share of the expenses. Monthly claims shall be reduced to the extent of any remaining balance of a county's quarterly payments. The amounts when collected shall be paid into the cash revolving fund.

(Added by Stats.1957, c. 205, p. 863, § 20. Amended by Stats.1959, c. 1489, p. 3781, § 1.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3308, enacted by Stats.1939, c. 60, p. 549, § 3308, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to payment of expenses by counties and deposit of amounts collected in the cash revolving fund.

Derivation: Former § 3308, enacted by Stats.1939, c. 60, p. 549, § 3308.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

§ 3309. Admission of patients

The hospital central committee may determine and pass upon the right of admission to the hospital of applicants, subject to the limitations of this chapter.

(Added by Stats.1957, c. 205, p. 863, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Former § 3309, enacted by Stats.1939, c. 60, p. 549, § 3309, and derived from Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2, was repealed by Stats.1957, c. 205, p. 848, § 1. The former section related to admission of patients.

Derivation: Former § 3309, enacted by Stats.1939, c. 60, p. 549, § 3309.

Stats.1915, c. 766, p. 1531, § 3; Stats.1919, c. 464, p. 853, § 1; Stats.1921, c. 861, p. 1642, § 2.

Library References

Hospitals ⇐5.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 7.

§ 3310. Quarterly estimate of amount required to operate hospital; payment of claim

Prior to the beginning of each quarter of the year an estimate of the amount required to operate the hospital for the subsequent quarter may be sent by the hospital central committee to the board of supervisors of each county, together with a claim for the county's proportionate share of the quarterly expenses of the hospital, and, upon approval of the board of supervisors, the county shall pay such claim.

(Added by Stats.1959, c. 1489, p. 3781, § 2.)

Library References

Hospitals ⇐2.
WESTLAW Topic No. 204.
C.J.S. Hospitals § 4.

§ 3315. Annual subvention for control program; local health departments; use; additional funds

The State Department of Health Services may distribute for the purpose of tuberculosis control an annual subvention, paid quarterly, to any local health department that maintains a tuberculosis control program consistent with standards and procedures established by the department. This annual subvention shall be used primarily for the strengthening of tuberculosis prevention activities by local health departments. Further, the department may allocate additional funds to selected local health departments based on high disease incidence, or other standards established by the department. These additional funds shall be expended primarily for the cost of diagnosis, treatment, and followup services required for an effective tuberculosis control program. Services rendered under this section may not be made dependent on status of residence.

(Added by Stats.1975, c. 671, p. 1464, § 13, eff. Sept. 10, 1975. Amended by Stats.1977, c. 1252, § 273, operative July 1, 1978.)

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

§ 3316. Local control programs; standards and procedures

The State Department of Health Services may establish standards and procedures for the operation of local tuberculosis control programs. Such standards shall include, but not be limited to, the maintenance of records and reports relative to services rendered and to expenditures made which shall be reported semiannually to the State Department of Health Services in such manner as it may specify.

(Added by Stats.1975, c. 671, p. 1465, § 14, eff. Sept. 10, 1975. Amended by Stats.1977, c. 1252, § 274, operative July 1, 1978.)

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

§ 3317. Administrative costs; limitation; laboratory services and hospitalization facilities

Of the annual appropriation made to the department for tuberculosis control, the department may expend a sum not to exceed 7.5 percent of the total, for administrative costs. In addition, it may, if it deems necessary, withhold a portion of the appropriation to pay for the cost of regional

laboratory services and regional hospitalization facilities for patients whose care cannot be reasonably accomplished in facilities available within a local health department, or it may contract with physicians to supervise the medical care of tuberculosis patients in areas where such specialized care is not available. Further, the appropriation shall be available to purchase materials or drugs used in tuberculosis control for distribution to local health departments.

(Added by Stats.1975, c. 671, p. 1465, § 15, eff. Sept. 10, 1975.)

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

§§ 3325, 3326. Repealed by Stats.1947, c. 1000, § 8, eff. June 30, 1947, operative July 1, 1947

Historical and Statutory Notes

The repealed sections, added by Stats.1939, c. 919, related to convalescent colonies for tuberculosis patients.

§§ 3340 to 3342. Repealed by Stats.1957, c. 205, p. 848, § 1

Historical and Statutory Notes

The repealed sections, added by Stats.1939, c. 919, p. 2589, related to payment and expenditure of tuberculosis subsidy funds.

Chapter 6

VIOLATIONS

Section

Chapter 6 was added by Stats.1957, c. 205, p. 863, § 20.

Cross References

Prosecution of violations of venereal disease prevention and control provisions, see § 3196.

§ 3350. Violation of rule, order, or regulation of state department; misdemeanor

Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the state department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor.

(Added by Stats.1957, c. 205, p. 863, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2600, added by Stats. 1939, c. 60, p. 542, § 2600.

Pen.C. § 377a, added Stats.1905, c. 144, p. 143, § 1.

Cross References

Misdemeanors,
Defined, see Penal Code § 17.
Punishment, see Penal Code §§ 19, 19.2.

Library References

Criminal Law ⇐27.
Health and Environment ⇐37, 43.
WESTLAW Topic Nos. 110, 199.

C.J.S. Criminal Law § 5 et seq.
C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

§ 3351. Refusal to comply with isolation order; misdemeanor; confinement by court order; probation

Inasmuch as the order provided for by Section 3285 is for the protection of the public health, any person who, after service upon him of an order of a health officer directing his isolation or examination as provided in Section 3285, violates or fails to comply with the same or any provision thereof, is guilty of a misdemeanor, and, upon conviction thereof, in addition to any and all other penalties which may be imposed by law upon such conviction, may be ordered by the court confined until such order of such health officer shall have been fully complied with or terminated by such health officer, but not exceeding six months from the date of passing judgment upon such conviction; further provided, that the court, upon suitable assurances that such order of such health officer will be complied with, may place any person convicted of a violation of such order of such health officer upon probation for a period not to exceed two years, upon condition that the said order of said health officer be fully complied with; and provided further, that upon any subsequent violation of such order of such health officer, such probation shall be terminated and confinement as herein provided ordered by the court.

(Added by Stats.1957, c. 205, p. 863, § 20. Amended by Stats.1961, c. 30, p. 937, § 3; Stats.1965, c. 1552, p. 3646, § 2.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1961 amendment included an examination as provided in § 3285 as subject to the provisions of this section.

The 1965 amendment added the introductory phrase "Inasmuch as the order provided for by § 3285 is for the protection of the public health".

Derivation: Former § 2600.5, added by Stats.1949, c. 305, p. 592, § 1.

Cross References

Misdemeanor,
Defined, see Penal Code § 17.
Punishment, see Penal Code §§ 19, 19.2.
Prosecution of violations, see § 3355.

Library References

Health and Environment ⇐37, 43.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

Notes of Decisions

In general 1

1. In general

If a person suspected of having tuberculosis refuses to submit to an examination by the health officer, an action may be instituted to compel such examination or a quarantine order may be issued, a violation of which may be prosecuted criminally. 36 Ops.Atty.Gen. 28, 7-14-60.

§ 3352. Subsequent convictions; punishment

Upon any subsequent conviction under the provisions of Section 3351, the court may order the person confined for a period not exceeding one year for such subsequent conviction, or such other penalty as provided by said section.

(Added by Stats.1957, c. 205, p. 864, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2600.6, added by Stats.1953, c. 331, p. 1600, § 2.

Cross References

Prior convictions, form of allegations, see Penal Code § 969.

Library References

Health and Environment ⇐43.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 51, 156.

Notes of Decisions

Jurisdiction 1

1. Jurisdiction

Municipal courts, have jurisdiction to enforce provisions of this section providing that for a second violation of tuberculosis quarantine, a recalcitrant tuberculosis patient may be confined for a period of one year in facilities provided by the state department of public health, but justice courts do not have jurisdiction to do so. 23 Ops.Atty.Gen. 275.

§ 3353. Wilful exposure to disease; misdemeanor

Except in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who wilfully exposes himself, and any

person who wilfully exposes another person afflicted with such disease, is guilty of a misdemeanor.

(Added by Stats.1957, c. 205, p. 864, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2601, added by Stats. 1939, c. 60, p. 542, § 2601.

Pen.C. former § 394.

Cross References

Misdemeanor,
Defined, see Penal Code § 17.
Punishment, see Penal Code §§ 19, 19.2.

Library References

Health and Environment ⇐37, 43.
WESTLAW Topic No. 199.

C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

§ 3354. Violations of chapter 3; misdemeanor; penalty

Any person who violates any section in Chapter 3 of this division, with the exception of Section 3111, is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or by imprisonment for a term of not more than 90 days, or by both. He is guilty of a separate offense for each day that the violation continued.

(Added by Stats.1957, c. 205, p. 864, § 20. Amended by Stats.1983, c. 1092, § 151, eff. Sept. 27, 1983, operative Jan. 1, 1984.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1983 amendment increased the minimum fine from $25 to $50; and increased the maximum fine from $500 to $1,000.

Derivation: Former § 2602, added by Stats. 1939, c. 60, p. 542, § 2602.

Stats.1907, c. 492, p. 902, § 21; Stats.1911, c. 339, p. 571, § 4.

Library References

Criminal Law ⇐27.
Health and Environment ⇐37, 43.
WESTLAW Topic Nos. 110, 199.

C.J.S. Criminal Law § 5 et seq.
C.J.S. Health and Environment §§ 48, 51, 113, 114, 141 to 156.

§ 3355. Prosecution of violations

The district attorney of the county in which a violation of Sections 3285 and 3351 may be committed, shall prosecute all such violations and, upon the request of a health officer, shall prosecute, as provided in Section 3351, violations of any isolation or examination order of a health officer made and served as provided in Section 3285 or Section 3002.

(Added by Stats.1957, c. 205, p. 864, § 20. Amended by Stats.1961, c. 30, p. 938, § 4; Stats.1963, c. 278, p. 1037, § 2.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1961 amendment included any examination order of a health officer as subject to prosecution for violation and added service according to § 3002 as a valid method of service.

The 1963 amendment eliminated duplications added by the 1961 amendment.

Derivation: Former § 2603, added by Stats. 1949, c. 305, p. 594, § 3.

Library References

Health and Environment ⇐39 to 43.
WESTLAW Topic No. 199.

C.J.S. Health and Environment §§ 51, 114, 155 to 157.

Notes of Decisions

In general 1

1. In general

If a person suspected of having tuberculosis refused to submit to an examination by the health officer, an action may be instituted to compel such examination or, a quarantine order may be issued, a violation of which may be prosecuted criminally. 36 Ops.Atty.Gen. 28, 7-14-60.

§ 3356. Illegal possession of intoxicating liquor

Every person who possesses any intoxicating liquor in or on any public hospital or sanatorium providing for the treatment of tuberculosis or within the boundaries of the grounds belonging thereto is guilty of a misdemeanor. The provisions of this section shall not prohibit (a) the possession of any intoxicating liquor used for medicinal purposes when issued pursuant to a written order of a physician licensed to practice medicine under the laws of the State of California, (b) the possession of any intoxicating liquor by personnel for his or her own use who resides at such hospital or sanatorium or on the grounds thereof, (c) the possession of any intoxicating liquor used by a minister of the gospel or priest or rabbi in a religious sacrament or ceremony or (d) the service of wine to a patient as part of the hospital's regular menu or bill of fare if the patient is located in a portion of the premises wholly separate and isolated from patients receiving treatment for tuberculosis.

(Added by Stats.1963, c. 185, p. 924, § 1.)

Library References

Criminal Law ⇐27.
Hospitals ⇐3.
WESTLAW Topic Nos. 110, 204.

C.J.S. Criminal Law § 5 et seq.
C.J.S. Hospitals § 5.

Chapter 7

IMMUNIZATION AGAINST COMMUNICABLE DISEASES

Section

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 2559.6, added by Stats.1949, c. 305, p. 593, § 1.5.

Law Review Commentaries

Faith healing. (1975) 8 Loyola L.Rev. (Calif.) 396.

Library References

Constitutional Law ⇐84.5(17).
Health and Environment ⇐23.
WESTLAW Topic Nos. 92, 199.

C.J.S. Constitutional Law §§ 527, 528.
C.J.S. Health and Environment §§ 18 to 21.

§ 3287. Inspection of records

The department may inspect and have access to all records of all institutions and clinics, both public and private, where tuberculosis patients are treated.

(Added by Stats.1957, c. 205, p. 860, § 20. Amended by Stats.1973, c. 1212, p. 2750, § 50, operative July 1, 1974; Stats.1975, c. 671, p. 1464, § 2, eff. Sept. 10, 1975.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

The 1973 amendment, after "The department" added "and the Department of Benefit Payments".

Operative date exception to Stats.1973, c. 1212, and implementation of the Act by the secretary of health and welfare agency after Jan. 1, 1974, see Historical and Statutory Notes under § 249.

Inoperability of provisions of Stats.1973, c. 1212, not in conformity with federal requirements, see Historical and Statutory Notes under § 249.

The 1975 amendment, after "The department", deleted "and the Department of Benefit Payments".

Derivation: Former § 414, added by Stats. 1939, c. 60, p. 492, § 414.

Library References

Health and Environment ⇐34.
Records ⇐58.
WESTLAW Topic Nos. 199, 326.

C.J.S. Health and Environment § 41.
C.J.S. Records § 36.

§ 3288. Advice to officers of state institutions

The department may advise officers of state educational, correctional, and medical institutions regarding the control of tuberculosis and the care of tuberculosis patients.

(Added by Stats.1957, c. 205, p. 860, § 20.)

Historical and Statutory Notes

Continuation of existing law, see Historical and Statutory Notes under § 410.

Derivation: Former § 412, added by Stats. 1939, c. 60, p. 492, § 412.

Library References

Health and Environment ⇐6, 22 et seq.
WESTLAW Topic No. 199.
C.J.S. Health and Environment §§ 13, 18.

Cx. 4

BILL NUMBER: AB 803 CHAPTERED 10/04/93
BILL TEXT

CHAPTER 676
FILED WITH SECRETARY OF STATE OCTOBER 4, 1993
APPROVED BY GOVERNOR OCTOBER 1, 1993
PASSED THE ASSEMBLY SEPTEMBER 10, 1993
PASSED THE SENATE SEPTEMBER 9, 1993
AMENDED IN SENATE SEPTEMBER 7, 1993
AMENDED IN SENATE AUGUST 30, 1993
AMENDED IN SENATE AUGUST 18, 1993
AMENDED IN SENATE AUGUST 17, 1993
AMENDED IN SENATE JULY 12, 1993
AMENDED IN ASSEMBLY APRIL 15, 1993

INTRODUCED BY Assembly Member Gotch

FEBRUARY 25, 1993

An act to amend Section 3351 of, to add Sections 3003, 3006, 3054, 3279.3, 3281, 3282, 3283, 3284, 3285.1, 3285.2, 3285.3, and 3285.4 to, and to repeal and add Section 3285 of, the Health and Safety Code, relating to communicable disease.

LEGISLATIVE COUNSEL'S DIGEST

AB 803, Gotch. Communicable disease: tuberculosis.

(1) Existing law requires the State Department of Health Services to maintain a program for the control of tuberculosis.

This bill would authorize the State Director of Health Services and a local health officer to order examinations for tuberculosis infection, as defined, of certain persons.

The bill would require the department to be the lead agency for all tuberculosis control and prevention activities at the state level.

The bill would, with certain exceptions, prohibit a person known to have active tuberculosis disease, as defined, or a person for whom the medical staff has reasonable grounds to believe has active tuberculosis disease from being discharged from a licensed health facility, or penal institution, or transferred, until certain notification and in some situations, treatment plan approval requirements are met.

The bill would require a health care provider who provides treatment to, or a person in charge of a health facility or clinic providing outpatient treatment for, a person with active tuberculosis, to report to the local health officer, as prescribed. The bill would require the health care provider to examine, or cause to be examined all household contacts of the person, as specified.

This bill would require a health officer to notify the medical officer of the parole region when there are reasonable grounds to believe that a parolee under the jurisdiction of the Department of Corrections has active tuberculosis disease. By imposing new duties upon a local entity, this bill would impose a state-mandated local program.

(2) Existing law requires a local health officer to use every available means to ascertain the existence of, and investigate,

all reported or suspected cases of tuberculosis in the infection stages, to make examinations and isolate, or quarantine and isolate certain persons, following local rules and regulations, and to make an examination order and isolation or quarantine order under certain circumstances, as prescribed.

This bill would in addition authorize the local health officer, under prescribed conditions, to issue an order authorizing removal to, or admission into, a health facility or other treatment facility, an order requiring completion of an appropriate prescribed course of medication, an order to follow a course of directly observed therapy, or an order for exclusion from the workplace. The bill would authorize a health officer to issue an order for isolation of persons with infectious tuberculosis in their residence. The order would be required to include certain information, including payer source. The bill would authorize a health officer to issue an order authorizing removal to, or admission into, a health facility or other treatment facility, as prescribed. The bill would exclude persons incarcerated in a state correctional institution from being subject to one of those orders.

The bill would prohibit anything in that provision from being construed to permit or require forcible administration of medication.

This bill would authorize a health officer to remove to, or detain in, a hospital or other place for examination or treatment persons subject to an order under this act, as prescribed.

(3) Existing law provides that any person who violates or fails to comply with an order of a health officer directing his or her isolation or examination is guilty of a misdemeanor.

This bill would instead provide that any person who violates or fails to comply with any order described in (2) is guilty of a misdemeanor. By changing the definition of a crime, the bill would impose a state-mandated local program.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that for certain costs no reimbursement is required by this act for a specified reason.

Moreover, this bill would provide that, if the Commission on State Mandates determines that this bill contains other costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3003 is added to the Health and Safety Code, to read:

3003. As used in this division, a person has "active tuberculosis disease" when either one of the following occur:

(a) A smear or culture taken from any source has tested positive for tuberculosis and the person has not completed the appropriate prescribed course of medication for tuberculosis disease.

(b) There is radiographic, current clinical, or laboratory evidence sufficient to establish a medical diagnosis of tuberculosis for which treatment is indicated.

SEC. 2. Section 3006 is added to the Health and Safety Code, to read:

3006. As used in this division the following terms have the following meanings, unless the context indicates otherwise:

(a) "Infectious tuberculosis disease" means active or suspected active tuberculosis disease in an infectious state.

(b) "Tuberculosis infection" means the latent phase of tuberculosis, during which the infected person cannot spread tuberculosis to others.

(c) "Heightened risk of tuberculosis exposure" means likely exposure to persons with infectious tuberculosis disease.

(d) "The appropriate prescribed course of medication for tuberculosis disease" means that course recommended by the most recent guidelines of the department, the most recent guidelines of the Centers for Disease Control and Prevention, or the most recent guidelines of the American Thoracic Society.

(e) "Directly observed therapy" means the appropriately prescribed course of treatment for tuberculosis disease in which the prescribed antituberculosis medications are administered to the person or taken by the person under direct observation.

(f) An "examination" for tuberculosis infection or disease means conducting tuberculosis specific tests, including, but not limited to, Mantoux tuberculin skin tests, laboratory examination, and X-rays, as recommended by the most recent guidelines of any of the following:

(1) The local health officer.

(2) The department.

(3) The Centers for Disease Control and Prevention.

(4) The American Thoracic Society.

(g) "State correctional institution" means a prison, institution, or other facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority.

(h) "Local detention facility" is defined in Section 6031.4 of the Penal Code.

(i) "Penal institution" means either a state correctional institution or a local detention facility.

(j) "Health facility" means a licensed health facility as defined in Sections 1250, 1250.2, and 1250.3.

SEC. 3. Section 3054 is added to the Health and Safety Code, to read:

3054. (a) The state director may order examinations for tuberculosis infection in the following persons for the purpose of directing preventive measures:

(1) Persons in close contact with persons with infectious tuberculosis disease.

(2) Other persons for whom the state director has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination for tuberculosis infection shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

SEC. 4. Section 3279.3 is added to the Health and Safety Code, to read:

3279.3. The state department shall be the lead agency for all tuberculosis control and prevention activities at the state level.

SEC. 5. Section 3281 is added to the Health and Safety Code, to read:

3281. (a) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(1) A person known to have active tuberculosis.

(2) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis.

In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 3282 is approved by a health officer.

Persons specified in this subdivision may be discharged from a penal institution only after a written treatment plan described in Section 3282 is received by a health officer. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(b) No health facility shall transfer a person described in paragraph (1) or (2) of subdivision (a) to another health facility unless subdivision (e) is complied with. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in paragraph (1) or (2) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in paragraphs (1) and (2) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) Persons specified in paragraph (1) or (2) of subdivision (a), in subdivision (b), in subdivision (c), or in subdivision (d) may be discharged, released, or transferred, as the case may be, only after notification and a written treatment plan pursuant to Section 3282 has been received by the local health officer. When prior notification is not possible or would jeopardize the public safety or the safety and security of the penal institution, then the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

SEC. 6. Section 3282 is added to the Health and Safety Code, to read:

3282. Each health care provider who treats a person for active tuberculosis, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis shall promptly report to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis, and when a person ceases treatment for tuberculosis. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or

discontinues care. The report shall include an individual treatment plan that indicates the name of the medical provider who has specifically agreed to provide medical care, the address of the person, and any other pertinent clinical or laboratory information required by the health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plans. Nothing in this section shall authorize the disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 1.11 (commencing with Section 199.20) of, Chapter 1.12 (commencing with Section 199.30) of, and Chapter 1.13 (commencing with Section 199.42) of, Division 1.

In the case of a parolee under the jurisdiction of the Department of Corrections, the health officer shall notify the medical officer of the parole region when there are reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

SEC. 7. Section 3283 is added to the Health and Safety Code, to read:

3283. Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to the local health officer for examination. Each health care provider shall promptly notify the health officer of the referral. When required by the health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the health officer or designee. If any abnormality consistent with the symptoms of tuberculosis disease is found, steps satisfactory to the health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment. Contacts shall be reexamined at times and in a manner as the health officer may require. When requested by the health officer, a health care provider shall report the results of any examination related to tuberculosis of a contact.

SEC. 8. Section 3284 is added to the Health and Safety Code, to read:

3284. (a) Within the territory under his or her jurisdiction, each health officer may order examinations for tuberculosis infection for the purposes of directing preventive measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the health officer has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination pursuant to this section shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

SEC. 9. Section 3285 of the Health and Safety Code is repealed.

SEC. 10. Section 3285 is added to the Health and Safety Code, to read:

3285. Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately

investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections. In carrying out the investigations, each health officer shall follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department. If the health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the health officer may issue any orders he or she deems necessary to protect the public health or the health of any other person, and may make application to a court for enforcement of the orders. The orders shall be in writing, and shall include the name of the person, the period of time during which the order shall remain effective, the location, payor source, and other terms and conditions as may be necessary to protect the public health. Upon issuing an order, a copy of the order shall be served upon the person named in the order. Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof.

Any and all orders authorized under this chapter shall be made by the health officer, and his or her authority to make the orders may be delegated to the person in charge of medical treatment of inmates in penal institutions within the territory, or pursuant to Section 7. The health officer shall not make any orders incorporating by reference any other rules or regulations.

The orders may include, but shall not be limited to, any of the following:

(a) An order authorizing the removal to, or admission into, a health facility or other treatment facility for appropriate examination for tuberculosis of a person who is known to have active tuberculosis, or a person for whom there are reasonable grounds to believe that the person has active tuberculosis and who is unable or unwilling voluntarily to submit to the examination by a physician or by the health officer. Any person whom the health officer determines should have an examination for tuberculosis may have the examination made by a physician of his or her own choice who is licensed to practice medicine under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code under terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.

(b) An order requiring a person who has active tuberculosis to complete an appropriate prescribed course of medication for tuberculosis and, if necessary, to follow required contagion precautions for tuberculosis. This subdivision does not allow the forceable or involuntary administration of medication. If an order to complete therapy is not complied with, the health officer may issue orders pursuant to subdivision (d), (e), (f), or (g).

(c) An order requiring a person who has active tuberculosis and who is unable or unwilling otherwise to complete an appropriate prescribed course of medication for tuberculosis to

follow a course of directly observed therapy. This subdivision does not allow forceable or involuntary administration of medication. If an order to follow a course of directly observed therapy is not complied with, the health officer may issue orders pursuant to subdivision (d), (e), (f), or (g).

(d) An order for the removal to, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has infectious tuberculosis, or who presents a substantial likelihood of having infectious tuberculosis, based upon proven epidemiologic evidence, clinical evidence, X-ray readings, or tuberculosis laboratory test results.

(2) The health officer finds, based on recognized infection control principles, that there is a substantial likelihood the person may transmit tuberculosis to others because of his or her inadequate separation from others.

(e) An order for the removal to, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has active tuberculosis disease, or has been reported to the health officer as having active tuberculosis disease with no subsequent report to the health officer of the completion of an appropriate prescribed course of medication for tuberculosis.

(2) There is a substantial likelihood, based on the person's past or present behavior, that he or she cannot be relied upon to participate in or complete an appropriate prescribed course of medication for tuberculosis and, if necessary, follow required contagion precautions for tuberculosis. The behavior may include, but is not limited to, refusal or failure to take medication for tuberculosis, refusal or failure to keep appointments or treatment for tuberculosis, refusal or failure to complete the treatment for tuberculosis, or disregard for contagion precautions for tuberculosis.

(f) An order for exclusion from attendance at the workplace for persons with infectious tuberculosis. The order may, also, exclude the person from any place when the health officer determines that the place cannot be maintained in a manner adequate to protect others against the spread of tuberculosis.

(g) An order for isolation of persons with infectious tuberculosis to their place of residence until the health officer has determined that they no longer have infectious tuberculosis.

(h) This section shall apply to all persons except those incarcerated in a state correctional institution.

(i) This section shall not be construed to require a private hospital or other private treatment facility to accept any patient without a payment source, including county responsibilities under Section 17000 of the Welfare and Institutions Code, except as required by Sections 1317 et seq. or by federal law.

SEC. 11. Section 3285.1 is added to the Health and Safety Code, to read:

3285.1. The health officer may remove to, or detain in, a hospital or other place for examination or treatment a person who is the subject of an order of removal or detention issued pursuant to Section 3285 without a prior court order except that when a person detained pursuant to Section 3285 has requested release, the health officer shall make an application for a court order authorizing the detention within 72 hours after the

request or, if the 72-hour period ends on a Saturday, Sunday, or legal holiday, by the end of the first business day following the Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After the request for release, detention shall not continue for more than five business days in the absence of a court order authorizing detention. However, in no event shall any person be detained for more than 60 days without a court order authorizing the detention. The health officer shall seek further court review of the detention within 90 days following the initial court order authorizing detention and thereafter within 90 days of each subsequent court review. In any court proceeding to enforce a health officer's order for the removal or detention of a person, the health officer shall prove the particularized circumstances constituting the necessity for the detention by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by counsel and upon the request of the person, counsel shall be provided.

SEC. 12. Section 3285.2 is added to the Health and Safety Code, to read:

3285.2. (a) An order of a health officer pursuant to Section 3285 shall set forth all of the following:

(1) The legal authority under which the order is issued, including the particular sections of state law or regulations.

(2) An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order.

(3) The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected.

(b) An order for the removal and detention of a person shall do all of the following:

(1) Include the purpose of the detention.

(2) Advise the person being detained that he or she has the right to request release from detention by contacting a person designate on the health officer's order at the telephone number stated on the order and that the detention shall not continue for more than five business days after the request, in the absence of a court order authorizing the detentions.

(3) Advise the person being detained that, whether or not he or she requests release from detention, the health officer is required to obtain a court order authorizing detention within 60 days following the commencement of detention and thereafter shall further seek court review of the detention within 90 days of the court order and within 90 days of each subsequent court review.

(4) Advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(5) Be accompanied by a separate notice that shall include, but not be limited to, all of the following additional information:

(A) That the person being detained has the right to request release from detention by contacting a person designated on the health officer's order at a telephone number stated on the order, and that the detention shall not continue for more than

five business days after the request in the absence of a court order authorizing the detention.

(B) That he or she has the right to arrange to be advised and represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(C) That he or she may supply the addresses or telephone numbers of friends or relatives to receive notification of the person's detention, and that the health officer shall, at the patient's request, provide notice to a reasonable number of those people that the person is being detained.

SEC. 13. Section 3285.3 is added to the Health and Safety Code, to read:

3285.3. Notwithstanding any inconsistent provision of Section 3285, 3285.1 or 3285.2, all of the following shall apply:

(a) A person who is detained solely pursuant to subdivision (a) of Section 3285 shall not continue to be detained beyond the minimum period of time required, with the exercise of all due diligence, to make a medical determination of whether a person who is suspected of having tuberculosis, has active tuberculosis or whether a person who has active tuberculosis has infectious tuberculosis. Further detention of the person shall be authorized only upon the issuance of a health officer's order pursuant to subdivision (d) or (e) of Section 3285.

(b) A person who is detained solely for the reasons described in subdivision (d) of Section 3285 shall not continue to be detained after he or she ceases to be infectious or after the health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis after his or her release from detention.

(c) A person who is detained for the reasons described in subdivision (f) of Section 3285 shall not continue to be detained after he or she has completed an appropriate prescribed course of medication.

SEC. 14. Section 3285.4 is added to the Health and Safety Code, to read:

3285.4. For the purposes of Sections 3285, 3285.1, and 3285.2, all of the following shall apply:

(a) If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law.

(b) Nothing in those sections shall be construed to permit or require the forcible administration of any medication without a prior court order.

(c) Any and all orders authorized under those sections shall be made by the health officer and his or her authority to make the orders shall be delegated only pursuant to Section 7. The health officer shall not make any orders incorporating by reference any other rules or regulations.

SEC. 15. Section 3351 of the Health and Safety Code is amended to read:

3351. Inasmuch as the orders provided for by Section 3285 are for the protection of the public health, any person who, after service upon him or her of an order of a health officer as provided in Section 3285 violates or fails to comply with the order, is guilty of a misdemeanor. Upon conviction thereof, in addition to any and all other penalties that may be imposed by law upon the conviction, the person may be ordered by the court

confined until the order of the health officer shall have been fully complied with or terminated by the health officer, but not exceeding one year from the date of passing judgment upon the conviction, further, the court, upon suitable assurances that the order of the health officer will be complied with, may place any person convicted of a violation of the order of the health officer upon probation for a period not to exceed two years, upon condition that the order of the health officer be fully complied with, further, upon any subsequent violation of the order of the health officer, the probation shall be terminated and confinement as provided for in this section shall be ordered by the court.

SEC. 16. Section 3355 of the Health and Safety Code is amended to read:

3355. The district attorney of the county in which a violation of Sections 3285 and 3351 may be committed, shall prosecute all such violations and, upon the request of a health officer, shall prosecute, as provided in Section 3351, violations of any order of a health officer made and served as provided in Section 3285 or Section 3002.

SEC. 17. No reimbursement is required by this act pursuant to Section 6 of Article XIIIB of the California Constitution because the only costs which may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, changes the definition of a crime or infraction, changes the penalty for a crime or infraction, or eliminates a crime or infraction. Moreover, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

Also, notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution. Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

BILL ANALYSIS

AB 803

Gotch (D)

9/7/93 in Senate

21

77-0, p. 1614, 5/13/93
(Passed Assembly on Consent)

SUBJECT: Communicable disease: tuberculosis

SOURCE: Health Officer's Association of California

DIGEST: This bill makes various changes to the Health and Safety Code šrelated to the control of tuberculosis (TB).

Senate Floor Amendments of 9/7/93:

1. Specify that the use of the term "health facility" in this bill is the š same as it is currently defined in existing law.

2. Eliminate persons in a local detention facility, as specified, from the š provision requiring that discharge from the facility is contingent on the approval of a written treatment plan.

3. Provide flexibility to penal institutions by permitting, under š specified conditions, the submission of a treatment plan within 24 hours of discharge, release, or transfer of a person with, or who is believed to have, active tuberculosis.

ANALYSIS: Current law:

1. Requires the Department of Health Services (DHS) to maintain a program š for the control of TB, and allows the department to establish standards and procedures for the operation of local tuberculosis control programs.

□

2.Requires local health officers to investigate all reported or suspected
š cases of tuberculosis. A health officer may isolate or quarantine persons with infectious TB.

3.Provides that any violation of an order by a health officer is a
š misdemeanor. In addition to any existing penalties, a person violating such an order may be confined for a period not exceeding six months.

In 1992, DHS, the California Tuberculosis Controllers Association and the šAmerican Lung Association convened a task force on tuberculosis elimination.

This bill seeks to address some of the problems identified by the task force.

This bill:

1. Requires DHS to be the lead agency for all tuberculosis control and
š prevention activities.

2. Allows the state director of DHS to order examinations for TB, in
š writing, of persons in close contact with others infected with TB, and those who are at heightened risk of TB exposure.

3. Prohibits health facilities, local detention facilities or state
š correctional institutions from releasing any person known to have, or is suspected to have, active TB, and prohibits the transfer of such persons between institutions without notification and a specified written treatment plan approved by the local health officer or the chief medical officer of the penal institution or local detention facility. Requires written treatment plan approval by a health officer before discharge from a health facility or penal institution is permitted. Permits the submission of the treatment plan within 24 hours of discharge, release, or transfer by a penal institution under specified conditions.

4. Requires each health care provider who treats a person for active TB,
š each person in charge of a health facility, and each person in charge of a clinic providing outpatient treatment for TB to promptly report to the local health officer at specified times. Requires the report to provide specified information, and that each of the specified health workers maintain documentation of each patient's adherence to treatment plans. Requires, in the case of a parolee, the health officer to notify the medical officer of the parole region when there are reasonable grounds to believe that a parolee under the jurisdiction of the Department of Corrections has active TB disease.

5. Requires each health care provider who treats a person for active TB
š disease to examine all household contacts or refer them to the local health officer for examination. Requires all nonhousehold and household contact to submit to examination, when required by the health officer. Requires health officers to refer a person to a health care provider if problems are found. Requires a health care provider to report the results of any exam related to tuberculosis of a contact, upon request of the health officer.

CONTINUED

6. For the purposes of directing preventive measures, permits health
š officers to order TB exams for persons within their jurisdiction, except for those incarcerated in a state correctional institution, determined to be at heightened risk of TB exposure.

7. Directs all health officers to investigate all reported or suspected
š cases and sources of active TB disease in their jurisdiction, except those in a state correctional institution. If public health is endangered by a person who has or suspected to have active TB disease, the health officer may issue an order to be served upon a person, with specified requirements, as necessary to protect the public health. The health officer order may include, but it not limited to:

a. the authorization to remove to, or admit into a health facility for
š examination, any person who has or is suspected to have active TB, and is unable or unwilling to voluntarily submit to examination;

b. requiring a person with active TB to complete a prescribed course
š of medication and follow required contagion precautions for TB;

c. requiring a person with TB, under specified conditions, to follow a
š course of directly observed therapy;

d. the authorization to remove to, or admit into a health facility of
š a person with infectious TB, under specified conditions, including a person's refusal or failure to keep appointments or treatment for TB;

e. exclusion from attendance at a workplace, or any place when the
š health officer determines the place cannot be maintained to protect others from the spread of TB;

f. isolation of persons with infectious TB to their place of residence
š until they no longer have TB;

8. Requires the health officer to report to the district attorney any
š violation of any order, and specifies misdemeanor penalties for any violation, including confinement for up to one year after conviction.

9. Authorizes the health officer to remove to , or detain in, a hospital
š or other place for examination or treatment a person subject to an order of removal or detention without a prior court order except as specified. No person may be detained for more than 60 days without a court order.

FISCAL EFFECT: Appropriation: No Fiscal Committee: Yes Local: Yes

According to the Senate Appropriations Committee:

Fiscal Impact (in thousands)

Major Provisions	1993-94	1994-95	1995-96	Fund

CONTINUED

□

Mandated local costs	unknown	General
Health Services	unknown administrative cost	General

SUPPORT: (Verified 9/7/93)

Health Officer's Association of California (source)
California Conference of Local Health Officers
California State Employees' Association
American Lung Association
California School Employees Association

ARGUMENTS IN SUPPORT: According to the sponsor, this bill seeks to šreduce and control the increasing tuberculosis epidemic and improves the šmanagement of active TB cases through the following means:

1. requiring the development of a treatment plan and notification of the š health officer before a person with active TB is released from a health facility or penal institution;

2. expanding the authority of health officers to direct preventative šmeasures; and

3. establishing a procedure "more in tune with current civil rights š expectations that allow for gradually more restricted measures for recalcitrant patients who threaten to spread infection because they do not respond to specific treatment orders."

Supporters contend that most patients that require isolation in a hospital šfor treatment of TB have a history of demonstrated non-compliance or are šinfected with a drug resistant strain. Isolation of an infectious TB špatient is not an accusation, but rather a tool to be used by medical šprofessionals to treat TB and preserve the public's health.

CP:lm 9/7/93 Senate Floor Analyses

CONTINUED

EX. 5

BILL NUMBER: AB 804 CHAPTERED 09/21/94
BILL TEXT

CHAPTER 685
FILED WITH SECRETARY OF STATE SEPTEMBER 21, 1994
APPROVED BY GOVERNOR SEPTEMBER 20, 1994
PASSED THE ASSEMBLY AUGUST 26, 1994
PASSED THE SENATE AUGUST 23, 1994
AMENDED IN SENATE AUGUST 9, 1994
AMENDED IN SENATE JUNE 30, 1994
AMENDED IN ASSEMBLY MAY 6, 1993
AMENDED IN ASSEMBLY APRIL 22, 1993

INTRODUCED BY Assembly Member Gotch

FEBRUARY 25, 1993

An act to amend Sections 3003, 3006, 3281, 3282, 3283, 3284, 3285, 3285.1, 3285.2, 3285.3, 3285.4, and 3351 of the Health and Safety Code, relating to communicable disease.

LEGISLATIVE COUNSEL'S DIGEST

AB 804, Gotch. Communicable disease: tuberculosis.

Existing law requires the State Department of Health Services to maintain a program for the control of tuberculosis and administer the funds made available to it by the state for the care of tuberculosis patients.

Existing law, with certain exceptions, prohibits discharge or release of persons from certain facilities if the person is known to have tuberculosis, or if there are reasonable grounds to believe the person has tuberculosis, unless certain procedures are followed, including providing a notice and report to the local health officer.

This bill would clarify that local health officers may delegate duties and authority relating to the issuance of related orders, and would make conforming and other technical changes. The bill would require review of related treatment plans within 24 hours, and would thereby impose a state-mandated local program.

Existing law requires that related delegations of authority by the local health officer be made pursuant to specified provisions of law relating to delegation of authority to a deputy.

This bill would provide that delegation may also be made to the person in charge of medical treatment of inmates at penal institutions. The bill would specify that in cases of court enforcement of an order, confinement may be accomplished by placement in any appropriate facility, penal institution, or dwelling specifically approved by the local health officer.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates which do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State

Mandates determines that this bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to those statutory procedures and, if the statewide cost does not exceed $1,000,000, shall be made from the State Mandates Claims Fund.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3003 of the Health and Safety Code is amended to read:

3003. As used in this division, a person has "active tuberculosis disease" when either one of the following occur:

(a) A smear or culture taken from any source in the person's body has tested positive for tuberculosis and the person has not completed the appropriate prescribed course of medication for active tuberculosis disease.

(b) There is radiographic, current clinical, or laboratory evidence sufficient to support a medical diagnosis of tuberculosis for which treatment is indicated.

SEC. 2. Section 3006 of the Health and Safety Code is amended to read:

3006. As used in this division the following terms have the following meanings, unless the context indicates otherwise:

(a) "Infectious tuberculosis disease" means active or suspected active tuberculosis disease in an infectious state.

(b) "Tuberculosis infection" means the latent phase of tuberculosis, during which the infected person cannot spread tuberculosis to others.

(c) "Heightened risk of tuberculosis exposure" means likely exposure to persons with infectious tuberculosis disease.

(d) "The appropriate prescribed course of medication for tuberculosis disease" means that course recommended by the health officer, the most recent guidelines of the department, the most recent guidelines of the Centers for Disease Control and Prevention, or the most recent guidelines of the American Thoracic Society.

(e) "Directly observed therapy" means the appropriately prescribed course of treatment for tuberculosis disease in which the prescribed antituberculosis medications are administered to the person or taken by the person under direct observation of a health care provider or a designee of the health care provider approved by the local health officer.

(f) An "examination" for tuberculosis infection or disease means conducting tests, including, but not limited to, Mantoux tuberculin skin tests, laboratory examination, and X-rays, as recommended by any of the following:

(1) The local health officer.

(2) The most recent guidelines of the state department.

(3) The most recent guidelines of the Centers for Disease Control and Prevention.

(4) The most recent guidelines of the American Thoracic Society.

(g) "State correctional institution" means a prison, institution, or other facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority.

(h) "Local detention facility" is defined in Section 6031.4 of the Penal Code.

(i) "Penal institution" means either a state correctional institution or a local detention facility.

(j) "Health facility" means a licensed health facility as defined in Sections 1250, 1250.2, and 1250.3.

(k) "Health officer" or "local health officer" includes his or her designee.

SEC. 3. Section 3281 of the Health and Safety Code is amended to read:

3281. (a) (1) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(A) A person known to have active tuberculosis disease.

(B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.

(2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 3282 is approved by a local health officer of the jurisdiction in which the health facility is located. Treatment plans submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of receipt of the plans.

(3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges described in this paragraph shall occur only after the notification and treatment plan required by Section 3282 have been received by the local health officer.

(4) This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(b) No health facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility unless subdivision (e) is complied with. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) All discharges, releases, or transfers described in subdivisions (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 3282 has been received by the local health officer. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution,

then the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

SEC. 4. Section 3282 of the Health and Safety Code is amended to read:

3282. Each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease shall promptly report to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or discontinues care. The initial disease notification report shall include an individual treatment plan that includes the patient name, address, date of birth, tuberculin skin test results, pertinent radiologic, microbiologic, and pathologic reports whether final or pending, and any other information required by the local health officer. Subsequent reports shall provide updated clinical status and laboratory results, assessment of treatment adherence, name of current care provider if patient transfers care, and any other information required by the local health officer. A facility discharge, release, or transfer report shall include all pertinent and updated information required by the local health officer not previously reported on initial or subsequent reports, and shall specifically include verified patient address, the name of the medical provider who has specifically agreed to provide medical care, clinical information used to assess the current infectious state, and any other information required by the local health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plans. Nothing in this section shall authorize the disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 1.11 (commencing with Section 199.20) of, Chapter 1.12 (commencing with Section 199.30) of, and Chapter 1.13 (commencing with Section 199.42) of, Division 1.

In the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the medical officer of the parole region or the physician and surgeon designated by the Director of Corrections when there are reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the local health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

SEC. 5. Section 3283 of the Health and Safety Code is amended to read:

3283. Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to the local health officer for examination. Each health care provider shall promptly notify the local health officer of the referral.

When required by the local health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the local health officer or designee. If any abnormality consistent with tuberculosis disease is found, steps satisfactory to the local health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment.

Contacts shall be reexamined at times and in a manner as the local health officer may require. When requested by the local health officer, a health care provider shall report the results of any examination related to tuberculosis of a contact.

SEC. 6. Section 3284 of the Health and Safety Code is amended to read:

3284. (a) Within the territory under his or her jurisdiction, each local health officer may order examinations for tuberculosis infection for the purposes of directing preventive measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the local health officer has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination pursuant to this section shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

SEC. 7. Section 3285 of the Health and Safety Code is amended to read:

3285. Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections. In carrying out the investigations, each local health officer shall follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department. If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer may issue any orders he or she deems necessary to protect the public health or the health of any other person, and may make application to a court for enforcement of the orders. Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof.

The orders may include, but shall not be limited to, any of the following:

(a) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility for appropriate examination for active tuberculosis disease of a person who is known to have active tuberculosis disease, or a person for whom there are reasonable grounds to believe that the person has active tuberculosis disease and who is unable or unwilling voluntarily to submit to the examination by a physician or by the local health officer. Any person whom the health officer determines should have an examination for tuberculosis disease may have the examination made by a physician and surgeon of his or her own choice who is licensed

to practice medicine under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code under terms and conditions as the local health officer shall determine on reasonable grounds to be necessary to protect the public health. This section does not authorize the local health officer to mandate involuntary anergy testing.

(b) An order requiring a person who has active tuberculosis disease to complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, to follow required infection control precautions for tuberculosis disease. This subdivision does not allow the forceable or involuntary administration of medication.

(c) An order requiring a person who has active tuberculosis disease and who is unable or unwilling otherwise to complete an appropriate prescribed course of medication for tuberculosis disease to follow a course of directly observed therapy. This subdivision does not allow forceable or involuntary administration of medication.

(d) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has infectious tuberculosis disease, or who presents a substantial likelihood of having infectious tuberculosis disease, based upon proven epidemiologic evidence, clinical evidence, X-ray readings, or tuberculosis laboratory test results.

(2) The local health officer finds, based on recognized infection control principles, that there is a substantial likelihood the person may transmit tuberculosis to others because of his or her inadequate separation from others.

(e) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has active tuberculosis disease, or has been reported to the health officer as having active tuberculosis disease with no subsequent report to the health officer of the completion of an appropriate prescribed course of medication for tuberculosis disease.

(2) There is a substantial likelihood, based on the person's past or present behavior, that he or she cannot be relied upon to participate in or complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, follow required infection control precautions for tuberculosis disease. The behavior may include, but is not limited to, refusal or failure to take medication for tuberculosis disease, refusal or failure to keep appointments or treatment for tuberculosis disease, refusal or failure to complete the treatment for tuberculosis disease, or disregard for infection control precautions for active tuberculosis disease.

(f) An order for exclusion from attendance at the workplace for persons with infectious tuberculosis disease. The order may, also, exclude the person from any place when the local health officer determines that the place cannot be maintained in a manner adequate to protect others against the spread of tuberculosis disease.

(g) An order for isolation of persons with infectious tuberculosis disease to their place of residence until the local health officer has determined that they no longer have infectious tuberculosis disease.

(h) This section shall apply to all persons except those

incarcerated in a state correctional institution.

(i) This section shall not be construed to require a private hospital or other private treatment facility to accept any patient without a payment source, including county responsibilities under Section 17000 of the Welfare and Institutions Code, except as required by Sections 1317 et seq. or by federal law.

SEC. 8. Section 3285.1 of the Health and Safety Code is amended to read:

3285.1. The local health officer may detain in a hospital or other appropriate place for examination or treatment, a person who is the subject of an order of detention issued pursuant to subdivision (a), (d), or (e) of Section 3285 without a prior court order except that when a person detained pursuant to subdivision (a), (d), or (e) of Section 3285 has requested release, the local health officer shall make an application for a court order authorizing the continued detention within 72 hours after the request or, if the 72-hour period ends on a Saturday, Sunday, or legal holiday, by the end of the first business day following the Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After the request for release, detention shall not continue for more than five business days in the absence of a court order authorizing detention. However, in no event shall any person be detained for more than 60 days without a court order authorizing the detention. The local health officer shall seek further court review of the detention within 90 days following the initial court order authorizing detention and thereafter within 90 days of each subsequent court review. In any court proceeding to enforce a local health officer's order for the removal or detention of a person, the local health officer shall prove the particularized circumstances constituting the necessity for the detention by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by counsel and upon the request of the person, counsel shall be provided.

SEC. 9. Section 3285.2 of the Health and Safety Code is amended to read:

3285.2. (a) An order of a local health officer pursuant to Section 3285 shall set forth all of the following:

(1) The legal authority under which the order is issued, including the particular sections of state law or regulations.

(2) An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order.

(3) The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected.

(4) The orders shall be in writing, and shall include the name of the person, the period of time during which the order shall remain effective, the location, payer source if known, and other terms and conditions as may be necessary to protect the public health. Upon issuing an order, a copy of the order shall be served upon the person named in the order.

(b) An order for the detention of a person shall do all of the following:

(1) Include the purpose of the detention.

(2) Advise the person being detained that he or she has the right to request release from detention by contacting a person

designated on the local health officer's order at the telephone number stated on the order and that the detention shall not continue for more than five business days after the request for release, in the absence of a court order authorizing the detention.

(3) Advise the person being detained that, whether or not he or she requests release from detention, the local health officer is required to obtain a court order authorizing detention within 60 days following the commencement of detention and thereafter shall further seek court review of the detention within 90 days of the court order and within 90 days of each subsequent court review.

(4) Advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(5) Be accompanied by a separate notice that shall include, but not be limited to, all of the following additional information:

(A) That the person being detained has the right to request release from detention by contacting a person designated on the local health officer's order at a telephone number stated on the order, and that the detention shall not continue for more than five business days after the request in the absence of a court order authorizing the detention.

(B) That he or she has the right to arrange to be advised and represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(C) That he or she may supply the addresses or telephone numbers of not more than two individuals to receive notification of the person's detention, and that the local health officer shall, at the patient's request, provide notice within the limits of reasonable diligence to those people that the person is being detained.

SEC. 10. Section 3285.3 of the Health and Safety Code is amended to read:

3285.3. Notwithstanding any inconsistent provision of Section 3285, 3285.1 or 3285.2, all of the following shall apply:

(a) A person who is detained solely pursuant to subdivision (a) of Section 3285 shall not continue to be detained beyond the minimum period of time required, with the exercise of all due diligence, to make a medical determination of whether a person who is suspected of having tuberculosis disease, has active tuberculosis or whether a person who has active tuberculosis disease has infectious tuberculosis disease. Further detention of the person shall be authorized only upon the issuance of a local health officer's order pursuant to subdivision (d) or (e) of Section 3285.

(b) A person who is detained solely for the reasons described in subdivision (d) of Section 3285 shall not continue to be detained after he or she ceases to be infectious or after the local health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis disease after his or her release from detention.

(c) A person who is detained for the reasons described in subdivision (e) of Section 3285 shall not continue to be

detained after he or she has completed an appropriate prescribed course of medication.

SEC. 11. Section 3285.4 of the Health and Safety Code is amended to read:

3285.4. For the purposes of Sections 3285, 3285.1, and 3285.2, all of the following shall apply:

(a) If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law.

(b) Nothing in those sections shall be construed to permit or require the forcible administration of any medication without a prior court order.

(c) Any and all orders authorized under those sections shall be made by the local health officer. His or her authority to make the orders may be delegated to the person in charge of medical treatment of inmates in penal institutions within the local health officer's jurisdiction, or pursuant to Section 7. The local health officer shall not make any orders incorporating by reference any other rules or regulations.

SEC. 12. Section 3351 of the Health and Safety Code is amended to read:

3351. Inasmuch as the orders provided for by Section 3285 are for the protection of the public health, any person who, after service upon him or her of an order of a local health officer as provided in Section 3285 violates or fails to comply with the order, is guilty of a misdemeanor. Upon conviction thereof, in addition to any and all other penalties that may be imposed by law upon the conviction, the person may be ordered by the court confined until the order of the local health officer shall have been fully complied with or terminated by the local health officer, but not exceeding one year from the date of passing judgment upon the conviction, further, the court, upon suitable assurances that the order of the local health officer will be complied with, may place any person convicted of a violation of the order of the local health officer upon probation for a period not to exceed two years, upon condition that the order of the local health officer be fully complied with, further, upon any subsequent violation of the order of the local health officer, the probation shall be terminated and confinement as provided for in this section shall be ordered by the court. Confinement may be accomplished by placement in any appropriate facility, penal institution, or dwelling approved for the specific case by the local health officer.

SEC. 13. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund. Notwithstanding Section 17580 of the Government Code, unless otherwise specified in this act, the provisions of this act shall become operative on the same date that the act takes effect pursuant to the California Constitution.

BILL ANALYSIS

AB 804

Gotch (D)

8/9/94 in Senate

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70-0, p. 2009, 5/27/93
(Passed Assembly on Consent)

SUBJECT: Tuberculosis

SOURCE: Health Officers Association of California

DIGEST: This bill clarifies existing law by (1) allowing the transfer šof tuberculosis (TB) patients, without prior approval of treatment plans, što a general acute care hospital when an immediate need for higher care is šrequired, or from any health facility to a state correctional institution; šand (b) requiring that treatment plans for patients being discharged from a šhealth facility be reviewed by the local health officer within 24 hours šfrom the time of receipt.

ANALYSIS: Existing law requires the Department of Health Services to šbe the lead agency for all TB control and prevention activities. Current šlaw authorizes health officers certain powers in the prevention and control šof TB disease and infection.

This bill:

1. Includes a local health officer's designee in the definition of "health officer" or "local health officer."

2. Clarifies "local health officer" as the health officer of the jurisdiction in which the health facility is located.

3. Requires treatment plans for persons awaiting discharge from health □ facilities to be reviewed by the local health officer within 24 hours of receipt of the plans.

4. Specifies that a person with active TB may be transferred to a general acute care hospital from a health facility due to an immediate need for higher level of care without approval by a local health officer. This exemption also applies to any transfer from any health facility to a correctional facility.

5 Requires a health provider to include the following information in disease notification reports and updates to the local health officer:

A. The patient's name, address, and date of birth;

B. Tuberculin skin test and other pertinent report results;

C. Updated clinical status and laboratory results;

D. Assessment of treatment adherence; and

E. Any other information required by the local health officer.

5. Requires a health provider to provide pertinent and updated report information to the local health officer upon the discharge, release, or transfer of a patient with active TB disease.

6. Specifies that this section does not authorize a local health officer to mandate involuntary anergy testing.

Comment

According to DHS, California reports the highest number of TB cases in any šstate. In 1992, the incidence rate of TB in the California was 17.2 cases šper 100,000 population, compared to the US rate of 10.5 cases per 100,000. šThe frequency of multi-drug-resistant TB (MDR-TB) is also of growing šconcern in the treatment and prevention of TB. Because the treatment of šMDR-TB is more complex, less efficacious, and more costly than standard TB, šMDR-TB markedly worsens the public health hazard of TB.

In 1993, the Legislature passed AB 803 (Gotch, Chapter 676) which:

1. Authorizes a local health director to order examinations for those persons in close contact or with a heightened risk of exposure to a patient with active TB disease.

2. Prohibits the release of persons with active TB disease from inpatient health facilities and penal institutions without notification and treatment plan approved by the local health officer.

3. Requires a health care provider who treats a person for active TB disease to report to the local health officer with specified information about the patient.

4. Directs a local health officer to investigate all reported or suspected cases of active TB disease. A health officer may issue an order upon a

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person with active TB disease if public health is endangered by that person.

5. Requires a local health officer to report to the district attorney any violation of any order, and specifies misdemeanor penalties for any violation.

FISCAL EFFECT: Appropriation: No Fiscal Committee: Yes Local: Yes

According to the Senate Appropriations Committee:

Fiscal Impact (in thousands)

Major Provisions	1994-95	1995-96	1996-97	Fund
Local mandate	---	Unknown costs	---	General

The mandated costs relate to the requirement that local health officers complete their review of treatment plans within 24 hours. This could open the door to local claims for reimbursement of some of the costs of these reviews.

SUPPORT: (Verified 8/18/94)

Health Officers Association of California (source)
California Conference of Local Health Officers
California Association of Hospitals and Health Systems
American Lung Association

CP:ctl 8/19/94 Senate Floor Analyses

CONTINUED

Ex. 6

Senate Bill No. 362

CHAPTER 116

An act to amend Section 121361 of the Health and Safety Code, relating to communicable diseases.

[Approved by Governor July 27, 1997. Filed with Secretary of State July 28, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

SB 362, Maddy. Tuberculosis: health facility.

Existing law prohibits a health facility, local detention facility, or state correctional institution from discharging, releasing, or transferring any person known to have or when the facility or institutional medical staff have reasonable grounds to believe the person has active tuberculosis, unless notification and a written treatment plan have been received by the local health officer, except as specified.

This bill would provide that no health facility that declines to discharge, release, or transfer a person pursuant to that provision shall be civilly or criminally liable or subject to administrative sanction as a result, if the health facility complies with that provision and acts in good faith. The bill would also provide that the local health officer under this provision is not relieved of any other duty imposed under state law governing tuberculosis control.

The people of the State of California do enact as follows:

SECTION 1. Section 121361 of the Health and Safety Code is amended to read:

121361. (a) (1) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(A) A person known to have active tuberculosis disease.

(B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.

(2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 121362 is approved by a local health officer of the jurisdiction in which the health facility is located. Treatment plans submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of receipt of the plans.

(3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due

to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges described in this paragraph shall occur only after the notification and treatment plan required by Section 121362 have been received by the local health officer.

(4) This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(b) No health facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility unless subdivision (e) is complied with. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) All discharges, releases, or transfers described in subdivisions (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 121362 has been received by the local health officer. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution, then the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

(f) No health facility that declines to discharge, release, or transfer a person pursuant to this section shall be civilly or criminally liable or subject to administrative sanction therefor. This subdivision shall apply only if the health facility complies with this section and acts in good faith.

(g) Nothing in this section shall relieve a local health officer of any other duty imposed by this chapter.

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SENATE RULES COMMITTEE SB 362
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 362
Author: Maddy (R)
Amended: 6/24/97
Vote: 21

SENATE JUDICIARY COMMITTEE : 7-0, 4/22/97
AYES: Burton, Haynes, Lee, Lockyer, O'Connell, Sher, Wright
NOT VOTING: Calderon, Leslie

SENATE FLOOR : 37-0, 5/1/97 (Passed on Consent)
AYES: Alpert, Ayala, Brulte, Calderon, Costa, Dills, Greene, Hayden, Haynes, Hughes, Hurtt, Johannessen, Johnson, Johnston, Karnette, Kelley, Knight, Kopp, Lee, Leslie, Lewis, Lockyer, Maddy, McPherson, Monteith, Mountjoy, O'Connell, Peace, Rainey, Rosenthal, Schiff, Sher, Solis, Thompson, Vasconcellos, Watson, Wright
NOT VOTING: Burton, Craven, Polanco

ASSEMBLY FLOOR : 76-0, 6/30/97 (Passed on Consent)

SUBJECT : Health facilities

SOURCE : California Healthcare Association

DIGEST : This bill provides that a health facility shall not be civilly or criminally liable or subject to administrative sanction if it declines to discharge, release or transfer any person known to have tuberculosis, pursuant to law. The bill conditions the immunity upon the health facility acting in good faith and actually complying with the law.

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Assembly Amendments provide that nothing in this bill or the section of law it amends shall relieve a local health officer of any other duty imposed by this chapter.

ANALYSIS : Existing law, Health and Safety Code Section 121361, prohibits a health facility from discharging, releasing, or transferring any person known to have or believed to have active tuberculosis, unless notification and a written treatment plan have been received by the local health officer. Once the written treatment plan is approved by the local health officer, the person may be discharged.

This bill provides a qualified immunity from civil or criminal liability, and from administrative sanction, when a health facility, in good faith, and in compliance with law, declines to discharge, release or transfer a person pursuant to the above described law.

Assembly amendments provide that nothing in the above shall relieve a local health officer of any other duty imposed by this chapter.

FISCAL EFFECT : Appropriation: No Fiscal Com.: No Local: No

SUPPORT : (Verified 7/1/97)

California Healthcare Association (source)

ARGUMENTS IN SUPPORT : California Healthcare Association, the sponsor of the bill, contends this bill is necessary in order to protect a health care facility from liability for detaining a person with active tuberculosis, as required by existing law. Although no lawsuit has ever been filed against a health care facility, the sponsor argues that this provision will provide certainty to health facilities who detain TB patients against their will.

The sponsor refers to two statutes that provide health facilities with a similar type of protection. The first statute, Probate Code Section 4753, provides that no health care provider, who honors a request to forego resuscitative measures, shall be subject to criminal prosecution, civil liability, administrative sanction or any other sanction. The second statute, Health & Safety Code Section 7190.5, provides that no physician or health care provider is subject to civil or criminal liability for giving effect to a declaration governing the withholding or withdrawal of

□

life-sustaining treatment.

However, protection for health facilities is granted only if the health facility acts in good faith in complying with the law.

This bill provides that the immunity applies only if the facility acts in good faith and in compliance with the law. For example, a facility's actions may not be "in good faith" where it fails to provide notification and a written treatment plan to local health officers, thereby unreasonably delaying the discharge.

RJG:jk 7/1/97 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** END ****

EX. 7

Senate Bill No. 391

CHAPTER 294

An act to repeal Article 6 (commencing with Section 58105) of Chapter 1 of Part 1 of Division 21 of the Food and Agricultural Code, to amend Sections 95004 and 95030 of, and to add Section 95001.5 to, to amend Sections 104380, 106805, 115065, 115080, 120955, 121200, 121260, and 121305 of, to add Sections 110241, 120970, 121358, 123255, and 123279 to, to add Chapter 1.5 (commencing with Section 124450) to Part 4 of Division 106 of, to add and repeal Section 1179.3 of, and to repeal Sections 349.109, 104485, 104550, 104569, 120450, 121205, 121215, 121220, and 124950 of, the Health and Safety Code, to amend Section 12696.05 of, and to repeal Section 12699.50 of, the Insurance Code, and to amend Section 1372 of the Penal Code, to amend Sections 4643.5, 4681.1, 4681.3, 6600.05, 7228, 14094.3, 14105.31, 14105.33, 14132.22, 14154.15, 14163, 16809.5, 16909, 16945, and 16990.5 of, to add Sections 4418.1, 4418.7, 4433, 4596.5, 4639, 7200.06, 7200.07, 7202, 7204, 7229, 7230, 7231, 7232, 7233, 14005.75, 14005.76, 14005.82, 14005.83, 14005.84, 14005.88, 14005.89, 14011.4, 14029, 14067, 14093.07, 14093.09, 14109.6, 14133.14, 14138.5, 14459.5, 14459.7, and 17000.51 to, and to add and repeal Sections 14085.7, 14085.8, 14148.99, and 16997.1 of, the Welfare and Institutions Code, relating to human services, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 18, 1997. Filed with Secretary of State August 18, 1997.]

LEGISLATIVE COUNSEL'S DIGEST

SB 391, Solis. Health.

Existing law authorizes the Department of Food and Agriculture to establish a program designed to provide eligible persons with coupons that may be exchanged for fresh, nutritious foods at farmers' markets pursuant to a program established by federal law, the WIC Farmers' Market Nutrition Act of 1992.

This bill would delete this authority and would instead authorize the State Department of Health Services to establish this program.

Existing law specifies that the provisions requiring the implementation of the Comprehensive Perinatal Outreach Program shall become inoperative July 1, 1997, and shall be repealed on January 1, 1998, unless a later enacted statute revises or repeals that date.

This bill would repeal the provision repealing the program.

Existing law requires the Secretary of the Health and Welfare Agency to establish an Office of Rural Health, or an alternative

This bill would repeal certain provisions of law relating to the creation and implementation of this program.

Existing law requires the department and each county to administer a tuberculosis control, prevention, and detention program.

This bill would prohibit individuals housed under this program, other than criminal offenders, from residing in correctional facilities. It would require the department and local health jurisdiction, by January 1, 1998, to identify a detention site for recalcitrant tuberculosis patients for each local health jurisdiction.

Existing law specifies that the provisions requiring the implementation of the Access for Infants and Mothers (AIM) Program and establishment of the continuously appropriated Perinatal Insurance Fund shall become inoperative July 1, 1997, and shall be repealed on January 1, 1998, unless a later enacted statute revises or repeals that date.

This bill would repeal the provision for the repeal of that program, and would make conforming changes to provisions authorizing the Major Risk Medical Insurance Board to adopt regulations for administration of that program.

Existing law requires the State Department of Health Services to maintain a program of maternal and child health.

This bill would authorize the department to maintain a child health program in each county, and to allocate funds to counties for these purposes that submit plans in compliance with minimum standards established by the department.

Existing law provides for various benefits through the implementation of programs for persons with developmental disabilities (consumers) through the State Department of Developmental Services. Existing law provides for the delivery of services to consumers through regional centers pursuant to contracts with the department.

This bill would require the department to contract with an independent agency or organization for the tracking and monitoring of consumers who are moved from state hospitals to the community to ensure that they are receiving necessary services and supports. The bill would require the department to monitor corrective actions taken by regional centers as a result of this tracking and monitoring and to establish a task force to review the findings of the contractor and make recommendations regarding tracking and monitoring.

The bill would provide for the provision of services on an emergency basis when the community placement of a consumer is at risk of failing and admittance to a state developmental center is likely. The bill would require the department to immediately seek admission to a state developmental center when it determines that admission is necessary to protect the health and welfare of the consumer.

(b) "An HIV-positive individual" means an individual who is infected with the AIDS virus.

(c) "Committee" means the AIDS Vaccine Research and Development Advisory Committee.

(d) "Grant award" means an AIDS Vaccine Clinical Trial Grant Award for the Prevention of Maternal Transmission of HIV Infection.

(e) "AIDS vaccine," for the purposes of this chapter, means a vaccine that has been developed by a manufacturer and is being tested and administered for the purposes of determining whether immunization of HIV-infected pregnant women will protect against maternal transmission of the AIDS virus. Clinical trials must be conducted under an investigational new drug (IND) application on file with the federal Food and Drug Administration (FDA).

(f) "Research subject" means a person who is administered an AIDS vaccine, or a fetus of a woman administered an AIDS vaccine, or a child born to a woman administered an AIDS vaccine during pregnancy.

(g) "Researcher" means a person employed by or affiliated with a manufacturer or a research institution, who participates in the development or testing or administration of an AIDS vaccine, or who is involved in the diagnosis and treatment of a research subject.

SEC. 24. Section 121358 is added to the Health and Safety Code, to read:

121358. (a) Notwithstanding any other provision of law, individuals housed or detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities, and the funds available under that program with regard to those individuals shall not be disbursed to, or used by, correctional facilities. This section shall not be interpreted to prohibit the institutionalization of criminals with tuberculosis in correctional facilities.

(b) The department shall work with local health jurisdictions to identify a detention site for recalcitrant tuberculosis patients appropriate for each local health jurisdiction in the state. The department shall notify all counties of their designated site by January 1, 1998.

SEC. 25. Section 123255 is added to the Health and Safety Code, to read:

123255. (a) The department may maintain a maternal and child health program in each county.

(b) Notwithstanding any other provision of law, the department may allocate, for the purposes of maintaining a maternal and child health program, to a county an amount determined in a manner as the director shall provide. The total of all county allocations shall not exceed the annual appropriation for this purpose.

(c) To be considered for an allocation, the county's governing board shall submit a plan and budget for the county's program in

SENATE RULES COMMITTEE SB 391
Office of Senate Floor Analyses
1020 N Street, Suite 524
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UNFINISHED BUSINESS

Bill No: SB 391
Author: Solis (D) & Ducheny (D), et al
Amended: 8/11/97
Vote: 27 - Urgency

All Prior Votes Not Relevant

ASSEMBLY FLOOR : 73-1, 8/11/97 - See last page for vote

SUBJECT : Health

SOURCE : The author

DIGEST : Assembly Amendments delete the prior version of the bill, which would have required every health service plan that uses financial bonuses or incentives to provide a written summary to any person who requests it that includes a general description of the bonus or incentive arrangements used by the plan and how they may relate to a provider's use of referred services.

This bill is now the 1997-98 omnibus health budget trailer bill.

ANALYSIS : This bill would:

1. Transfer the administration of the Farmer's Market Nutrition Program from the Department of Food and Agriculture to the Department of Health Services (DHS), thereby allowing the program to continue to draw down federal funds matched through existing state resources.

□

2. Eliminate various extraneous special funds without any

significant fiscal impact.

3. Establish DHS's authority to recover regulatory costs for x-ray equipment inspections from public agencies through fees.

4. Conform the existing AIDS Drug Assistance Program's rebate policy with federal law, as specified, for the purpose of enhancing the collection of existing statutory rebates.

5. Provide specified patient protections for AIDS Drug Assistance Program beneficiaries.

6. Stipulate that individuals housed through a specified tuberculosis control program shall not reside in correctional facilities, while not precluding the incarceration of criminals under law.

7. Allow DHS to allocate funds to local Maternal and Child Health programs pursuant to specified public accountability conditions.

8. Reiterate existing law stating that specified clinics receiving public funds shall provide a sliding-scale fee based on income, including a zero payment option, and enhances enforcement opportunities and penalty options for noncompliance.

9. Modify the existing transitional Medi-Cal program, which sustains health benefits as individuals move from welfare to work, to include notification requirements for eligible participants, allow particular retroactive eligibility, require the Director of Health Services to seek a waiver, establish an outreach campaign, and contract for an evaluation, as specified. These provisions would be implemented only in the event that federal financial participation is available. Lastly, the bill would require the director to monitor participation rates.

10. Require DHS to develop a simplified Medi-Cal eligibility form for newborns and provide outreach on eligibility.

11. Require consultation with a child's case manager for transfer to in-home care, as specified.

12. Establish a discretionary program to support medical education costs for eligible participants through the

□

use of intergovernmental transfers. Approximately $57,000,000 in federal funds is anticipated to be obtained through the program.

13. Provide for voluntary enrollment of foster children in managed care.

14. Extend the existing carve-out of California Children Services beneficiaries from managed care until pilot projects are provided, as specified.

15. Modify the existing Medi-Cal drug rebate statute to clarify procedures and enhance revenue collections, as specified.

16. Reaffirm existing state law for conformity with the federal budget agreement and stipulates that reimbursement rates for specified inpatient services shall be no greater than Medicare for similar services. Savings of $94 million are reflected in the budget from this Medi-Cal crossover issue.

17. Remove the sunset on existing law for transitional inpatient care provisions.

18. Add criteria that the department shall use to identify providers placed on prior authorization for noninvasive testing procedures, as specified. Savings of $8.4 million from the implementation of this administrative change are reflected in the budget.

19. Add particular reporting requirements for several programs, as stipulated.

20. Authorize the use of out-stationed Medi-Cal workers to draw down available enhanced federal funding for eligibility services.

21. Implement the $75 million in local government relief reflected in the budget through disproportionate share hospital program.

22. Authorize the department to negotiate in good faith and repay costs for county claims from areas adversely affected by delays in the implementation of the local initiative under managed care, as specified. Costs under this provision would be funded through a deficiency and may likely be over $10 million subject to determination.

□

23. Intend to overturn the court ruling in Caulk v Superior Court , C015355, June 27, 1997, by confirming and declaring existing law, as provided for in Chapter 6 of the Statutes of 1996, which was intended only to provide local government with the discretion to reduce its general assistance grant level by up to $40 per month. The section also would only become effective if it does not create a mandate.

24. Allow, but not require, DHS to extend the term of contracts with clinics providing HIV testing services in

FY 1996-97.

2. Reenact the current health education, indigent health care, and tobacco-related disease research programs supported by ongoing funds and which implemented the Tobacco Tax and Health Protection Act of 1988 (Proposition 99). Specifically, the reauthorization would eliminate the sunset date for the programs, which are funded through the annual budget act and subject to program review through the budget process. Further, the reauthorization would continue support for Rural Health Grants and provide specified increases and extended resource availability for designated programs (consistent with existing authority), and allow the Department of Finance to modify program allocations pursuant to specified reporting provisions. The budget bill includes over $400 million in tobacco tax allocations for these programs.

26. Make a variety of changes to the statutes governing the Early Intervention Infant and Toddler Program's Interagency Coordinating Council, including the addition of a conflict of interest provision, Family Resource Centers as a defined service to be offered under the program, and extension of the sunset on the program from January 1, 1998 to January 1, 2000.

27. Make technical changes to the Penal Code relating to people with mental illness being returned to state hospitals and includes specified reporting requirements.

28. Establish statutory requirement and guidance for the Department of Developmental Services (DDS) to contract for tracking and monitoring the well-being of individuals with developmental services who move from Developmental Centers into the community.

29. Require DDS to contract with a nonprofit organization to provide client rights advocacy services.

□

30. Require DDS to contract on a multi-year basis for quality of life assessments of individuals with developmental disabilities living in the community.

31. Require each regional center to contract annually with an independent auditing firm for an audited financial statement.

FISCAL EFFECT : Appropriation: Yes Fiscal Com.: Yes
Local: Yes

ASSEMBLY FLOOR :
AYES: Ackerman, Aguiar, Alby, Alquist, Aroner, Ashburn, Baca, Battin, Baugh, Bordonaro, Bowen, Bowler, Brewer,

Caldera, Campbell, Cardenas, Cardoza, Cunneen, Davis, Ducheny, Escutia, Figueroa, Firestone, Frusetta, Gallegos, Goldsmith, Granlund, Havice, Hertzberg, Honda, House, Keeley, Knox, Kuehl, Kuykendall, Lempert, Leonard, Machado, Margett, Martinez, Mazzoni, Migden, Miller, Morrissey, Morrow, Murray, Napolitano, Olberg, Oller, Ortiz, Pacheco, Papan, Perata, Poochigian, Prenter, Pringle, Richter, Runner, Scott, Shelley, Strom-Martin, Sweeney, Takasugi, Thomson, Torlakson, Villaraigosa, Vincent, Washington, Wayne, Wildman, Woods, Wright, Bustamante

NOES: Thompson

NOT VOTING: Baldwin, Brown, Floyd, Kaloogian, Leach, McClintock

_ DLW:ctl 8/12/97 Senate Floor Analyses

SUPPORT/OPPOSITION: NONE RECEIVED

**** END ****

Ex. 8

Senate Bill No. 843

CHAPTER 763

An act to amend Sections 121361 and 121362 of, and to add and repeal Section 121360.5 of, the Health and Safety Code, relating to communicable diseases.

[Approved by Governor September 20, 2002. Filed with Secretary of State September 21, 2002.]

LEGISLATIVE COUNSEL'S DIGEST

SB 843, Perata. Omnibus Tuberculosis Control and Prevention Act of 2002.

Existing law establishes various communicable disease prevention and control programs, including one for tuberculosis. That program provides for testing of various persons for tuberculosis by prescribed licensed health professionals.

This bill would enact the Omnibus Tuberculosis Control and Prevention Act of 2002.

This bill would until January 1, 2006, permit any local health department to provide for certification, by the local health officer, of tuberculin skin test technicians, as defined, in accordance with specified requirements.

Existing law requires each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease to promptly provide a disease notification report and written treatment plan to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease.

Existing law prohibits a health facility, local detention facility, or state correctional institution from discharging or releasing a person known to have active tuberculosis disease or a person the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease, unless the notification report and individual treatment plan requirements specified above have been met.

This bill would provide that when a person described above is released on parole from a state correctional institution, the notification and written treatment plan shall be provided to both the local health officer for the county in which the parolee intends to reside and the local health officer for the county in which the state correctional institution is

located. It would require the Department of Corrections to inform the parole agent, and other parole officials as necessary, that the person has active or suspected active tuberculosis disease and provide information regarding the need for evaluation or treatment. In addition, the bill would require the parole agent and other parole officials to coordinate with the local health officer in supervising the person's compliance with medical evaluation or treatment related to tuberculosis, and to notify the local health officer if the person's parole is suspended as a result of having absconded from supervision. The imposition of new duties on local health officers in connection with these provisions would create a state-mandated local program.

Existing law provides that in the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the medical officer of the parole region or the physician and surgeon designated by the Director of Corrections when there are reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis.

This bill would instead require the local health officer to notify the assigned parole agent, when known, or the regional parole administrator.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed $1,000,000 statewide and other procedures for claims whose statewide costs exceed $1,000,000.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

The people of the State of California do enact as follows:

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) Each year, approximately 3,000 Californians develop tuberculosis (TB). Tuberculosis is a contagious disease transmitted through the air by bacteria when a person with active tuberculosis disease coughs or sneezes, and another person breathes in the tuberculosis bacteria.

(2) For each reported case of active tuberculosis disease, public health officials identify 10 or more individuals who have been directly exposed to the disease and are at risk of developing latent tuberculosis infection. These individuals who have been exposed to the disease are

at the highest risk of developing active tuberculosis disease soon after exposure. Finding and screening individuals who have been recently exposed to active tuberculosis disease, referred to as "contact investigation," is essential in preventing outbreaks of tuberculosis in communities.

(3) Public health officials estimate that as many as 3.4 million Californians may now be infected (latent tuberculosis infection) with the bacteria that can cause active tuberculosis disease. If undetected and untreated, an estimated 5 to 10 percent of persons in California, or 170,000 to 340,000 people, with latent tuberculosis infection will, throughout the course of their lives, develop active tuberculosis disease, thus continuing the cycle of transmission.

(4) Because persons with latent tuberculosis infection have no symptoms, the only way to detect their infection is by a tuberculin skin test.

(5) Tuberculin skin tests may now be placed and measured only by certain licensed health professionals, which do not include public health tuberculosis workers who are not licensed health professionals, but who are employed by, or under contract with, a city or county health department.

(6) The National Institute of Medicine's report on tuberculosis clearly recommends increased efforts at contact investigation, targeted skin testing, and bringing under treatment those individuals with latent tuberculosis infection in order to prevent the progression to active, transmissible, tuberculosis disease.

(b) It is the intent of the Legislature to enact legislation to permit any city or county health department to provide for certification, by the local health officer, of tuberculin skin test technicians, who are public health tuberculosis workers, and to authorize tuberculin skin test technicians to place and measure skin tests for tuberculosis for the local health department, in order to increase the number of persons qualified to administer tests and to thereby more effectively, and more cost-effectively, control the spread and contagion of this communicable disease.

SEC. 2. This act shall be known, and may be cited, as the Omnibus Tuberculosis Control and Prevention Act of 2002.

SEC. 3. Section 121360.5 is added to the Health and Safety Code, to read:

121360.5. (a) Any city or county health department may provide for one-year certification of tuberculin skin test technicians by local health officers.

(b) For purposes of this section, a "certified tuberculin skin test technician" is an unlicensed public health tuberculosis worker

employed by, or under contract with, a local public health department, and who is certified by a local health officer to place and measure skin tests in the local health department's jurisdiction.

(c) A certified tuberculin skin test technician may perform the functions for which he or she is certified only if he or she meets all of the following requirements:

(1) The certified tuberculin skin test technician is working under the direction of the local health officer or the tuberculosis controller.

(2) The certified tuberculin skin test technician is working under the supervision of a licensed health professional.

(d) A certified tuberculin skin test technician may perform intradermal injections only for the purpose of placing a tuberculin skin test and measuring the test result.

(e) A certified tuberculin skin test technician may not be certified to interpret, and may not interpret, the results of a tuberculin skin test.

(f) In order to be certified as a tuberculin skin test technician by a local health officer, a person shall meet all of the following requirements, and provide to the local health officer appropriate documentation establishing that he or she has met those requirements:

(1) The person has a high school diploma, or its equivalent.

(2) The person has completed a standardized course approved by the California Tuberculosis Controllers Association (CTCA), which shall include at least 24 hours of instruction in all of the following areas: Didactic instruction on tuberculosis control principles and instruction on the proper placement and measurement of tuberculin skin tests, equipment usage, basic infection control, universal precautions, and appropriate disposal of sharps, needles, and medical waste, client preparation and education, safety, communication, professional behavior, and the importance of confidentiality.

A certification of satisfactory completion of this CTCA-approved course shall be dated and signed by the local health officer, and shall contain the name and social security number of the tuberculin skin test technician, and the printed name, the jurisdiction, and the telephone number of the certifying local health officer.

(3) The person has completed practical instruction including placing at least 30 successful intradermal tuberculin skin tests, supervised by a licensed physician or registered nurse at the local health department, and 30 correct measurements of intradermal tuberculin skin tests, at least 15 of which are deemed positive by the licensed physician or registered nurse supervising the practical instruction. A certification of the satisfactory completion of this practical instruction shall be dated and signed by the licensed physician or registered nurse supervising the practical instruction.

(g) The certification may be renewed, and the local health department shall provide a certificate of renewal, if the certificate holder has completed inservice training, including all of the following:

(1) At least three hours of a CTCA-approved standardized training course to assure continued competency. This training shall include, but not be limited to, fundamental principles of tuberculin skin testing.

(2) Practical instruction, under the supervision of a licensed physician or registered nurse at the local health department, including the successful placement and correct measurement of 10 tuberculin skin tests, at least five of which are deemed positive by the licensed physician or registered nurse supervising the practical instruction.

(h) The local health officer or the tuberculosis controller may deny or revoke the certification of a tuberculin skin test technician if the local health officer or the tuberculosis controller finds that the technician is not in compliance with this section.

(i) This section shall remain in effect only until January 1, 2006, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2006, deletes or extends that date.

SEC. 4. Section 121361 of the Health and Safety Code is amended to read:

121361. (a) (1) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(A) A person known to have active tuberculosis disease.

(B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.

(2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 121362 is approved by a local health officer of the jurisdiction in which the health facility is located. Any treatment plan submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of receipt of that plan.

(3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges described in this paragraph shall occur only after the notification and treatment plan required by Section 121362 have been received by the local health officer.

(4) This subdivision shall not apply to any transfer within the state correctional system or to any interfacility transfer occurring within a local detention facility system.

(b) No health facility shall, without first complying with subdivision (e), transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility. This subdivision shall not apply to any transfer within the state correctional system or to any interfacility transfer occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) (1) Any discharge, release, or transfer described in subdivisions (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 121362 has been received by the local health officer. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution, the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

(2) When a person described in paragraph (1) of subdivision (a) is released on parole from a state correctional institution, the notification and written treatment plan specified in this subdivision shall be provided to both the local health officer for the county in which the parolee intends to reside and the local health officer for the county in which the state correctional institution is located.

(3) Notwithstanding any other provision of law, the Department of Corrections shall inform the parole agent, and other parole officials as necessary, that the person described in paragraph (1) of subdivision (a) has active or suspected active tuberculosis disease and provide information regarding the need for evaluation or treatment. The parole agent and other parole officials shall coordinate with the local health officer in supervising the person's compliance with medical evaluation or treatment related to tuberculosis, and shall notify the local health officer if the person's parole is suspended as a result of having absconded from supervision.

(f) No health facility that declines to discharge, release, or transfer a person pursuant to this section shall be civilly or criminally liable or subject to administrative sanction therefor. This subdivision shall apply

only if the health facility complies with this section and acts in good faith.

(g) Nothing in this section shall relieve a local health officer of any other duty imposed by this chapter.

SEC. 5. Section 121362 of the Health and Safety Code is amended to read:

121362. Each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease shall promptly report to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or discontinues care. The initial disease notification report shall include an individual treatment plan that includes the patient's name, address, date of birth, tuberculin skin test results, pertinent radiologic, microbiologic, and pathologic reports, whether final or pending, and any other information required by the local health officer. Subsequent reports shall provide updated clinical status and laboratory results, assessment of treatment adherence, name of current care provider if the patient transfers care, and any other information required by the local health officer. A facility discharge, release, or transfer report shall include all pertinent and updated information required by the local health officer not previously reported on any initial or subsequent report, and shall specifically include a verified patient address, the name of the medical provider who has specifically agreed to provide medical care, clinical information used to assess the current infectious state, and any other information required by the local health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plan. Nothing in this section shall authorize the disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 7 (commencing with Section 120975) of, Chapter 8 (commencing with Section 121025) of, and Chapter 10 (commencing with Section 121075) of Part 4 of Division 105.

In the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the assigned parole agent, when known, or the regional parole administrator, when there are

reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the local health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

SEC. 6. Notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars ($1,000,000), reimbursement shall be made from the State Mandates Claims Fund.

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SENATE RULES COMMITTEE
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327-4478

SB 843

UNFINISHED BUSINESS

Bill No: SB 843
Author: Perata (D), et al
Amended: 6/30/02
Vote: 21

SENATE HEALTH & HUMAN SERV. COMMITTEE : 7-1, 5/2/01
AYES: Ortiz, Chesbro, Escutia, Figueroa, Kuehl, Romero, Vincent
NOES: Morrow

SENATE APPROPRIATIONS COMMITTEE : 9-0, 5/31/01
AYES: Alpert, Bowen, Burton, Escutia, Karnette, McPherson, Murray, Perata, Speier

SENATE FLOOR : 29-8, 6/4/01
AYES: Alarcon, Alpert, Bowen, Burton, Chesbro, Costa, Dunn, Escutia, Figueroa, Johannessen, Karnette, Kuehl, Machado, Margett, McPherson, Murray, O'Connell, Ortiz, Peace, Perata, Polanco, Romero, Scott, Sher, Soto, Speier, Torlakson, Vasconcellos, Vincent
NOES: Ackerman, Brulte, Haynes, Knight, McClintock, Monteith, Oller, Poochigian

ASSEMBLY FLOOR : 74-1, 8/15/02 - See last page for vote

SUBJECT : Omnibus Tuberculosis Control and Prevention Act of 2002

SOURCE : Health Officers Association of California

DIGEST : This bill, as it left the Senate, required the

CONTINUED

State Department of Health Services, State Department of Corrections, and the State Board of Corrections to develop plans to control and prevent tuberculosis. This bill now authorizes local health officers to certify tuberculin skin test technicians and requires parole agents to be notified when an inmate with tuberculosis is released from prison.

ANALYSIS : This bill:

1. Authorizes a city or county health department to permit its local health officer (LHO) to certify tuberculin skin test technicians, as defined, and to place and measure TB skin tests for one year within the local department's jurisdiction.

2. Requires the technicians to work under the direction of the LHO or tuberculosis controller, be supervised by a licensed health professional, and perform, but not interpret, TB skin tests.

3. Requires the technicians to meet specified educational and experience requirements for initial and ongoing certification.

4. Sunsets the above on January 1, 2006.

5. Requires the State Department of Corrections (CDC) to do the following upon release of an inmate with active or suspected active TB from a state prison:

   A. Provide notification and a written treatment plan to the LHO in the county where the inmate intends to reside, as well as the county in which the prison is located.

   B. Inform the assigned parole agent that the parolee has TB and requires the parole agent to coordinate with the LHO in supervising the person's compliance with medical evaluation or treatment for TB, and to notify the LHO if the person absconds from supervision.

6. Requires the LHO to notify the assigned parole agent or the regional parole administrator, instead of the medical

officer for the parole region or a physician designated by CDC, when a parolee with active TB ceases treatment.

Comments

This bill, sponsored by the Health Officers Association of California, is intended to help combat the spread of TB in California in two ways: (a) increasing the number of persons qualified to perform TB skin tests; and (b) authorizing direct notification to parole agents when a recent parolee under their supervision has TB.

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes Local: No

According to the Assembly Appropriations Committee:

1. Negligible fiscal impact on CDC, as many of the activities required by the bill are already being performed.

2. State-reimbursable costs -- likely minor -- for an LHO to coordinate with a parole agent on a parolee's medical evaluation or treatment for TB.

SUPPORT : (Verified 8/16/02)

Health Officers Association of California (source)
Alameda County Health Care Services Agency, Public Health Department
American Lung Association
California Conference of Local Health Department Nursing Directors
California Conference of Local Health Officers
California Correctional Peace Officer Association
California Department of Corrections
County Health Executives Association of California
California Medical Association
County of San Bernardino
County of San Diego
San Francisco Mayor's Office
Santa Clara County Board of Supervisors

OPPOSITION : (Verified 8/16/02)

American Nurses Association of California
California Nurses Association

ARGUMENTS IN SUPPORT : Proponents assert that public health and nursing shortages in many areas have prevented TB control programs form expanding contact investigation

and elimination efforts. Allowing local health officers to certify skin test technicians, they contend, would allow local health departments to maximize the effectiveness of existing staff and allow for more TB testing.

CDC, writing in support of the parole agent provisions, states this bill makes statutory notification for parole agents consistent for HIV and TB. Although a recent parolee has the most contact with his parole agent in the initial period after release, current law authorizes release of this information for parolees with HIV, but not TB. Instead of waiting for an LHO to notify the parole agent, this bill authorizes CDC to directly notify the agent upon the parolee's release from prison.

ARGUMENTS IN OPPOSITION : The California Nurses Association (CAN) opposes this bill because it feels public health nurses, rather than unlicensed technicians, should perform TB skin tests. CAN argues the bill would "fragment the public health system and create a second class tier of public health services" by using technicians who lack the requisite education and training to properly place, measure, and interpret the tests. The technicians would not be able to provide the comprehensive case management and other related services that persons infected with TB need.

ASSEMBLY FLOOR :
AYES: Aanestad, Alquist, Aroner, Ashburn, Bates, Bogh, Briggs, Calderon, Bill Campbell, Canciamilla, Cardenas, Cardoza, Cedillo, Chan, Chavez, Chu, Cogdill, Cohn, Corbett, Correa, Cox, Daucher, Diaz, Dickerson, Dutra, Firebaugh, Florez, Frommer, Goldberg, Harman, Havice, Hollingsworth, Horton, Jackson, Keeley, Kehoe, Kelley, Koretz, La Suer, Leach, Leonard, Leslie, Liu, Longville, Lowenthal, Maddox, Maldonado, Matthews, Migden, Nakano, Nation, Negrete McLeod, Robert Pacheco, Rod Pacheco,

Papan, Pavley, Pescetti, Reyes, Richman, Salinas, Shelley, Simitian, Strickland, Strom-Martin, Thomson, Vargas, Washington, Wayne, Wiggins, Wright, Wyland, Wyman, Zettel, Wesson
NOES: Mountjoy

CP:sl 8/16/02 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

Exhibit 9

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CIVIL ORDER OF DETENTION FOR TUBERCULOSIS: MODEL FORMS FOR CALIFORNIA HEALTH OFFICERS

Table of Contents

The purpose of these documents is to provide general guidance on executing tuberculosis-related civil detention orders. The guidance is based on the opinions of the attorneys at the Public Health Law Program of the Public Health Institute and is not intended or offered as legal advice. Health officials should consult with their legal counsel before using these documents.

PUBLIC HEALTH INSTITUTE

TB and the Law Project

CIVIL ORDER OF DETENTION FOR TUBERCULOSIS: MODEL FORMS FOR CALIFORNIA HEALTH OFFICERS

INTRODUCTION AND OVERVIEW

This packet is designed to assist California Health Officers, Tuberculosis Controllers, and their staff in executing tuberculosis-control-related civil detention orders. It was developed by attorneys at the Public Health Law Program of the Public Health Institute in consultation with representatives of the California Tuberculosis Controllers Association and the California Department of Health Services, Tuberculosis Control Branch. This packet is not intended or offered as legal advice. Health officials should consult with their legal counsel before using the enclosed forms.

The following overview describes each of the forms included in this packet, indicating which components are required by the California tuberculosis control statute (California Health and Safety Code §§ 121350-121555), and which components are recommended but optional from a statutory perspective. It is important to read this overview before adapting any of the forms for a health official's use. Otherwise, legally essential material could be left out.

Civil Order of Detention for Tuberculosis

The model Civil Order of Detention for Tuberculosis form tracks the requirements set forth in the tuberculosis control statute. These requirements codify procedures for civil detention that reflect constitutional standards. Because the model order form incorporates the statutory and constitutional obligations of health departments with respect to the patient being detained, it is essential to complete the form as thoroughly and precisely as possible.

The ***heading*** (e.g., "This order issued to," "This order issued by," etc.) contains important information regarding the parties involved, much of which must be included in the order pursuant to the tuberculosis control statute.

Part 1 of the order states that the recipient must comply with detention in a specified facility. This part also meets the statutory mandate that the recipient be informed of the purpose of the order.

Part 2 enumerates certain due process rights to which the recipient is entitled under the tuberculosis control statute. These rights are repeated in the Notice and Restatement of Rights that must be given to the recipient along with the order itself.

Note that the TB control statute requires that the detainee be notified of certain rights in two places: the order itself and a separate notice. In the order, the detainee must be notified at least of his/her (1) right to request release, (2) right to counsel, and (3) right to 60-day court review. In the separate notice, the detainee must be notified at least of his/her (1) right to request release, (2) right to counsel, and (3) right to supply the contact information of two people to be notified of the detention. The right to request release and the right to counsel must be included both places, but the right to 60-day court review need only be included in the order itself, while the right to supply the contact information of two people need only be included in the separate notice. The model order form includes the same comprehensive list of rights in the order and the separate notice. The list includes all of the rights that must be listed in the order and/or the separate notice as well as the right to an interpreter.

Part 3 specifies the legal basis for the detention. It is essential that the health officer identify whether the recipient is being detained for isolation or completion of treatment, since the legal basis for detention bears upon the individualized assessment that the health officer must provide (see ***part 4***) and the maximum duration of detention (see ***part 6***).

With respect to ***parts 4 and 5*** of the order, it is particularly important to provide comprehensive lists documenting the behaviors of the individual requiring detention and the less restrictive alternatives that were attempted and failed and that were considered and rejected. The level of detail contained in these lists is not only legally mandated but also reflects good medical practice.

In asking for a list of the specific patient behaviors that support the need for detention, ***part 4*** captures the statutory requirement that the health officer provide an "individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order." (§ 121367(a)(2).) This individualized assessment should give a chronological description of every incident leading up to the issuance of the detention order. While completing the individualized assessment, it is advisable to refer to the *Guidelines for the Civil Detention of Persistently Nonadherent Tuberculosis Patients in California*. Specifically, sections II(A) and II(B) of the *Plan for the Civil Detention of Persistently NonAdherent Tuberculosis Patients* (*Civil Detention Plan*) enumerate the types of patient behaviors which support a civil detention order for the purposes of isolation pursuant to section 121365(d) or for the purposes of completing treatment pursuant to section 121365(e).

Part 5 asks for two lists: the less restrictive alternatives that were attempted and failed, and the less restrictive alternatives that were considered and rejected. Again, it is important to provide detailed information, because it is the health officer's statutory and constitutional responsibility to consider and/or attempt less restrictive alternatives to detention before engaging in this serious deprivation of the patient's liberty. Less restrictive alternatives that might be included on the lists are set forth in sections II(A) and II(B) of the *Civil Detention Plan*.

Part 6 fulfills the statutory requirement that the recipient be informed of the duration of detention. It is important to remember that if a patient is being detained solely to be isolated from other people, then the patient must be released once he or she ceases to be infectious or once the health officer has determined that circumstances have changed, permitting the patient to be adequately separated from others upon release. (§ 121368(b).) If the patient is being detained solely to make sure he or she completes a course of treatment, then the patient must be released upon completing the prescribed course of medication. (§ 121368(c).)

Notice and Restatement of Rights

The tuberculosis control statute states that the civil detention order must be accompanied by a separate notice that includes specified information about the recipient's rights. This form serves that purpose.

Acknowledgment of Receipt/Choice of Action

This form is an optional addendum to the civil detention order. The tuberculosis control statute does not require the information in this form to be communicated in this format. However, the form serves as powerful documentation of the health officer's compliance with the statute. The written acknowledgment of receipt provides supplementary evidence that the order and Notice and Restatement of Rights actually made it into the hands of the recipient. The choice of action portion of the form reflects the health department's efforts to facilitate the recipient's ability to exercise his or her statutory rights to request release, free legal representation, and the notification of up to two designees about the detention.

Proof of Personal Service

Technically, a civil detention order may be served by registered or certified mail. (§ 120105.) Practically, however, civil detention orders are served in person by health department personnel. This generic form can be used by anyone serving a tuberculosis patient with a civil detention order. Since the tuberculosis control statute does not specify who may serve an order, it is fine for someone from a health department to serve the order, regardless of whether the server is a "party" to the action.

Termination of Civil Order of Detention for Tuberculosis

The tuberculosis control statute does not contain any guidance regarding the procedures for terminating a civil detention order. Nonetheless, it is worthwhile to verify in writing the termination date of a civil detention order. This form not only informs the interested parties of the termination but also serves an important record-keeping function by documenting the end date of the civil detention.

Date: _____

CIVIL ORDER OF DETENTION FOR TUBERCULOSIS

ISSUED PURSUANT TO CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 120175 AND 121365(d) or (e)

This order issued to: Name: _____

Address: _____

Telephone number: _____ Date of birth: _____

Medical record number: _____ Payment source: _____

This order issued by: _____ (Signature of Health Officer or Designee)

_____ (Printed name and title)

If applicable, this order interpreted by: _____ (Signature)

_____ (Printed name)

Health department contact person: Name and title: _____

Telephone number: _____

* * * * *

1. Order and Purpose of Detention

This is a *legal order* issued by the Health Officer of (City/County) _____. You must comply with this order. Failure to comply with this order is a criminal misdemeanor and may result in imprisonment for up to one year.

YOU ARE ORDERED TO COMPLY WITH YOUR DETENTION IN THE FOLLOWING FACILITY: _____. The *purpose* of your detention is to protect the public health.

2. Detained Patient's Rights

- You have the right to request release from detention by indicating your request on the attached Acknowledgment of Receipt/Choice of Action form or by contacting the health department contact person listed above.
- If you request release from detention, your detention will not continue for more than five (5) business days after your request unless a court issues an order authorizing your continued detention.
- Whether or not you request release from detention, the Health Officer is required to obtain a court order authorizing your detention within 60 days of the beginning of your detention if your detention continues through that time. After obtaining the first court order authorizing your detention, the Health Officer is required to obtain another court review of your detention at least once every 90 days so long as your detention continues.

- You have the right to hire a lawyer to represent you or to have a lawyer provided to you free of charge. If you would like to have a lawyer provided to you free of charge, indicate your request on the attached Acknowledgment of Receipt/Choice of Action form or contact the health department contact person listed above. The health department will notify a lawyer that you have requested legal representation.
- You may give the health department contact person listed above the addresses or telephone numbers of two people who you want to be told of your detention. At your request, the Health Officer shall take reasonable steps to notify those people that you are being detained.
- If necessary, you shall be provided with a language interpreter or a person skilled in communicating with vision or hearing impaired individuals in accordance with applicable law.

3. Legal Basis for Detention
(Check applicable box(es))

☐ Detention for isolation: You *have infectious* tuberculosis and there is a substantial likelihood that you may transmit tuberculosis because of your inadequate separation from others. (Health and Safety Code section 121365(d).)

☐ Detention for isolation: There *is a substantial likelihood that you have infectious* tuberculosis and that you may transmit tuberculosis because of your inadequate separation from others. (Health and Safety Code section 121365(d).)

☐ Detention for completion of treatment: You *have active* tuberculosis and there is a substantial likelihood based on your past or present behavior that you cannot be relied upon to participate in or complete an appropriate course of medication or to follow required infection control precautions. (Health and Safety Code section 121365(e).)

☐ Detention for completion of treatment: You *have been reported to the health officer as having active* tuberculosis with no subsequent report to the health officer that you have completed an appropriate prescribed course of medication, and there is a substantial likelihood based on your past or present behavior that you cannot be relied upon to participate in or complete an appropriate course of medication or to follow required infection control precautions. (Health and Safety Code section 121365(e).)

4. Circumstances and Behavior of Patient Causing the Need for Detention
(In an attachment labeled "Attachment A," list in chronological order the specific patient behaviors that support the need for detention, including dates, times, and names of relevant health department personnel. Attach as many pages as needed.)

See *Attachment A* for the specific circumstances and/or behaviors that support the need for your detention.

5. Lack of Alternatives that Are Less Restrictive than Detention
(In an attachment labeled "Attachment B," list the less restrictive alternatives that were attempted but unsuccessful. This list may cross-reference Attachment A. In an attachment labeled "Attachment C," list the less restrictive alternatives that were considered and rejected, and explain the reason for the rejection of each alternative. Attach as many pages as needed.)

The health department attempted the alternatives to detention listed in *Attachment B*, but those alternatives were unsuccessful. In addition, the health department considered and rejected the alternatives to detention listed in *Attachment C* for the reasons stated therein.

6. Duration of Detention

This order shall remain in effect until it is terminated by the Health Officer. You may only be detained for the amount of time necessary to fulfill the legal basis of your detention as set forth under number 3 above. To ensure the order remains effective, the Health Officer must obtain court authorization within 60 days of the beginning of your detention and at least once every 90 days thereafter.

* * * * *

This order distributed to:

Patient: _____ (Printed name)

Health Officer: _____ (Printed name)

Tuberculosis Controller: _____ (Printed name)

County Counsel: _____ (Printed name)

District Attorney: _____ (Printed name)

Detention Facility Contact: _____ (Printed name)

Other (e.g., Case Manager, Health Care Provider):

_____ (Printed name)

_____ (Printed name)

Date:_____

NOTICE AND RESTATEMENT OF RIGHTS

You, _____, have been detained pursuant to a Civil Order of Detention for Tuberculosis in accordance with Health and Safety Code sections 120175 and 121365(d) or (e). You are hereby advised of the following rights:

- You have the right to request release from detention by indicating your request on the attached Acknowledgment of Receipt/Choice of Action form or by contacting the health department contact person listed above.
- If you request release from detention, your detention will not continue for more than five (5) business days after your request unless a court issues an order authorizing your continued detention.
- Whether or not you request release from detention, the Health Officer is required to obtain a court order authorizing your detention within 60 days of the beginning of your detention if your detention continues through that time. After obtaining the first court order authorizing your detention, the Health Officer is required to obtain another court review of your detention at least once every 90 days so long as your detention continues.
- You have the right to hire a lawyer to represent you or to have a lawyer provided to you free of charge. If you would like to have a lawyer provided to you free of charge, indicate your request on the attached Acknowledgment of Receipt/Choice of Action form or contact the health department contact person listed above. The health department will notify a lawyer that you have requested legal representation.
- You may give the health department contact person listed above the addresses or telephone numbers of two people who you want to be told of your detention. At your request, the Health Officer shall take reasonable steps to notify those people that you are being detained.
- If necessary, you shall be provided with a language interpreter or a person skilled in communicating with vision or hearing impaired individuals in accordance with applicable law.

ACKNOWLEDGMENT OF RECEIPT/CHOICE OF ACTION

I, _____ (printed name of patient), acknowledge that I have received the Civil Order of Detention for Tuberculosis and the Notice and Restatement of Rights.

Patient Signature: _____ Date: _____

At this time, I choose to do the following (*place initials in the space(s) provided*):

Request for Release

____ I request release from detention.

____ I do not request release from detention. If I decide to request release at any time during the duration of my detention, I will contact the health department contact person listed on the first page of the Civil Order of Detention for Tuberculosis.

Request for a Free Lawyer

____ I request that I be provided a lawyer free of charge.

____ I do not request free legal representation. If I decide to request free legal representation at any time during the duration of my detention, I will contact the health department contact person listed on the first page of the Civil Order of Detention for Tuberculosis.

Request for Notification of Friends, Family, or Others

____ I request that the health department tell the following person or people about my detention:

Person # 1: Name: _____

Address: _____

Telephone number: _____

Person # 2: Name: _____

Address: _____

Telephone number: _____

____ I do not request that the health department tell someone about my detention. If I decide I want one or two people told about my detention, I will contact the health department contact person listed on the first page of the Civil Order of Detention for Tuberculosis

* * * * *

For the person delivering the order if the patient refuses to sign or complete this form:

I, _____(printed name), explained this form to the patient and asked the patient to sign and complete this form, but the patient refused to sign or complete the form.

Signature: _____ Date: _____

PROOF OF PERSONAL SERVICE

State of California, City/County of _____

_____, the undersigned, states:

I am an agent of the City/County of _____, in which the within-mentioned personal service occurred. My business address is:

_____

_____

I delivered the attached CIVIL ORDER OF DETENTION FOR TUBERCULOSIS and NOTICE AND RESTATEMENT OF RIGHTS by hand to the following person at the following address, date, and time:

Name of person served: _____

Address where service took place: _____

_____

Date of service: _____

Time of service: _____

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed at _____, California, on _____, 20___.

_____

Signature

Date: _____

TERMINATION OF CIVIL ORDER OF DETENTION FOR TUBERCULOSIS

This termination issued by: _____ (Signature of Health Officer or Designee)

_____ (Printed name and title)

This termination issued to: Name: _____

Address: _____

Telephone number: _____ Date of Birth: _____

Medical record number: _____

Termination

On _____, you were issued a Civil Order of Detention for Tuberculosis. That order is hereby terminated, and you are hereby released from detention.

This termination distributed to:

Patient: _____ (Printed name)

Health Officer: _____ (Printed name)

Tuberculosis Controller: _____ (Printed name)

County Counsel: _____ (Printed name)

District Attorney: _____ (Printed name)

Detention Facility Contact: _____ (Printed name)

Other (e.g., Case Manager, Health Care Provider):

_____ (Printed name)

_____ (Printed name)

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Types of Health Orders Related to Tuberculosis Control

A health officer may issue the following health orders.[1] Health orders are legally enforceable if proper procedures are followed.

- Detention for purposes of examination.
- Completion of a prescribed course of medication.
- Compliance with infection control precautions.
- Compliance with DOT plan (if an active TB patient is unable or unwilling to complete a prescribed course of medication).
- Detention in a health or other treatment facility if a person is substantially likely to have infectious TB and to transmit the disease.
- Detention in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2) there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions.
- Exclusion from attendance at the workplace.
- Home isolation.
- Other orders the health officer deems necessary and appropriate.

[1] See Cal. Health & Safety Code § 121365.

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Contents of Health Orders: Check List for Compliance

A health order must include all of the following information:[1]

- The legal authority and particular sections of state law or regulations under which the order is issued;
- An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order.
- The less restrictive treatment alternatives that were attempted and were unsuccessful, or that were considered and rejected with the reasons the alternatives were rejected.
- The orders must be in writing and include the person's name, the time period the order will be in effect, the location, the payer source if known, and other terms and conditions necessary to protect the public health. A copy of the order must be served upon the person.
- Language, visual, or hearing interpreters must be provided when necessary to ensure the person's understanding of the health order.

[1] See Cal. Health & Safety Code §§121367(a) and 121369(a).

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Legal Rights of Detainees: Civil Detention Check List

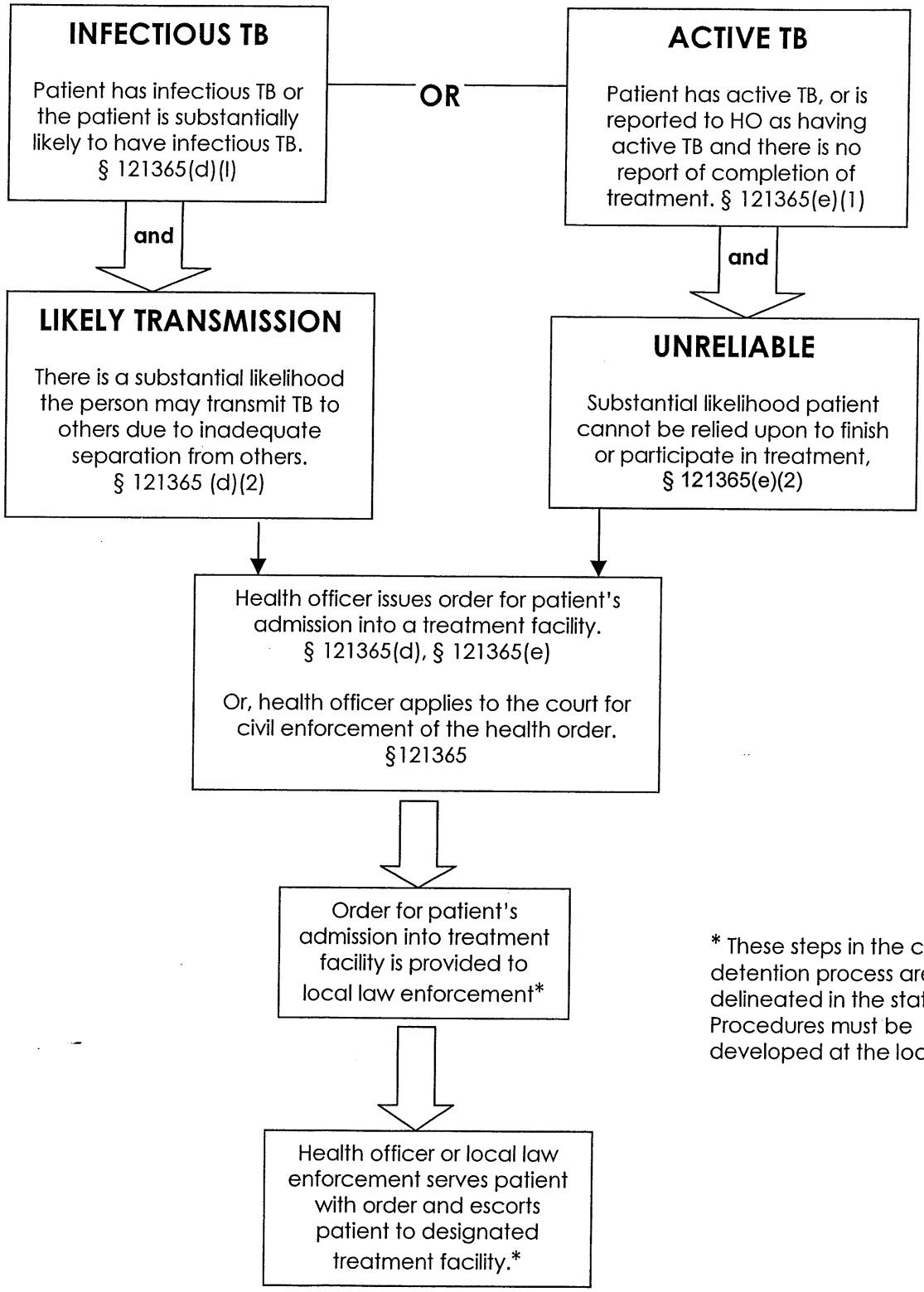
A person who is detained for violating a health order related to TB control has the following legal rights:[1]

- Upon a detainee's request, the local health officer must apply for a court order authorizing continued detention within 72 hours of the request.
- Whether or not a detainee makes a request, a court order is required for detentions of more than 60 days.
- The health officer must seek further court review of a detention within 90 days of the initial court order and within 90 days of each subsequent court review.
- The health officer must prove the necessity of the detention by "clear and convincing" evidence.
- A person subject to detention has the right to counsel and to have counsel provided.
- Each health order must advise the detainee of his or her rights regarding release requests, court orders, court review, and legal representation.
- Each health order must be accompanied by a separate notice that explains the detainee's right to request release; that lists the phone number the detainee may call to request release; that explains the detainee's right to counsel; and that informs the detainee that, at the detainee's request, the health officer will notify two individuals of the detention.
- A detainee may only be detained for the amount of time necessary to fulfill the purpose of the detention.

[1] See Cal. Health & Safety Code §§ 121366, 121367 & 121368.

Civil Detention of Persistently Nonadherent TB Patients

All citations to the California Health and Safety Code

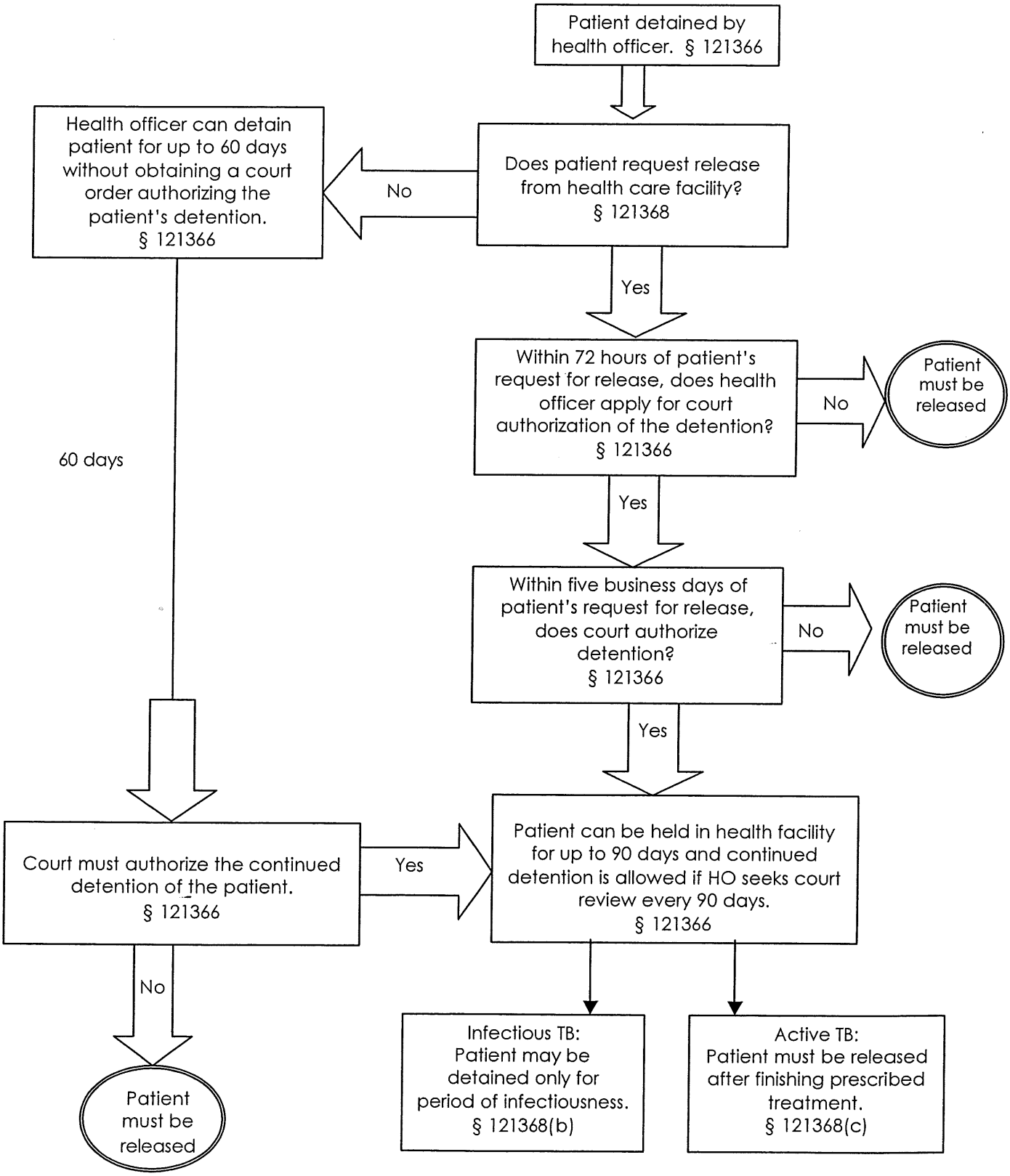


* These steps in the civil detention process are not delineated in the statute. Procedures must be developed at the local level.

Thanks to Ann Alpers, Esq.; Office of the City Attorney, San Francisco for assistance with this chart.

Release of Persistently Nonadherent TB Patients from Detention by Health Officer

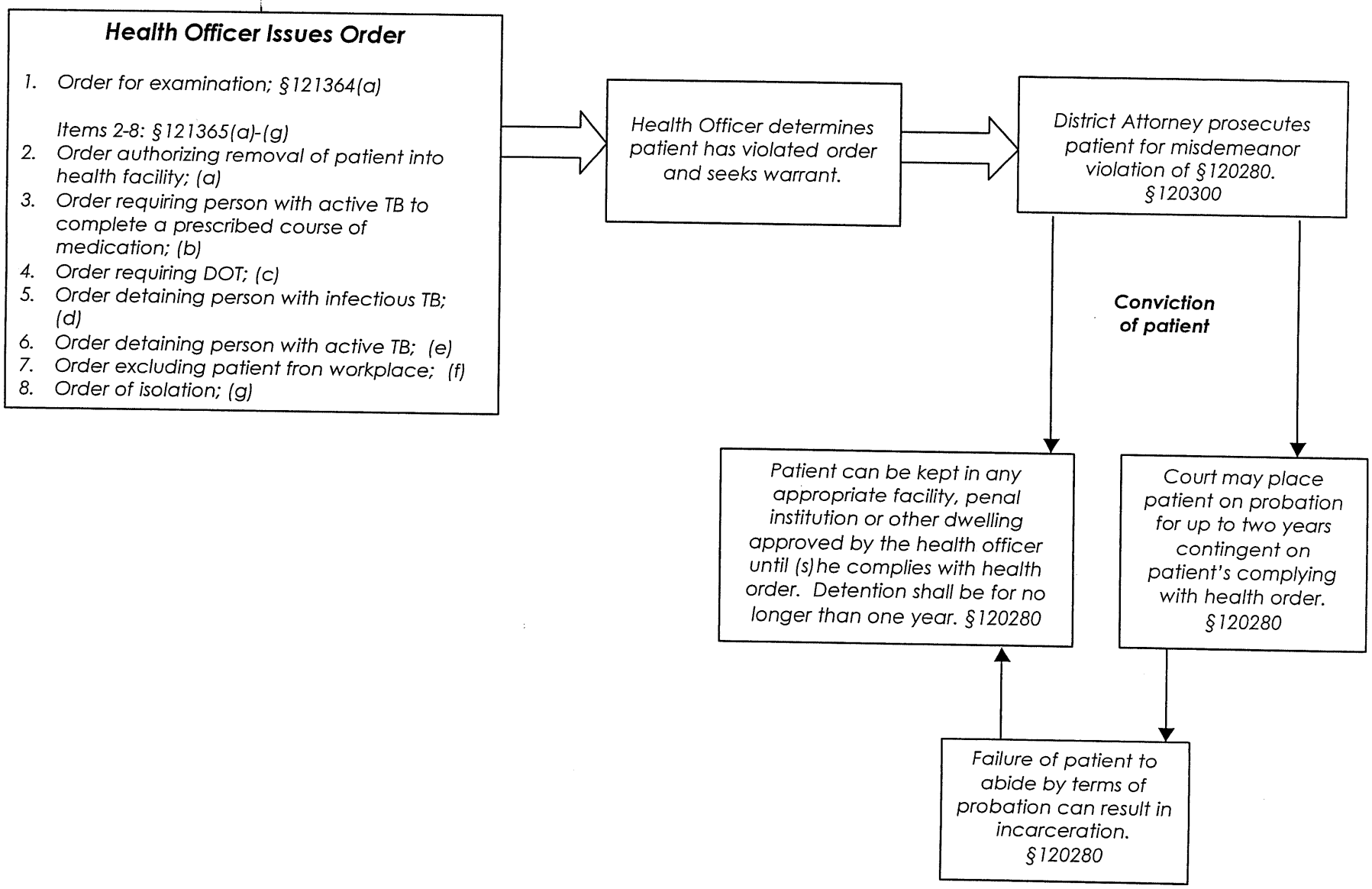
All citations to the California Health and Safety Code



Thanks to Ann Alpers, Esq.; Office of the City Attorney, San Francisco for assistance with this chart

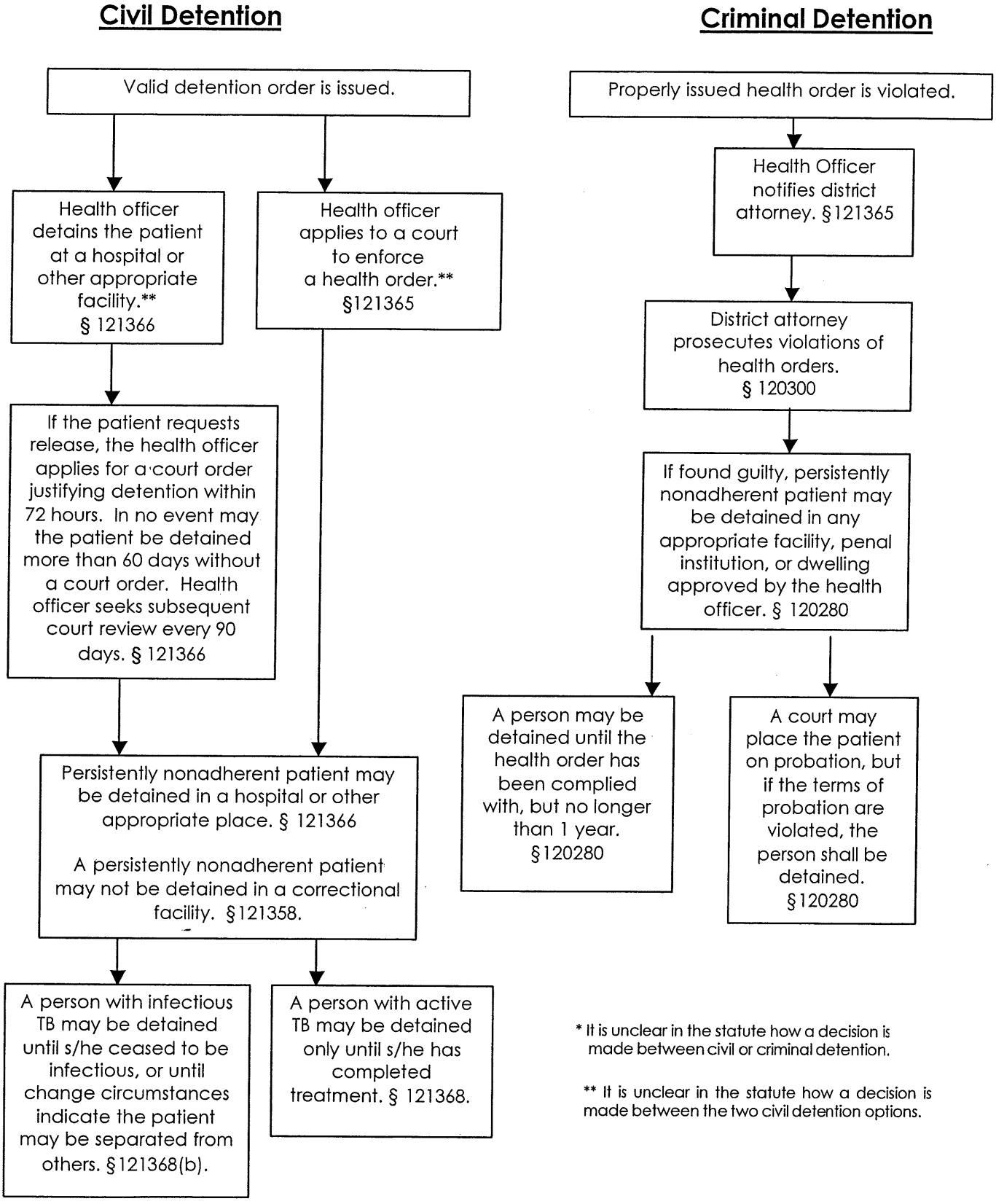
Criminal Detention of Persistently Nonadherent TB Patients

All citations to the California Health and Safety Code



Comparison of Civil and Criminal Detention Of Persistently Nonadherent TB Patients*

All citations to the California Health and Safety Code



* It is unclear in the statute how a decision is made between civil or criminal detention.

** It is unclear in the statute how a decision is made between the two civil detention options.

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Souvannarath Case Study

The story of Hongkham Souvannarath has quickly become well known in the California TB control community.[1] From July 1998 through May 1999, Souvannarath was illegally detained in the Fresno county jail due to her alleged defiance of California's TB laws. Her incarceration involved a series of missteps by county officials, so upon her release, Souvannarath filed two court cases. The first case cost the county $1.2 million in settlement funds,[2] and the second resulted in an appeals court opinion ordering the Fresno Human Services System ("HSS") to cease using the county jail as a civil detention site for noncompliant TB patients.[3] The Souvannarath story serves as a sharp reminder that the law is implicated in the every-day actions of the public health community.

Background

Souvannarath and her six children fled their homeland of Laos in 1984 along with a wave of refugees who were caught up in the political aftermath of the Vietnam War. Souvannarath ultimately settled in California's Central Valley, which is home to a large number of Southeast Asian immigrants. Souvannarath lives with her four daughters, two of whom were minors as of 1998. She speaks very little English.

TB Diagnosis and DOT

In February 1998, Souvannarath was diagnosed with MDR TB. She received medical care from the county health department which operates a chest clinic to treat TB patients. The TB Controller, a physician, oversees the clinic. Health orders requested by the TB Controller are issued and enforced by the local health officer.

The TB Controller prescribed Souvannarath a combination of intravenous drugs and oral medications that caused severe side effects. Souvannarath had a dim understanding of her disease and course of treatment because the chest clinic provided a Hmong translator who spoke broken Laotian. Despite the serious side effects she was suffering and despite her lack of

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[1] The information in this case study is drawn from the following sources: *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115 (2002); John Roemer, Reclaiming a Soul, Daily Journal, Apr. 30, 2001; *Souvannarath v. Fresno*, Civ. F-99-6655 (1999) (plaintiff's early neutral evaluation brief); *Souvannarath v. Hadden*, No. 633425-4 (Aug. 26-Aug. 27, 1999) (hearing transcript).

[2] See John Roemer, Reclaiming a Soul, Daily Journal, Apr. 30, 2001.

[3] See *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115 (2002).

comprehension about her medical situation, Souvannarath cooperated with the health care workers who administered the intravenous drugs and who gave her oral medications under DOT.

Ohio Plans

After several months of complying with a treatment regimen that was causing her to feel increasingly ill, Souvannarath made plans to move to Ohio to live with one of her sons. In her culture, sons are considered better equipped than daughters to advocate and care for their parents, so Souvannarath hoped that she would improve if she lived with a son for awhile. She informed the chest clinic of her intentions, so a nurse removed her PICC line, the TB Controller gave her a supply of medications to take with her, and the chest clinic alerted its counterpart in Ohio to Souvannarath's impending arrival. The son who was planning to pick up Souvannarath was delayed by problems at work, and Souvannarath ran out of medications while she was waiting for him. As soon as she stopped taking the medications, she felt perfectly well. She thus decided to avoid the chest clinic until she left town. Souvannarath instructed her daughters not to disclose her whereabouts to any local authority.

In early July 1998, the chest clinic got word from Ohio that Souvannarath had not shown up at her son's house. The clinic staff was worried that Souvannarath could infect her family members (including a five-year-old granddaughter), so health workers quickly tried to track her down. Souvannarath's daughters denied knowing where she was, but they suggested that the health workers call Souvannarath's sons, who had more influence over their mother. The chest clinic did not contact the sons.

Order for Examination

A field nurse finally located Souvannarath approximately two weeks later, on July 23. The next day, an HSS communicable disease specialist visited Souvannarath with a translator. The specialist served Souvannarath with an English-language order for examination instructing her to appear at the chest clinic. He explained the meaning of the order, and he warned her that a failure to appear could result in detention. Souvannarath and her daughters had trouble understanding the translator. Souvannarath did not keep her appointment at the chest clinic on July 28.

Detention Order

Upon Souvannarath's failure to appear, the TB Controller requested that the health officer sign and issue a detention order. The health officer did so, directing that Souvannarath be detained in the county jail until she completed the prescribed course of treatment (which had the potential to extend for two years). The order did not state any reasons for the detention, and it contained no reference to Souvannarath's rights under the state TB control statute to a request for release, to a hearing, and to court appointed counsel.

Incarceration

On July 30, an HSS communicable disease specialist and two police officers arrested Souvannarath at her home. They took her at gun point to the county jail after promising her that that she was only going to the hospital. When she reluctantly agreed to proceed into the jail, she was strip searched. She was then confined in a cold and dark safety cell for three days because she cried that she was afraid she would die, and a Hmong translator interpreted her cry as a suicide threat.

Once she was released from the safety cell, Souvannarath was housed in the jail's infirmary for the six months that it took to complete the intravenous portion of her therapy. According to Souvannarath, the other inmates in the infirmary were allowed to exercise and go to church, but because she could not communicate with the jail personnel, she was unable to enjoy such privileges. The few times she was taken to the county chest clinic, she was forced to walk down a major thoroughfare shackled at her wrists, ankles, and waist.

Souvannarath was ultimately placed in the general population of the county jail, where she was subject to the same treatment as the other inmates. She was allowed one-half hour visits with her daughters twice a week through a glass security barrier. She was often too weak to climb to her assigned top bunk, and she had trouble obtaining her nausea medications. One guard was able to provide occasional translation services, but most of the time, Souvannarath could not communicate her problems to the prison staff.

Release

Ten months after her arrest, Souvannarath was served with a revised detention order and was given an attorney and a hearing date. The order was drawn from a new set of forms that the county had developed for use in civil detention cases in order to ensure that the county was complying with state TB control laws. At a May 27, 1999 hearing, Souvannarath was released from jail and placed on electronic monitoring, and at a July 19, 1999 review hearing, Souvannarath was unconditionally released from detention.

Litigation

Souvannarath ultimately filed two lawsuits, one in federal and one in state court. In the federal case, Souvannarath claimed that several HSS employees had violated provisions of the U.S. Constitution and of California state law, and that she was entitled to damages in light of what she had suffered. That case settled for $1.2 million. In the state case, Souvannarath asked the court to order HSS to cease using the county jail as a civil detention site for noncompliant TB patients. The trial court granted her request, and a court of appeals affirmed this decision.

In a hearing relating to the state case, a county health official stated, "I did not dwell into [the] individual lives nor [the] legal issues" of the patients served by HSS. The official furthered, "We're not attorneys, we're just medical providers." Moreover, the official "could not say whether any patients detained in the jail were afforded due process protections as this is a legal matter and [the official] would be unaware of that."

Questions

- What statutory provisions were implicated by the county's use of translators who were hard for Souvannarath to understand?
- What statutory provisions and constitutional principles did the health officer fail to follow when issuing the order of detention?
- What statutory provisions and constitutional principles were implicated in Souvannarath's arrest and incarceration?
- How could the health department have handled Souvannarath's case differently?

PUBLIC HEALTH INSTITUTE

TB and the Law Project

TB Control and the Law
Frequently Asked Questions on Criminal Commitment

Is failure to comply with a health order a crime?	§120275:* After notice or upon demand, the failure to comply with a health order of the California Department of Health Services is a misdemeanor which is a crime. See below for the definition of a misdemeanor. §120280: Failure to comply with a health order issued by a local health officer pursuant to §121365 is a misdemeanor. *Comment*: §121365 states that a local health officer may issue any orders he or she deems necessary to protect the public health, and may make an application to a court to enforce those orders.
Is any other behavior by a person with TB a crime?	§120290: A person who has TB and who willfully exposes him or herself to another person is guilty of a misdemeanor. *Comment*: A "willful"act is an action that proceeds from a conscious motion of the will. It is voluntary, conscious, and purposeful, not accidental.
What is a misdemeanor and what punishment can be imposed?	California Penal Code §§ 17 and 19 state that a misdemeanor is a non-felony crime. Penalties for a misdemeanor are a fine and/or imprisonment for up to 6 months, unless otherwise specified by a particular statute. *Comment*: The TB control statute specifies that violations of TB-related health orders may result in imprisonment for up to one year.
Where can confinement occur?	§120280: Confinement may occur in any appropriate facility, penal institution, or dwelling approved by the local health officer.
For how long can a person be confined?	§120280: Confinement can last as long as indicated in the order of the health officer or until terminated by the local health officer. Under no circumstance may confinement last more than 1 year.

* All references are to the California Health and Safety Code unless otherwise specified.

PUBLIC HEALTH INSTITUTE

TB and the Law Project

LEGAL MEMORANDUM

To: CDHS TB Control Branch
CTCA Workgroup

From: Samantha Graff
Marice Ashe

Re: Legal Analysis Regarding Procedural Due Process Safeguards for Recipients of Tuberculosis-Control-Related Work Exclusion and Home Isolation Orders

Date: July 1, 2004

This memo entails a legal analysis of the procedural due process protections that should be afforded to TB patients who receive legal health orders for work exclusion or home isolation. At a minimum, constitutional procedural due process principles guarantee that a TB patient is entitled to receive (1) *adequate notice* of the health officer's decision to exclude the patient from work or to isolate the patient, and (2) a *meaningful opportunity to object* to the health officer's decision (i.e., a meaningful hearing).[1]

Specifically, this memo explores what might constitute *adequate* notice and a *meaningful* opportunity to object in the context of a TB-control-related work exclusion or home isolation order. There is little case law addressing notice and hearings in this unique context, but the California TB control statute[2] does offer some guidance. In order to safeguard the constitutional rights of TB patients, the TB control statute extends certain due process protections to all recipients of TB-control-related health orders. These protections mainly relate to notice.[3] The statute gives recipients of civil detention orders special additional due process protections, most of which have to do with a hearing procedure that applies only to civil detainees.[4] The statute does not indicate what type of hearing is available to recipients of other TB-control-related health orders. Since a work exclusion or home isolation order can involve a significant

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[1] *See, e.g., Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 13 (1978); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950).
[2] Cal. Health & Safety Code §§ 121350-121555.
[3] *See id.* § 121367(a).
[4] *See id.* §§ 121366, 121367(b).

deprivation of a patient's liberty and property interests, it is important to determine what type of hearing should be offered to patients subject to work exclusion or home isolation.

I. Adequate Notice

The U.S. Supreme Court has ruled that "[a]dequate notice under the Due Process Clause has two components. It must inform affected parties of the *action about to be taken* against them as well as of *procedures available for challenging that action*."[5] Each of these requirements serves a discrete purpose: "[A]dequate notice of the action itself permits the individual to evaluate its accuracy or propriety and to determine whether or not to contest it; notice of how to appeal ensures that available error-correction procedures will be effective."[6]

When a health officer orders a TB patient to stay out of work or to remain isolated at home, notice is embodied in the work exclusion or home isolation order. For the order to contain *adequate* notice, it must fulfill the two constitutional components articulated by the Supreme Court.

A. Notice of the Action About to Be Taken

First, the order must give the patient notice of the *action about to be taken* against him or her. This notice must provide enough information to allow the patient to evaluate the accuracy or propriety of the order and to determine whether or not to contest the order. The TB control statute sets forth clear requirements regarding how a health officer should notify a patient of the action about to be taken against him or her. Section 121367(a) states that any TB-control-related health order must be in writing and must set forth:

- the legal authority upon which the order is issued
- an individualized assessment of the patient's circumstances or behavior constituting the basis for the issuance of the order
- the less restrictive alternatives that were attempted and unsuccessful or were considered and rejected
- the name of the recipient
- the period of time during which the order shall remain effective
- the location
- the payor source
- other terms and conditions as may be necessary to protect the public health.

Moreover, section 121367(a) requires a copy of the order to be served upon the recipient, and section 121369(a) mandates that, if necessary, language interpreters and persons skilled in

[5] *Atkins v. Parker*, 472 U.S. 115, 152 (1985) (*citing Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 13 (1978) and *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950)).
[6] *Id.*

communicating with vision and hearing impaired individuals be provided in accordance with applicable law.[7]

Note that if a health officer is issuing a home isolation order, he or she must comply with additional notice-related requirements set forth in the California Code of Regulations.[8] These requirements include:

- giving detailed instructions to household members regarding precautionary measures to be taken to prevent the spread of disease
- issuing instructions to the patient and household members prescribing the isolation technique to be followed[9]

If a health officer adheres closely to the TB control statute (and, if applicable, the regulations pertinent to home isolation) in drafting and delivering a TB-control-related health order, the health officer will almost certainly be providing sufficient notice of the action about to be taken against the patient. The statutory and regulatory requirements are specially designed to ensure that the patient understands the order, receives ample information to evaluate the accuracy or propriety of the order, and is able to determine whether or not to contest the order.

B. Notice of the Procedures Available for Challenging the Action

The second constitutional component that a health order must fulfill to contain adequate notice is information about the *procedures available for challenging the action* about to be taken against the patient. The TB control statute is silent regarding the health officer's duty to inform the patient about the procedures that are available for contesting a work exclusion or home isolation order. This is where the statute delineates between civil detention orders and all other types of TB-control-related health orders. The statute requires health officers to notify recipients of civil detention orders that they are entitled to a court hearing characterized by various safeguards, including the right to free legal representation, optional judicial review within five days of a request for release, and mandatory judicial review within 60 days of the detention and every 90 days thereafter.[10] Meanwhile, the statute does not require health officers to notify recipients of other types of TB-control-related health orders about any procedures that might be available for challenging those orders. However, to be constitutionally valid, any TB-control-related health order should contain information about how the recipient may go about contesting the order.

II. Meaningful Opportunity to Object via a Hearing

The U.S. Supreme Court has consistently interpreted the Due Process Clause to require some sort of hearing when an individual is deprived of a liberty or property interest. The Court

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[7] Although not required by statute, it would be sensible to provide written translations to non-English speakers both to assure the patient's comprehension and to have solid evidence that the patient was duly notified of the contents of the order.

[8] *See* Cal. Code Regs. §§2514-2524.

[9] Section 2516 sets forth specific measures that must be taken in the instance of "strict isolation." Section 2518 permits the health officer to issue whatever instructions might be appropriate in the instance of "modified isolation."

[10] *See* Cal. Health & Safety Code §§ 121367, 121368.

has pronounced that the "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[11]

A work exclusion or home isolation order has a clear impact on the recipient's liberty interests and may also implicate the recipient's property interests. The U.S. Supreme Court has recognized that "one of man's most precious liberties is his right to work,"[12] and that "the basic liberty from physical confinement l[ies] at the heart of due process."[13] If a work exclusion or home isolation order causes an individual to lose wages, the person's property interests may also be affected. Therefore, whenever the government takes an action that denies an individual his or her strong liberty interest and potential property interest in attending work or moving about freely, it must provide some mechanism for the individual to contest the action "at a meaningful time and in a meaningful manner."[14] What constitutes a *meaningful time* and *meaningful manner* varies from situation to situation.

A. Hearing at a Meaningful Time

As to *timing*, the government generally must provide a hearing before it deprives an individual of his or her liberty or property. However, in the context of communicable disease orders, post-deprivation hearings may be constitutional if the individual is considered an immediate danger to self or others and if the hearing takes place within a reasonable time after the deprivation.[15] So, if a health officer wants a TB-control-related work exclusion or home isolation order to be effective instantaneously, the health officer should be able to show that the patient embodies an imminent threat to the population that the order is intended to protect (i.e., the people at the patient's place of work or the general public) and should ensure that the patient has an opportunity to contest the order within a reasonable time after the order is issue.

In order to determine what constitutes a reasonable time, it is worth looking to two statutory schemes that address somewhat comparable situations. Under the TB control statute, if the recipient of a civil detention order requests release, the health officer must seek court review within 72 hours of the request, and a court must authorize the detention with five days of the request in order for the detention to continue.[16] Under the California Welfare and Institutions Code, a "mentally disordered person" who is taken into custody for evaluation must be certified for treatment by two medical professionals within 72 hours in order for the detainee to remain in custody. Following certification, the person is entitled to an administrative certification review hearing within four days, or, in the alternative, is entitled to a court hearing by writ of habeas

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[11] *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (*quoting Joint Anti- Fascist Comm. v. McGrath,* 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)).

[12] *Peters v. Hobby*, 349 U.S. 331, 352 (1955).

[13] *Demore v. Hyung Joon Kim*, 538 U.S. 510, 541 (2003).

[14] *Id.* (*quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[15] *Cf. Menefee & Son v. Dep't of Food and Agric.*, 199 Cal. App. 3d 774, 781 (1988) ("[I]n some emergency situations the legitimate and overriding interests of the government may permit summary action. In such circumstances the opportunity for a hearing may be postponed but not eliminated." (internal citation omitted)); 7 Witkin, Summary of California Law, Constitutional Law § 537 (9th ed. 1990).

[16] *See* Cal. Health & Safety Code § 121366. Note that if the 72-hour period ends on a weekend day or legal holiday, the hearing shall take place on the first business day thereafter. *See id.*

corpus within two working days after a petition is filed.[17] In both of these statutes, the custodial agency must take some action within 72 hours, and the outside time frame within which a detainee is entitled to a hearing is seven days from the date of the initial detention.

Drawing analogies to these two statutory schemes makes sense even though a TB-control-related work exclusion or home isolation order involves a distinct factual scenario. If the hearing will be before a court, it would be prudent for the health officer to seek judicial review within 72 hours of the patient's request for a hearing and to ask the court to hold a hearing within five days of the patient's request. If the hearing will be administrative, the health officer should probably offer a hearing within a week of the issuance of the order.

B. Hearing in a Meaningful Manner

There is no universal rule about the *manner* of hearing that the government must provide an individual who is being deprived of liberty or property. For instance, some hearings can consist solely of an opportunity to mail in a written objection, while other hearings require full-fledged judicial or judicial-like proceedings in which the individual is entitled to an oral hearing, a government lawyer, a translator, an impartial adjudicator, the ability to confront adverse witnesses, the ability to present witnesses and other evidence, a heightened standard of proof, and a verbatim transcript of the proceedings for purposes of appeal.

Considerable legal uncertainty surrounds the type of hearing that should be afforded to the recipient of a work exclusion or home isolation order. Nonetheless, health officers should make a serious effort to respect basic due process principles by providing some sort of hearing to these patients.

1. Legal Uncertainties Around Determining the Appropriate Manner of Hearing

There are at least two reasons why it is difficult to identify exactly what manner of hearing should be afforded to a recipient of a TB-control-related work exclusion or home isolation order: one relating to the TB control statute, and the other relating to the constitutional standard used to determine the adequacy of a hearing.

a. Uncertainties Relating to the TB Control Statute

The TB control statute contains no guidance as to the type of hearing that should be offered to the recipient of a work exclusion or home isolation order. This silence is problematic for both practical and legal reasons. Practically, it places the burden on local health departments to build a hearing procedure from scratch out of a wide-open field of possibilities.

Legally, health departments could face a catch-22 because the TB control statute under which they are forced to operate may be unconstitutional. There is an argument to be made that the TB control statute violates the Due Process Clause of the California Constitution because it fails to provide for any type of hearing in the instance of a TB-control-related work exclusion or home isolation order. This argument arises from a line of California cases (the "seizure cases")

[17] *See* Cal. Welf. & Inst. Code §§ 5250, 5251, 5256, 5276.

reviewing state statutes or local ordinances that allowed an administrative agency to seize property in an emergency situation without providing for a pre- or post-deprivation hearing.[18]

In the seizure cases, the courts held that the statutes/ordinances authorizing the seizures were constitutionally deficient because they did not provide for a hearing. The failure was not cured by an administrative hearing granted by an agency as a matter of discretion: "[W]here a statute authorizes the taking of private property but makes no provision for hearing or notice, either actual or constructive, such defect is not supplied by the voluntary adoption by public officers of rules covering the situation. . . . [T]o constitute due process, the statute itself must provide for notice of the time and place of hearing . . . ."[19] Nor was the failure cured by the availability of a "collateral" judicial action (i.e., a court action for a writ of mandate, injunction, or other remedy not included in the statute/ordinance for the express purpose of contesting the seizure): "The California Supreme Court has held emphatically and unanimously 'the availability of a collateral judicial remedy [cannot] sustain a seizure procedure which provides absolutely no hearing whatsoever, either before or after the taking.'"[20]

Although the seizure cases addressed the taking of property and not the deprivation of liberty, well settled law dictates that minimum procedural due process standards apply equally to a property seizure as to a liberty deprivation.[21] It therefore is conceivable that the TB control statute is unconstitutional because of its failure to include a hearing procedure for non-civil-detention orders. If the statute is unconstitutional, then health departments technically could not remedy the statutory deficiency even if they designed an administrative hearing procedure for, or offered judicial recourse to, the recipient of a work exclusion or home isolation order.

While the TB control statute may be unconstitutional, it is important to note that a court could well find the TB control statute to be constitutional – especially in light of the precept articulated by the California Supreme Court that "courts will presume a statute is constitutional unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity."[22] A court would uphold the TB control statute if the court identified language in the statute implying that the recipient of a work exclusion or home isolation order is entitled to a hearing.[23]

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[18] *See Leslie's Pool Mart, Inc. v. Dep't of Food and Agric.*, 223 Cal.App.3d 1524 (1990); *Menefee & Son v. Dep't of Food and Agric.*, 199 Cal. App. 3d 774 (1988); *Phillips v. San Luis Obispo County Dep't of Animal Regulation*, 183 Cal. App. 3d 372 (1986); *Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal. 3d 294 (1977); *People v. Lockheed Shipbuilding and Constr. Co.*, 25 Cal. App. 3d 776 (1973); *Merco Constr. Engineers v. Los Angeles Unified School District*, 274 Cal. App. 2d 154 (1969).

[19] *Merco Constr.*, 274 Cal. App. 2d at 167; *Phillip*, 183 Cal. App. 3d at 380 ("A hearing granted as a matter of discretion is no substitute for due process.").

[20] *Leslie's Pool Mart,* 223 Cal.App.3d at 1535 (*quoting Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal. 3d 294, 309 (1977)).

[21] *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also Zinermon v. Burch*, 494 U.S. 113, 131 (1990) (noting that for procedural due process purposes, there is no "support in precedent for a categorical distinction between a deprivation of liberty and one of property.")

[22] *People v. Falsetta*, 21 Cal. 4th 903, 912-13 (1999).

[23] *See Phillips*, 183 Cal. App. 3d at 379; *Merco Constr.*, 274 Cal. App. 2d at 168. *See also Newark v. J.S.*, 652 A.2d 265, 277 (N.J. Super. Ct. Law Div. 1993) (upholding the constitutionality of the New Jersey TB control statute by construing it to include modern due process standards).

The availability of a hearing arguably could be inferred from certain statutory provisions. For example, section 121365 allows health officers to "make application to a court for enforcement" of TB-control-related health orders. It is possible to read this clause as implying that a health officer should offer to initiate a court hearing if the patient requests it. Section 121367 requires health officers to include in every TB-control-related health order an individualized assessment of the circumstances or behavior constituting the basis for the order and the less restrictive alternatives that were attempted and unsuccessful or considered and rejected. This section could be interpreted as implicitly laying the groundwork for an administrative hearing in which the recipient of the order would have a chance to respond to the health officer's diagnosis of the patient and the situation.

In addition, it is possible that the availability of a habeas corpus petition rescues the statute from unconstitutionality, at least with respect to isolation orders. Under the California Penal Code, habeas corpus is applicable to any individual who believes he or she has been "unlawfully imprisoned or restrained of his liberty."[24] A person may seek a writ of habeas corpus from a state court "to inquire into the cause of such imprisonment or restraint."[25] If the court finds that the imprisonment or restraint is unlawful, the court can order that the individual be released or that the terms of imprisonment or restraint be modified. Historically, courts have recognized habeas corpus to be a valid route to contesting isolation and quarantine orders even in the absence of statutory language identifying habeas corpus as the appropriate hearing procedure.[26] Habeas corpus could be distinguished from the "collateral" judicial procedures that proved to be inadequate in the seizure cases because habeas corpus is part of the overall California statutory framework and is universally available for the express purpose of challenging an allegedly unlawful restraint.

Whether or not the TB control statute is constitutional, health officers must act under the presumption that the statute is constitutionally valid.[27] They must bear the burden of implementing a hearing procedure that attempts to fill the gaps left open by the statute under which they must operate.

b. Uncertainties Relating to the Constitutional Due Process Standard

In trying to construe the manner of hearing that should be guaranteed in a work exclusion or home isolation order, the silence of the TB control statute is not the only hurdle. An added challenge is the constitutional standard used to assess the adequacy of a hearing. The U.S. and California Supreme Courts have set forth a number of factors that must be weighed in determining whether the form of hearing in a particular instance satisfies due process:

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[24] Cal. Penal Code § 1473(a).

[25] *Id.*

[26] *See, e.g., In re Fisher*, 74 Cal. App. 225 (1925); *In re Halko*, 246 Cal. App. 2d 553 (1966). Note that habeas corpus most likely is not available to recipients of work exclusion orders, since they are not being physically restrained in the manner apparently contemplated by the habeas corpus statute.

[27] *See* Cal. Const. Art. III § 3.5(a) ("An administrative agency . . . has no power . . . to declare a statute unenforceable, or to refuse to enforce a statute, on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.).

1. The private interest at stake
2. The fairness and reliability of the procedures leading up to the deprivation and the probable value, if any, of additional or substitute procedural safeguards
3. The government's interest in taking the challenged action and in shouldering the fiscal and administrative burdens that the additional or substitute procedural requirement would entail[28]
4. The dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible governmental official[29]

The weighing of these four factors entails a very situation-specific analysis. In the words of the U.S. Supreme Court, "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands."[30] Since the constitutional procedural due process standard is so situation-specific, there is no way to know for sure whether a given hearing model is constitutionally sound until it is challenged by a recipient and reviewed by a court.

Drawing analogies to hearing procedures that courts have upheld in different circumstances will be of limited use. A hearing model that is appropriate in the instance of TB-control-related work exclusion or home isolation order will be unique, even as compared to hearing models for health orders issued in the context of other diseases. It will be designed in light of a disease-specific statute that already contains multiple due process provisions, so it will be specially crafted to suit the pathology of TB, the profile of the typical TB patient, and the structure of the TB control statute.

2. Possible Courses of Action Given the Legal Uncertainties Around Determining the Appropriate Manner of Hearing

In the face of these legal uncertainties, health officers should consider taking two simultaneous courses of action. They should explore various avenues of clarifying the law and should assess the risks and benefits of gaining clarity. Meanwhile, they should offer some sort of hearing procedure that reflects basic due process principles.

a. Seeking Clarity

There are several ways that health officers might try to obtain clarity about the type of hearing they are obligated to provide to the recipient of a TB-control-related work exclusion or home isolation order. One approach could involve advocating for legislative reform. Since the hearing question is not the only component of the TB control statute that could use

[28] *See Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970); *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976) (articulating the first three factors).
[29] *See People v. Ramirez*, 25 Cal. 3d 260, 269 (1979) (adding the dignitary interest to the list of three factors set forth by the U.S. Supreme Court in *Goldberg* and *Matthews*).
[30] *Mathews,* 424 U.S. at 334 (internal citations omitted).

clarification,[31] the question could be resolved as part of a general clean-up bill targeted at tightening up the TB control statute. An alternative approach toward legislative reform could involve taking up the hearing question in the larger context of the communicable disease statute. After all, the entire communicable disease statute suffers from the same deficiency as the TB control statute in that it is silent as to the type of hearing that should be afforded to the recipients of most types of health orders.

Another avenue toward gaining clarity could entail asking the Office of the Attorney General of California for an official legal opinion. The Attorney General's Office provides legal opinions upon request to local public officials and agencies on issues arising in the course of their duties. These opinions are accorded "great weight" by the courts.[32] Thus, if the Attorney General's Office were willing to provide an opinion, health officers could comfortably rely on it.

In very limited circumstances, a health officer could request "declaratory relief" in court regarding the hearing procedures that should be afforded to the recipient of a TB-control-related work exclusion or home isolation order.[33] A "declaratory relief" action would basically involve asking a court for a declaration regarding the duties owed by the health officer to the recipient. The disadvantage of using a declaratory relief action to achieve clarity is that it is only available if there is an actual, present controversy pending.[34] This means that a health officer cannot bring a declaratory relief action in the absence of a current conflict with the recipient of a work exclusion or home isolation order.

Before deciding to seek clarity about the hearing issue, health officers should weigh the benefits and risks of achieving clarity. A major benefit would be the sense of security that comes with an assurance that they are following the law and respecting the constitutional rights of TB patients. Moreover, if health officers knew what hearing procedures to offer, they would diminish their chances of being held liable for a constitutional violation.

Seeking clarity could involve some risk. The hearing issue could be plunged into the spotlight. Generally, the issuance of TB-control-related orders runs fairly smoothly, and health officers might be wary of opening up the process to public scrutiny. Also, if health officers obtained a clear answer to the question of what hearing procedures to follow, they would face a mandate for action. They would be obliged to follow the given procedures even if those procedures turned out to be unduly burdensome from a monetary or bureaucratic perspective.

b. Establishment of Simple Hearing Procedures

Regardless of whether health officers try to clear up the legal uncertainties around the hearing issue, they should make a good faith effort to respect basic due process principles by offering some sort of hearing to each recipient of a TB-control-related work exclusion and home

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[31] *See* James B. Simpson, Samantha Graff, and Marice Ashe, California Tuberculosis Control Law 20-26 (2003), available at http://tb.phlaw.org (discussing several ambiguities in the TB control statute).

[32] *California Assn. of Psychology Providers v. Rank*, 51 Cal.3d 1, 17 (1990).

[33] *See* Cal. Code of Civ. Pro. § 1060.

[34] *See Alameda County Land Use Assn. v. Hayward*, 38 Cal. App. 4th 1716, 1723 (1995) ("An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law.").

isolation order. Moreover, to ensure that they are abiding by the constitutional doctrine of equal protection, they should establish hearing procedures that are used with consistency when dealing with every recipient of a particular type of order.

In the face of legal uncertainty, there are several reasons why it is prudent for a health officer to develop a hearing procedure. By institutionalizing a hearing procedure, a health department can shield itself from engaging in the type of serious constitutional violations that led Fresno County officials to sign a $1.2 million settlement with Hongkham Souvannarath. Moreover, in the event of litigation, a court is likely to be sympathetic to a health department that made a concerted effort to abide by constitutional principles. Further, by adopting a hearing approach, a health department can set itself up to make the legal argument that the TB control statute is constitutional because it implies that the recipient of a work exclusion or home isolation order is entitled to a hearing.

There are at least three general types of hearing that a health officer might provide, two of a judicial nature and one of an administrative nature. First, a health officer might simply inform the recipient that he or she may file a law suit to contest the order. The order might even alert the recipient as to the various causes of action that he or she might bring in court. This course of action is appealing because it would put the onus on the recipient to exercise his or her right to object to the order. However, it is legally suspect when viewed in light of the seizure cases discussed above. These cases suggest that the ability of an individual to challenge a health order via a "collateral" judicial action is no substitute for the availability of a hearing specifically provided to address the merits of the order.[35] The one situation in which this approach may be legally valid would entail informing the recipient of a home isolation order that he or she may file a petition for habeas corpus. As discussed above, the California statutory framework makes habeas corpus available to anyone who believes he or she has been unlawfully imprisoned or restrained. Moreover, courts historically have recognized habeas corpus to be a valid route to contesting isolation and quarantine orders.[36] So, it may be acceptable to alert the recipient of a home isolation order that he or she may object to the order by filing a habeas corpus petition in court.

Second, a health officer might offer to bring a court action so the recipient can have a chance to contest the order before a judge. The TB control statute gives health officers the option to "make application to a court for enforcement" of TB-control-related health orders.[37] This provision arguably implies that a health officer should offer to initiate a court hearing if the patient requests it.[38] So, a health officer could write in each work exclusion or home isolation order that upon the recipient's request, the health officer will initiate a civil court action for enforcement of the order. As a party to the action, the patient would have an opportunity to contest the validity of the order in some sort of court hearing.

In many counties, judges do not have experience reviewing health orders, so a health officer who uses the court hearing route should ensure that his or her lawyers educate the judge

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[35] *See supra* text accompanying note 18.
[36] *See supra* text accompanying note 26.
[37] Cal. Health & Safety Code § 121365.
[38] *See supra* text following note 23.

about how to handle an application for enforcement of a TB-control-related health order. A good place for the lawyers to start is the portion of the TB control statute regarding hearings for patients subject to civil detention orders. Under the TB control statute, the recipient of a civil detention order is entitled to a court hearing characterized by several strong due process safeguards, including the right to be represented by counsel and have counsel provided, and the right to court review within five days of a request for release.[39] The lawyers can recommend that a judge extend similar safeguards to the recipient of a work exclusion or home isolation order.[40]

Finally, as an alternative to initiating a judicial proceeding, a health department could provide some sort of administrative hearing to the recipient of a TB-control-related work exclusion or home isolation order. An administrative hearing has the advantage that it does not have to be as formal and rule-based as a court hearing, so long as basic procedural due process requirements are met.[41] Moreover, an administrative hearing is generally less expensive and time consuming than a court hearing and is more likely to yield predictable results.

As discussed above, it is hard to know exactly what type of hearing meets minimal due process standards in a given situation. However, there is a reasonable argument to be made that a simple administrative hearing process resembling the following would be constitutionally sufficient:[42]

- A TB-control-related work exclusion or home isolation order contains instructions about who to contact to request an administrative hearing and summarizes how that hearing will proceed.
- The administrative hearing is held as soon as possible, but in no instance is held more than five business days after the request is made.
- The patient is entitled to an in-person hearing unless personal appearance is contraindicated or impractical. In that case, the patient is entitled to a telephonic hearing. The patient may also be offered the option to have a hearing in writing.
- The health department provides the patient an interpreter if necessary.
- The health department provides the patient an attorney or patient advocate upon request. (Note that in many administrative hearings, due process does not require the government to provide counsel to the individual contesting the government action.[43] However, given that important liberty and property interests are probably at stake and that the typical patient may lack the capacity to navigate even the most simple hearing, it may be advisable to supply legal representation. If finding a government lawyer is too expensive or difficult, an alternative is to provide a patient advocate similar to the advocate that can

[39] Cal. Health & Safety Code §§ 121366, 121367.
[40] Note that the health department cannot guarantee that a judge will extend such safeguards to the recipient of a work exclusion or home isolation order. Under the separation of powers doctrine, the executive branch does not have the power to create statutory rights or to interpret the law. *See* Cal. Const. Art. III, § 3.
[41] *See Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 246 (1944).
[42] Note that this is a rough sketch of what a hearing process might look like. It is essential for health officials to consult with their attorneys before adopting a particular approach.
[43] *See* California Administrative Hearing Practice §4.3 (Continuing Education of the Bar ed., 2004).

represent a "mentally disordered person" at a certification review hearing under California Welfare and Institutions Code section 5256.4.[44])

- The hearing officer is an unbiased adjudicator who did not issue the health order. (Since the communicable disease statute defines "health officer" to include his or her designee,[45] a designee could issue TB-control-related health orders, leaving a health officer available to serve as a hearing officer. Alternatively, health officers from neighboring counties could enter into memoranda of understanding agreeing to serve as hearing officers for one another.)
- The patient is entitled to present evidence that he or she does not meet the legal basis for the order or that the order is not necessary to protect the public health or the health of any individual.
- The issuing health official presents evidence supporting his or her position that the patient meets the legal basis for the order and that order is necessary to protect the public health or the health of any individual person. (It is an open question whether the patient should have the chance to confront the issuing health official at a hearing or whether the official could direct the hearing officer to rely solely on the written health order. One hallmark of due process is the ability of a party to confront the witnesses against that party, but given that a proper health order is based on solid medical evidence and is comprehensive in its diagnosis of the patient and the circumstances giving rise to the order, there is an argument to be made that the health official need not appear at the hearing to defend the order.[46])
- The hearing is conducted in an informal manner, and the judicial rules of evidence do not apply.
- An oral hearing is recorded in some manner (e.g., steno-typed, taped, or videotaped).
- The hearing officer issues a final written decision within one day of the hearing. The decision makes a determination about whether the order will be upheld, annulled, or modified and explains the basis for that determination.
- Give the decision to the patient right away.

As enumerated above, a court would assess four factors to determine whether this simple type of administrative hearing would meet minimal due process standards when applied to the recipient of a TB-control-related work exclusion or home isolation order. The first factor weighs in favor of an administrative hearing with maximal due process protections, but the health department could use the latter three factors to justify a less rigorous administrative hearing.

The private interest at stake: The right to work and the right to be free from physical confinement implicate precious liberty rights and may affect important property rights as well. In order to deprive an individual of these rights, the government should afford a hearing characterized by significant due process protections. That said, in the context of most TB-control-related health orders, the recipient has had an opportunity to comply with less restrictive

[44] Under the Welfare and Institutions Code, a "mentally disordered person" who is certified for 14 days of intensive treatment is entitled to an administrative certification review hearing within four days of certification. *See* § 5256. At the hearing, the person has a right to be assisted by an attorney or by a patient advocate who has no clinical or administrative responsibility for the person receiving mental health services. *See* §§ 5256.4, 5325.

[45] Cal. Health & Safety Code § 120115(k).

[46] *See infra* text accompanying note 48 (discussing the reliability of written medical records).

alternatives and has failed to so. So, the private interest at stake is likely to be diminished by a patient's unwillingness to abide by a protocol that would involve a lesser deprivation.

The fairness and reliability of the procedures leading up to the deprivation and the probable value, if any, of additional or substitute procedural safeguards: The U.S. Supreme Court gives great deference to "the reliability and probative worth of written medical records."[47] In *Mathews v. Eldridge*,[48] the Court examined the federal administrative hearing procedures that accompanied the termination of social security disability benefits. The Court upheld the procedures against a claim that there should have been greater due process safeguards. The Court stated that the "decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists concerning a subject whom they have personally examined."[49] The Court found that this type of decision involved a low likelihood of error, especially when viewed in comparison to a decision to deny welfare benefits, where issues of witness credibility and veracity tend to be critical. The low likelihood of error in turn reduced the probable value of additional or substitute procedural safeguards. Just as in the *Mathews* scenario, health officers issuing TB-control-related health orders generally base their actions on "routine, standard, and unbiased" medical determinations. Health departments often have a long history dealing with the recipient of a health order and have compiled extensive documentation of the need for the order. Therefore, the second factor counsels against an administrative hearing that involves maximal due process protections (including the right to confront witnesses).

The government's interest in taking the challenged action and in shouldering the fiscal and administrative burdens that the additional or substitute procedural requirement would entail: Courts are readily persuaded that health officers have a compelling interest in controlling disease.[50] And a court may be sympathetic to the reality that local health departments are financially strapped and are not set up to provide judicial-like administrative hearings to recipients of health orders. Moreover, in the instance of a patient who has had repeat encounters with the health department, a court is likely to recognize that the health department has already shouldered a significant fiscal and administrative burden in providing pre-hearing due process to the patient.

The dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible governmental official: If the issuing official takes the mandate of the TB control statute seriously, a health order will give the patient extensive information about the nature, grounds, and consequences of the order. A simple administrative hearing would certainly offer the patient a chance to present his or her side of the story before a responsible governmental official.

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[47] *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976).
[48] *Id.*
[49] *Id.* at 344.
[50] *See, e.g., Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993) ("Hardly any state interest is higher than protecting its citizenry from disease.")

III. Conclusion

Health officers should always keep in mind that work exclusion and home isolation orders deprive the recipients of some of their most basic freedoms. Whether or not health officers attempt to fix the legal ambiguities in the TB control statute, they should abide by fundamental procedural due process principles when issuing a work exclusion or home isolation order. They almost certainly will meet the standard of *adequate notice* if they make a firm practice of following sections 121367(a) and 121369(a) and if they inform each recipient about how to contest the given order. And by working with their attorneys to design and implement a fair judicial or administrative hearing process, health officers can give recipients the opportunity to object in a *meaningful time* and *meaningful manner*.

STATE OF CALIFORNIA
COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
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April 18, 2011

Vinod K. Sharma
County of Santa Clara
70 West Hedding St.
East Wing, 2nd Floor
San Jose, CA 95110

Lehoa Nguyen, Staff Counsel
California Department of Public Health
Office of Legal Services
1501 Capitol Ave., Suite 71.5064
MS 0506, P.O. Box 997377
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And Interested Parties and Affected State Agencies (See Mailing List)

Re: REQUEST FOR ADDITIONAL INFORMATION
Tuberculosis Control, 03-TC-14
Health and Safety Code Sections 121361, 121362, 121363, 121364, 121365, 121366, 121367, 121368, and 121369, as added or amended by Statutes 1993, Chapter 676; Statutes 1994, Chapter 685; Statutes 1997, Chapters 116 and 294; and Statutes 2002, Chapter 763
County of Santa Clara, Claimant

Dear Vinod Sharma and Lehoa Nguyen:

After reviewing the *Tuberculosis Control* test claim (03-TC-14), staff with the Commission on State Mandates (Commission) finds that additional information is needed for analysis of whether costs have been mandated by the state.

Specifically, Health and Safety Code Sections 121350, 121355, 121357, 121360, 121375, 121380, 121390, 121450, 121455, and 121460 authorize the tuberculosis (TB) subvention program and charge the California Department of Public Health (CDPH) with establishing standards and procedures with which to condition the awarding of funds. It appears that the state has been providing funding to local governments to fund the costs of the TB control program on an annual basis. In particular state funding is currently being provided for requirements imposed by the test claim statutes including "food, shelter, incentives and enablers funds reimbursement for civil detention."[1] However, it is unclear whether this funding is sufficient to fund the costs of any newly required activities (i.e. those activities that were not already required before the adoption of the test claim legislation), resulting in no state mandated costs or whether it only partially covers the costs of any new program or higher level of service that may have been

[1] http://www.cdph.ca.gov/programs/tb/Documents/TBCB-LHJFunding-%20RFA-PPM-Final.pdf

imposed by the test claim statutes and so should be considered as an offset to any costs found to be mandated by the state.

Additionally, it is unclear whether the Health Officer's Association of California (HOAC) was formally authorized by the Santa Clara County Board of Supervisors or any other county board of supervisors to request the test claim legislation or to lobby on behalf of the county. Please comment on the scope of the authority granted by the counties including Santa Clara County to HOAC to act on their behalf in legislative matters and in particular, how that authority was granted in 1993 and 1994 (i.e. by resolution of the board, contract, or in some other way).

Finally, please provide information regarding any authority to impose fees or charges for costs of TB control activities. For example, do counties charge those who have the ability to pay for TB-related medical testing and treatment? Also, do counties provide attorneys for all TB patients that request them free of charge? Or is the provision of counsel by the county based on the ability of the patient to pay?

In light of Government Code section 17556(a), (d), and (e), the Commission requests comments from the claimants, interested parties, and affected state agencies, on cost required to be incurred, if any, by the above referenced test claim statutes in *Tuberculosis Control* (03-TC-14). Please submit comments as soon as possible, but **not later than Monday, May 2, 2011**.

You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents on the Commission's website. Please see the Commission's website at http://www.csm.ca.gov/dropbox_procedures.shtml for instructions on electronic filing. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Please contact Heather Halsey at (916) 323-3562 if you have any questions or concerns regarding this matter.

Sincerely,

Drew Bohan
Executive Director

J:mandates/2003/tc/03tc14/request for additional information 04182011

Received
May 2, 2011
Commission on
State Mandates

State of California—Health and Human Services Agency
California Department of Public Health

HOWARD BACKER, MD, MPH
Interim Director

EDMUND G. BROWN JR.
Governor

May 2, 2011

Drew Bohan
Executive DIrector
Commission on State Mandates
980 Ninth ST Suite 300
Sacramento, CA 95814

Re: REQUEST FOR ADDITIONAL INFORMATION
Tuberculosis Control. 03-TC-14

Dear Mr. Bohan:

The California Department of Public Health (Department) hereby submits this response to the Commission on State Mandates (Commission) request for additional information, dated April 18, 2011. The majority of this request appears to be directed at the claimant, County of Santa Clara who is in the position to provide additional information regarding net costs incurred by any claimed "newly required activity," claimant's authority to impose fees, and authority granted by claimant to the Health Officer's Association of California (HOAC). However, in response to the Commission's inquiry regarding present state funding, the Department can provide a description of the present distribution of funds by the Department to local health departments.

The Commission correctly noted that, "the state has been providing funding to local governments to fund the costs of the TB program on an annual basis. In particular, state funding is currently being provided for requirements imposed by the test claim statutes including food, shelter, incentives and enablers funds reimbursement [*and reimbursement]* for civil detention." While the state does provide an annual award of funds to jurisdictions reporting an average of 6 or greater cases of tuberculosis, these funds are intended to be used to strengthen the tuberculosis prevention activities by local health officers, augmenting, but not supplanting local government funding for tuberculosis prevention and control, activities the locals have historically been responsible for. The Department stands by the position that the tuberculosis control activities described by the test claim statutes predate January 1, 1975.

As outlined below, the state provides reimbursement to counties on an as-needed basis for all allowable costs associated with the civil detention of tuberculosis patients who are at risk for elopement and defaulting on their treatment regimen.

Tuberculosis Local Assistance Funding for Local Health Jurisdictions

Eligible local health jurisdictions receive one or more types of local assistance funding. Base Awards and Housing Award funds are issued as annual awards on the state fiscal year cycle (July through June). Civil detention expenses are invoiced and reimbursed throughout the fiscal year on a flow basis. Subject to availability of funds, invoices submitted for designated allowable detention expenses are reimbursed in full.

Base Award: Funds are to be used to support staff and expenses associated with completion of therapy and contact investigation [Centers for Disease Control and Prevention's (CDC's) Priorities I and II]. Under special circumstances, funds may be used for CDC Priority III, targeted testing in high risk populations in order to detect and treat latent tuberculosis (TB) infection. Eligible Base Award expenditures include salaries, benefits, equipment, supplies, training materials, local mileage, and expenses for in-state travel to TB–related trainings.

Base Award allocation: Base Awards are provided annually to local health jurisdictions that report six or more cases of TB. To minimize fluctuations in funding over time, Base Award amounts are held constant for two years. Jurisdictions reporting on average 20 or more cases receive an award determined by a multi-variable funding allocation formula. The funding allocation formula uses a five-year average number of reported cases and case characteristics (e.g. homelessness, disease site, infectiousness, drug resistance). Jurisdictions reporting an average 6 to 19 cases annually receive a fixed award amount. Every two years, the formula is re-calculated using the most recent five-year surveillance data.

Housing Allocation (two components): State general funds are provided to promote treatment adherence and ensure completion of therapy in TB patients who are homeless, at risk for homelessness, or at risk for civil detention because they are persistently non-adherent with their treatment regimen. Jurisdictions with sizeable TB patient populations are provided an annual award allotment based on historic costs of housing and related expenses for homeless and at-risk for homeless persons undergoing TB treatment.

- Food, Shelter, Incentives and Enablers (FSIE) allotment: FSIE funds are used to provide services that include measures to enhance adherence, prevent homelessness and allow the use of less restrictive alternatives to decrease or obviate the need for detention. Eligible expenditures include: food, shelter, other 'incentives and enablers' as well as personnel and personnel-related costs for conducting designated activities.

Received
May 2, 2011
Commission on
State Mandates

- Housing Personnel: supports personnel salaries and benefits for staff working directly with patients that are homeless, at risk of homelessness, or at risk for civil detention (e.g., outreach worker, social worker, public health nurse staff who work with the specified population to attain the desired outcomes).

Jurisdictions without an allotment may submit requests for reimbursement; those receiving allotments may submit supplemental invoices for expenses that exceed their allotment.

Civil Detention: A regional facility (in San Mateo County) receives an annual award of state TB funds to support unlimited use by jurisdictions that need a site to detain persistently non-adherent patients for the duration of their treatment. TB Civil Detention funds are available for reimbursement to jurisdictions that use local facilities for civil detention of recalcitrant patients. Reimbursement is available for costs of detentions for isolation (Health and Safety Code section 121365(d)) and completion of therapy (Health and Safety Code section 121365(e)). Jurisdictions seeking reimbursement for detention and detention-related expenses follow the state guidance and reimbursement procedure. Jurisdictions have the option to civilly detain recalcitrant TB patients, and will be reimbursed for all eligible expenses that conform to the state civil detention policy. Consideration for reimbursement for detention of persistently non-adherent tuberculosis patients is made on a case-by-case basis. Health and Safety Code 121358(a) prohibits the use of these funds to support costs of detention carried out in correctional facilities.

Additionally, the Department reasserts all of the arguments presented in the Department's hearing brief submitted on August 24, 2004 in opposition to claimant's test claim: 1) these claims do not meet the definition of "costs mandated by the state" because the statutory requirements of the tuberculosis program predate January 1, 1974 with much of the program in place in 1957; 2) the counties' sponsorship of this legislation through HOAC bars them from seeking reimbursement for costs mandated by the state, finding otherwise would permit a circumvention of Government Code section 17556(a); 3) provision of due process rights existed in law prior to these statutes; 4) non-criminal detention proceedings are discretionary and thus not a "new program or higher level of service"; and, 5) offsetting savings result in no net costs to the local agency. Accordingly, the Department requests the denial of this test claim.

Sincerely,

Lehoa Nguyen

Lehoa Nguyen
Staff Counsel

RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION

On Original Test Claim
Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002

Claim no. CSM-03-TC-14

Tuberculosis Control

Test claimant, County of Santa Clara, submits the following in response to the Request for Additional Information, dated April 18, 2011, as issued by the Commission Staff.

1. Whether the funding provided by the California Department of Public Health is sufficient to fund the costs of any newly acquired activities?

While the California Department of Public Health does provide some much needed assistance, the funding is insufficient to cover the expenses for the County of Santa Clara. For example, in 2010, the County had $5,144,431 in expenses for TB control and the TB Clinic (which excludes Public Health Nursing and Lab costs). The funding from all sources for 2010 was $4,579,366 leaving the County to carry $565,066 in expenses. The declaration of Martha Paine is attached hereto and incorporated herein by reference as though fully set forth.

2. Whether the Health Officers' Association of California (HOAC) was formally authorized by the Santa Clara Board of Supervisors or any other county board of supervisors to request the test claim legislation or lobby on behalf of the county?

After diligent search of the County of Santa Clara's Board agenda items, no item could be found that addressed the test claim legislation, the HOAC, or any contract between the HOAC and the County. The declaration of Jenny Yelin is attached hereto and incorporated herein by reference as though fully set forth.

Moreover, the HOAC executive director, Bruce Pomer, explained that the HOAC is a non-profit whose members are the Health Officers for the 58 counties and three cities. It seeks to improve the practice of public health, responds to requests for technical information from the legislature, engages in extensive research projects and may sponsor legislation. The HOAC has close ties to the California Conference of Local Health Officers (CCLHO) which is an intergovernmental, statutory body which includes

members of the state in addition to the members of the HOAC. Although he could not comment on the test claim legislation without benefit of his file, he related that generally the CCLHO is the body that initiates new legislation. The declaration of Juliana F Gmur is attached hereto and incorporated herein by reference as though fully set forth.

3. Whether the County has granted authority to impose fees or charges for TB-related costs?

The County makes every effort to obtain fees for its services wherever possible. The County charges a fee for TB skin tests from members of the public requesting the test. If the exposure occurs at the workplace, the employer is charged for the costs of blood tests. The County has a pre-negotiated rate for billing Medi-Cal or Medicare for the provision of Directly Observed Therapy (DOT). The declaration of Julie Higashi is attached hereto and incorporated herein by reference as though fully set forth.

4. Whether counsel is provided for TB patients free of charge or as based on an ability to pay?

The County, in reliance on the plain language of Health and Safety Code section 121366, provides a deputy Public Defender free of charge for any person subject to a detention order who requests counsel.

CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 16 day of May, 2011, at San Jose, California, by:

Martha Paine

County of Santa Clara

DECLARATION IN SUPPORT OF
RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION

On Original Test Claim
Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002

Claim no. CSM-03-TC-14

Tuberculosis Control

Declaration of Juliana F Gmur

I, Juliana F Gmur, state as follows:

1. I am an attorney duly licensed by the State of California and have been so for 19 years. I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

2. On May 13, I had an extended conversation with Bruce Pomer, executive director of the Health Officers Association of California (HOAC), a non-profit organization comprised of the Health Officers of the 58 counties and three cities, governed by a board of directors, fourteen in number, chosen from among the members. The HOAC seeks to improve the practice of public health, responds to requests for technical information from the legislature, engages in extensive research projects and may sponsor legislation.

3. Mr. Pomer explained that his organization is closely related to the California Conference of Local Health Officers (CCLHO) which is an intergovernmental, statutory body which includes members of the state in addition to the members of the HOAC. He noted that the two organizations are so close that when the president of the CCLHO steps down, he becomes the president of the HOAC for the next year.

4. Upon my prior request, Mr. Pomer had searched for their file relating to the mandate legislation. He related to me that he was unable to locate it and did not

want to rely on his memory as to any specifics regarding HOAC and the test claim legislation; save one specific recollection: that he worked extensively with the state TB controller at the time and they had had many back-and-forths over the wording of the legislation.

5. Mr. Pomer did provide an overview of how the HOAC is generally involved with legislation. He said that the generation of legislation is a collective effort. Usually the idea comes from a committee within CCLHO which identifies a public health problem. The CCLHO then takes a position on the matter and the HOAC implements it by drafting legislation.

I declare under penalty of perjury that the foregoing is true and correct as based upon my personal knowledge, information or belief, and that this declaration is executed this 16 day of May, 2011, at Clovis, California.

Juliana F Gmur

SANTA CLARA COUNTY
PUBLIC HEALTH DEPARTMENT
FY10 TUBERCULOSIS CONTROL REVENUES AND EXPENSES

	TB Control	TB Clinic	TB PH Nursing
State/Federal Grants	$1,018,980	$449,535	$0
All Other Revenue	$0	$2,770,024	$0
Expense Reimbursement	$75,412	$265,413	$0
Subtotal Funding Sources	$1,094,393	$3,484,973	$0
Payroll	$1,528,958	$2,752,527	$0
Other Expenses	$383,971	$478,975	$0
Subtotal Expenditures	$1,912,929	$3,231,502	$0
Net County Cost	$818,536	($253,471)	$0

TB PH Lab	TB Total
$0	$1,468,516
$0	$2,770,024
$0	$340,826
$0	$4,579,366
$0	$4,281,485
$0	$862,946
$0	$5,144,431
$0	$565,066

DECLARATION IN SUPPORT OF
RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION

On Original Test Claim
Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002

Claim no. CSM-03-TC-14

Tuberculosis Control

Declaration of Martha Paine

I, Martha Paine, state as follows:

1. I am the Financial Director for the Public Health Department of the County of Santa Clara. I have been in the employ of the County for sixteen years. I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

2. On April 28, 2011, I reviewed the costs to the County for the running of the TB program by identifying and summarizing the TB Control program and TB Clinic program actual revenues and expenses for Fiscal Year 2010.

3. My findings are set forth in the attached spreadsheet.

I declare under penalty of perjury that the foregoing is true and correct as based upon my personal knowledge, information or belief, and that this declaration is executed this 2nd day of May, 2011, at San Jose, California.

Martha Paine

Martha Paine

DECLARATION IN SUPPORT OF
RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION

On Original Test Claim
Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002

Claim no. CSM-03-TC-14

Tuberculosis Control

Declaration of Jenny Yelin

I, Jenny Yelin, state as follows:

1. I am an attorney, duly licensed by the State of California, and an attorney in the Office of the County Counsel for the County of Santa Clara. I have been in the employ of the County for nine months. I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

2. On May 3, 2011, I reviewed the agendas for all meeting of the Santa Clara County Board of Supervisors ("Board") from January 1993 to December 1994.

3. None of the agendas I reviewed had any mention of the Health Officer's Association of California (HOAC) or the test claim legislation. According to the agendas I examined, the Board did not vote on any resolutions relating to the HOAC or the test claim legislation, and did not authorize any County entity to enter into a contract with the HOAC.

4. I have reviewed California Health and Safety Code section 121366, which states that "any person" subject to an order by a public health officer requiring the individual's detention to a health facility for tuberculosis treatment has the right to be represented by counsel. Based on information and belief, the County provides a Deputy Public Defender to represent any person subject to such a detention order who requests counsel.

I declare under penalty of perjury that the foregoing is true and correct as based upon my personal knowledge, information or belief, and that this declaration is executed this 13th day of May, 2011, at San Jose, California.

Jenny Yelin

County of Santa Clara

DECLARATION IN SUPPORT OF
RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION

On Original Test Claim
Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002

Claim no. CSM-03-TC-14

Tuberculosis Control

Declaration of Julie Higashi

I, Julie Higashi, state as follows:

1. I am currently employed by the Santa Clara County ("County") Public Health Department, as a Deputy Health Officer. I am the Tuberculosis Controller for the County and I oversee the County's tuberculosis control program. I have been in the employ of the County for 3 years. I have personal knowledge of the facts stated herein, and if called upon to testify, I could do so competently.

2. The County charges fees for limited services it provides as part of its tuberculosis control program.

3. When members of the public request tuberculosis screening at one the clinics operated by the County's public health department, the County charges a $20 fee for a skin test.

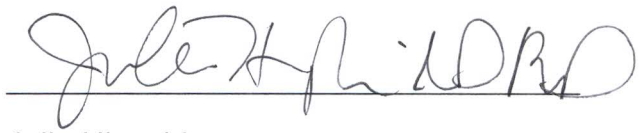
4. For patients with suspected or confirmed cases of tuberculosis, the County does not charge any fee for skin tests or blood tests to screen for the presence of tuberculosis, nor does the County charge any fee for follow-up evaluations. If the exposure occurs at a worksite, and the County performs a blood test, we bill the employer for the cost of the test. However, if a skin test is performed, the County absorbs that cost.

5. The County also provides Directly Observed Therapy (DOT) to patients with active tuberculosis. DOT consists of monitoring patients to ensure they are taking prescribed medications and otherwise complying with their treatment recommendations. The County provides DOT to patients in the County's public health clinics, in patients' homes, or through video-conferencing. DOT can require patient visits as many as five times per week.

6. When tuberculosis patients receiving DOT are Medi-Cal or Medicare eligible, the County bills Medi-Cal or Medicare for DOT services, at a pre-negotiated daily rate. For all other patients receiving DOT (uninsured and privately insured patients), the County fully absorbs the cost of providing DOT. The County does not receive reimbursement from any private insurance providers for providing DOT.

7. The County also incurs substantial costs when a TB patient is subject to a civil detention for failure to comply with a prior order of the TB Officer.

I declare under penalty of perjury that the foregoing is true and correct as based upon my personal knowledge, information or belief, and that this declaration is executed this13th day of May, 2011, at San Jose, California.



Julie Higashi

County of Santa Clara

Hearing Date: September 29, 2011
J:\MANDATES\2003\TC\03-tc-14\TC\dsa

ITEM __
TEST CLAIM
DRAFT STAFF ANALYSIS

Health and Safety Code Sections 121361, 121362, 121363, 121364, 121365, 121366, 121367, 121368, and 121369, as added or amended by Statutes 1993, Chapter 676; Statutes 1994, Chapter 685; Statutes 1997, Chapters 116 and 294; and Statutes 2002, Chapter 763

TUBERCULOSIS CONTROL

03-TC-14

County of Santa Clara, Claimant

EXECUTIVE SUMMARY

Overview

This test claim addresses the activities required of local detention facilities and local health officers (LHOs) relating to tuberculosis (TB) control. Eligible claimants for state-mandated costs imposed on LHOs include counties and the following specified cities: Berkeley, Long Beach, and Pasadena. Eligible claimants for state-mandated costs imposed on local detention facilities include all cities and counties with local detention facilities as defined by Penal Code section 6031.4. Although the test claim statutes also impose duties on health care providers, health facilities, and outpatient clinics, those activities will not be discussed in this analysis because the claimant has not requested reimbursement for those activities. [1]

Procedural History

This test claim was filed with the Commission on State Mandates (Commission) on September 26, 2003. Between 2003 and 2004, the Department of Health Services (DHS)[1] requested and received multiple extensions to file comments on the test claim. The Commission received comments on the test claim from the claimant, DHS, and Department of Finance (DOF). Commission staff requested additional information from the claimant, the Department of Public Health (DPH), and other parties and interested parties on April 18, 2011. On May 2, 2011, the Department of Public Health (DPH), which is now the state agency with responsibility for the TB control program, submitted a response to the request for additional information. On May 16, 2011, claimant submitted a response to the request for additional information.

[1] At the time this claim was filed, DHS was the department with responsibility for TB control. Under current law, the Department of Public Health (DPH) is tasked with TB control.

Positions of the Parties and Interested Parties

Claimant's Position

Claimant alleges that the test claim statutes impose the following activities which are new and reimbursable under article XIII B, section 6 of the California Constitution and which can generally be categorized as follows:

- Increased paperwork for the LHO and staff that must be reviewed, created, drafted, transmitted, maintained, and in the case of an LHO order to detain, served by the LHO and staff;
- LHO and staff preparation and appearance at hearings to obtain court orders and detain;
- Increased paperwork that must be reviewed, created, drafted, transmitted, and maintained by local detention facilities for purposes of releasing or transferring TB patients;
- Housing, detaining, transporting, and following up on TB patients;
- Counsel's review of legal forms, service of documents, and preparation for and appearance at hearings for court orders for detention and representation of detainees; and
- Drafting, reviewing, and establishing policies, procedures, forms, and protocols, and the training to comply with the above-stated requirements.

Department of Finance's Position

DOF states that the claimant has identified a number of new activities related to the manner in which LHOs manage and control the spread and treatment of TB which it asserts are new and reimbursable mandates. If the Commission reaches the same conclusion, the nature and extent of the specific activities required can be addressed in the parameters and guidelines. DOF notes that it expects the county to be very specific regarding the activities necessary to comply with the test claim statutes since they were effective nearly ten years prior to the test claim filing.

Department of Health Services' Position

DHS was the state agency responsible for TB control when this test claim was filed. DHS contends that this test claim should be denied because:

- Many of the statutory requirements predate January 1, 1975;
- Claimant, through the Health Officer's Association of California (HOAC), requested the test claim legislation. HOAC was the sponsor of AB 803, Statutes 1993, chapter 676 and also sponsored three of the subsequent amendments of the test claim legislation. HOAC's request should be imputed to its member counties under Government Code section 17556;
- The due process rights required by the test claim statutes were declared existing state law (Art. 1 §7(a) of the California Constitution) and federal law (Fifth and Fourteenth Amendments of the United States Constitution) by action of the courts;

- The non-criminal detention proceedings are discretionary and thus the hearing costs for such proceedings do not impose a state-mandated new program or higher level of service; and
- Offsetting savings may result in no net cost, for example: the option of outpatient treatment instead of confinement in a facility, as required under prior law; the reduction in the number of TB examinations required to be performed by the LHO; Medi-Cal or Medicare subsidized examinations for eligible beneficiaries; reduced exposure to monetary damages resulting from violation of due process rights.

DHS further argues that if the Commission does find there is a "new program or higher level of service," costs to the local agency are reduced because the State has provided instructions, model documents, and materials both in hard copy and on-line.

Department of Public Health's Position

DPH has replaced DHS as the state agency responsible for the TB control program. DPH reasserts the arguments made by DHS discussed above including the argument that the "activities described in the test claim statutes predate January 1, 1975" and adds a description of the state funding provided to the counties and specified cities for TB control activities.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local governments and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local governments or school districts to be eligible for reimbursement, one or more similarly situated local governments or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission cannot apply article XIII B as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.[2]

Claims

The following chart provides a brief summary of the claims and issues raised by the claimant and staff's recommendation.

[2] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802.

Claim	Description	Issues	Staff Recommendation
Health and Safety Code sections 121361 and 121362	Require: (1) local detention facilities to submit notice and other information to the LHO; and (2) LHOs to review written treatment plans submitted by health facilities and coordinate with parole agents and officials.	Claimant alleges these code sections impose state-mandated costs.	*Approved*: The requirements imposed on local detention facilities and LHOs by the plain language of these sections impose reimbursable state-mandated costs on counties and specified cities.[3]
Health and Safety Code section 121363	Imposes requirements on public and private health care providers who treat TB patients.	Claimant alleges this code section imposes state-mandated costs.	*Denied*: The plain language of section 121363 does not impose any requirements on the LHO.
Health and Safety Code section 121364	Authorizes LHOs to issue written orders for examination.	Claimant alleges this code section imposes state-mandated costs.	*Denied*: Prior law required the LHO to issue orders for examination in writing and serve them on the person named in the order.
Health and Safety Code section 121365	Authorizes the LHO to issue *any* order necessary to protect the public health including several specified orders.	Claimant alleges this code section imposes state-mandated costs.	*Denied*: Much of the authority granted by this section is not new and the new authority does not mandate a new program or higher level of service.
Health and Safety Code sections, 121366, 121367, 121368, and 121369	Impose numerous federal due process and federal statutory protections upon orders issued under section 121364 or 121365	Claimant alleges these code sections impose state-mandated costs.	*Partially Approved*: The requirement to provide counsel to non-indigent persons subject to orders of detention issued under section 121365 imposes reimbursable state-mandated costs.

Analysis

Staff finds that Health and Safety Code sections 121361 and 121362 impose a new program or higher level of service on counties and specified cities for the following activities only:

- For local detention facilities to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and

[3] The activities imposed by section 121361 and 121362 on health care providers, health facilities, and outpatient clinics (which were not claimed) are not unique to government but apply generally to all health facilities, public and private. This issue will not be included in this analysis because it was not pled in the test claim.

- When a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction, submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person.

- For LHOs to:
  - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
  - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.[4]

Staff finds that the alleged activity to "prepare a written treatment plan" does not impose a new program or higher level of service because the law in effect immediately prior to the enactment of the test claim statutes required local detention facilities to prepare written treatment plans for inmates. However, staff finds that the mandated activities, bulleted above, when compared with the legal requirements in effect immediately before the enactment of the test claim statutes, are new and were first enacted by Statutes 1993, chapter 676, Statutes 1994, chapter 685 and Statutes 2002, chapter 763. In addition, these bulleted activities are unique to government because, by definition, only local governments have LHOs and local detention facilities which imprison inmates and these requirements are imposed on those entities.[5] Moreover, the activities provide a governmental service to the public by preventing the spread of TB.

However staff finds that the plain language of section 121363[6] does not require LHOs to perform any activities. In addition, the requirements of Health and Safety Code section 121364[7] were required under pre-1975 law and so are not new. Similarly, Health and Safety Code section

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[4] With the exception of preparing the written treatment plans, the other activities requested by the claimant pursuant to sections 121361 and 121362 may be considered during the adoption of the parameters and guidelines. The Commission's regulations allow the Commission to consider and include activities in the parameters and guidelines that are reasonably necessary to comply with the mandated activities if there is substantial evidence in the record to support the finding. (Cal. Code Regs., tit. 2, § 1183.1(a)(4).)

[5] This case is distinguishable from *County of Los Angeles v. State of California*, *supra*, 43 Cal.3d 46, since even though health care providers have similar requirements they do not have the responsibility to house and provide medical care to inmates.

[6] (Originally section 3283) as added by Statutes 1993, chapter 676, amended by Statutes, 1994, chapter 65, repealed, renumbered, and reenacted as current section 121363 by Statutes 1995, chapter 415.

[7] (Originally former section 3284) as added by Statutes 1993, chapter 676; amended by Statutes 1994, chapter 685; and repealed, renumbered and reenacted as 121364 by Statutes 1995, section 415.

121365[8] requires LHOs to investigate cases of TB; prevent the spread of the disease; issue orders for exams, detention, and isolation in writing; and serve the person named in the order. However, these activities have been required since at least 1957 and are not new. In addition, the new orders authorized by section 121365 implement the requirements of federal law and thus do not mandate a new program or higher level of service.

Staff finds that the Health and Safety Code section 121366 requirement to provide counsel to non-indigent people subject to orders of detention imposes a new program or higher level of service since it is new and is not required by federal due process or other federal laws. However, with the exception of that requirement, staff finds that Health and Safety Code sections 121366-121369,[9] implement the due process and other procedural protections of the 14th Amendment to the Constitution of the United States; article 1, section 14 of the California Constitution; and the federal Rehabilitation Act, and Americans with Disabilities Act (ADA). Therefore, the remaining requirements of sections 121366-121369 are federal mandates and requirements of existing law and do not mandate a new program or higher level of service within the meaning of article XIII B, section 6 of the California Constitution.

Staff also finds that there are costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514 for the activities that mandate a new program or higher level of service, which may be partially offset by revenues generated through fee authority. With respect to the issue of costs mandated by the state, staff finds that:

1. There is no evidence in the record to support a finding that the claimant requested the test claim legislation within the meaning of Government Code section 17556(a), as argued by the Departments of Health Services and Public Health.
2. The State provides substantial funding for TB control, but it is not authorized for use for the state-mandated activities.
3. Claimant has fee authority for the test claim activities, but the fee authority is subject to the voter approval limitations of Proposition 218. Thus, the fee authority cannot be used to deny the claim pursuant to Government Code section 17556(d), but may be identified as offsetting revenue in the parameters and guidelines.

Conclusion and Staff Recommendation

Staff concludes that Health and Safety Code sections 121361 and 121362 and 121366 as added or amended by Statutes 1993, chapter 676, Statutes 1994, chapter 685, Statutes 1997, chapter 116, and Statutes 2002, chapter 763 mandate a new program or higher level of service for counties and cities and within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section

[8] (Originally former section 3285) as amended by Statutes 1993, chapter 676 and Statutes 1994, chapter 685 and repealed, renumbered and reenacted as 121365 by Statutes 1995, section 415.

[9] (Originally sections 3285.1-3285.4) as added by Statutes 1993, chapter 676 and amended by Statutes 1994, chapter 685, and repealed, renumbered, and reenacted as sections 121366-121369 by Statutes 1995, chapter 415.

17514, subject to the offsetting revenues described in the analysis below, only for the following activities:

- For local detention facilities to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and
    - When a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction, submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person.
- For LHOs to:
    - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
    - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.[10]
- For counties or specified cities to provide counsel to non-indigent TB patients who are subject to an order of detention.[11]

Staff further concludes that all other statutes pled in this claim do not constitute reimbursable state-mandated programs.

Staff Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

[10] With the exception of preparing the written treatment plans, the other activities requested by the claimant pursuant to sections 121361 and 121362 may be considered during the adoption of the parameters and guidelines. The Commission's regulations allow the Commission to consider and include activities in the parameters and guidelines that are reasonably necessary to comply with the mandated activities if there is substantial evidence in the record to support the finding. (Cal. Code Regs., tit. 2, § 1183.1(a)(4).)

[11] Health and Safety Code section 121366.

STAFF ANALYSIS

Claimant

County of Santa Clara

Chronology

9/26/2003	Claimant, County of Santa Clara, filed the test claim with the Commission on State Mandates ("Commission")[12]
10/07/2003	Commission staff issued a completeness review letter for the test claim and requested comments from state agencies
11/03/2003	Department of Finance (DOF) submitted comments on the test claim
2/05/2004	Claimant submitted a response to DOF's comments on test claim
2/22/2004	Department of Health Services (DHS) requested an extension to file comments on test claim
2/25/2004	The Commission granted DHS an extension to March 26, 2004
3/26/2004	DHS requested an extension to file comments on test claim
4/08/2004	The Commission granted DHS an extension to May 25, 2004
5/21/2004	DHS requested an extension to file comments on test claim
5/26/2004	The Commission granted DHS an extension to June 24, 2004
6/14/2004	DHS requested an extension to file comments on test claim
6/29/2004	The Commission granted DHS an extension to July 26, 2004
7/26/2004	DHS requested a 60-day extension to file comments on test claim
7/27/2004	The Commission granted DHS an extension to August 25, 2004
8/25/2004	DHS submitted comments on the test claim
4/18/2011	Commission staff issued a request to parties, interested parties and affected state agencies for additional information
5/02/2011	Department of Public Health (DPH) submitted a response to the request for additional information
5/03/2011	Claimant requested an extension to submit a response to the request for additional information
5/04/2011	The Commission granted claimant an extension to May 16, 2011
5/16/2011	Claimant submitted a response to the request for additional information

[12] Based on the filing date of September 23, 2003, the period of reimbursement for this test claim begins on July 1, 2002.

I. Introduction

This test claim addresses the activities required of local detention facilities[13] and local health officers[14] (LHOs) relating to tuberculosis (TB) control. Eligible claimants for state-mandated costs imposed on LHOs include counties and the following specified cities: Berkeley, Long Beach, and Pasadena.[15] Eligible claimants for state-mandated costs imposed on local detention facilities include all cities and counties with local detention facilities as defined by Penal Code section 6031.4. Although the test claim statutes also impose duties on health care providers, health facilities,[16] and outpatient clinics, those activities will not be discussed in this analysis because the claimant has not requested reimbursement for those activities.[17] Finally, duties are imposed on state correctional facilities and state parole agents and officials, but those duties are not imposed on local government and will not be addressed.

Tuberculosis (TB) is a contagious disease that is transmitted through the air from one person to another by tiny infectious airborne particles expelled when a person with active TB coughs, sneezes, or talks.[18] Anyone inhaling the air containing these particles may become infected. In most people, the immune system keeps the TB bacteria in check, so the person infected does not

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[13] A "local detention facility" is a jail or other local penal institution and is defined by Penal Code section 6031.4. Private penal institutions are excluded from the definition of "local detention facility."

[14] A local "health officer," as used in the Communicable Disease Prevention and Control Act includes county, city, and district health officers, and city and district health boards, but does not include advisory health boards. (Health & Saf. Code § 120100.)

[15] References in this analysis to "specified cities" mean the cities of Berkeley, Long Beach, and Pasadena. Fifty-eight counties have LHOs as do the three cities of Berkeley, Long Beach, and Pasadena. Note that cities are required to appoint a LHO except when the city has conferred the powers and duties of the City LHO on the County LHO. (Health & Saf. Code § 101460.) The three cities of Berkeley, Long Beach, and Pasadena are currently the only cities which have not conferred the powers and duties on the county LHO.

[16] A "health facility" is "any facility, place or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer . . ." (Health & Saf. Code § 1250.) Both public and private facilities are included in this definition.

[17] The activities imposed on public and private health care providers, health facilities and outpatient clinics arguably do not impose a program subject to reimbursement under article XIII B, section 6 of the California Constitution because they are not unique to government. See *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal. App.3d 1538, 1545 (holding "[p]roviding elevators equipped with fire and earthquake safety features simply is not 'a governmental function of providing services to the public' and 'does not impose a unique requirement on local government'").

[18] California Department of Public Health (DPH), Fact Sheet, Tuberculosis Control Branch, March 2008, p. 1.

feel sick and cannot spread TB to others. This is known as latent TB infection. If untreated, the latent TB bacteria can become active and cause TB disease. If active TB develops, TB bacteria attack the lungs or other parts of the body. It usually takes six months of treatment to cure the disease, which helps to ensure that the patient does not die or remain infectious and spread TB to others. Multi drug-resistant TB, active TB caused by bacteria resistant to our most powerful drugs, is much more difficult and costly to treat and can be incurable. Extensively drug-resistant TB is from strains of TB resistant to most, if not all, available treatment, may be impossible to treat, and has a high mortality rate.[19]

California reports the most TB cases of any state, 21 percent of the nation's total.[20] A total of 2,472 new cases of TB were reported in California in 2009.[21] Roughly nine percent of California TB patients have died with TB each year over the past decade.[22] California also reports the most multi-drug resistant TB cases of any state, and one or two cases of virtually untreatable, extensively drug resistant strains of TB have been reported each year in California since 2000.[23]

A. Overview of California Tuberculosis Control Law

California has had TB control laws since the early 1900s. In 1957, the law was amended to give local health departments lead responsibility for TB control.[24]

1. Powers and Duties of Department of Public Health (DPH)

DPH has a range of responsibilities for communicable disease, including TB control. Mandatory duties include examining the causes of communicable diseases, establishing a list of reportable diseases (of which TB is one), acting as the lead agency for TB response, working with local health departments to identify detention sites, and maintaining a program for the control of TB.[25] DPH also has discretion to advise LHOs; adopt regulations about isolation and quarantine; and require inspection, disinfection, isolation, or quarantine when necessary to protect the public health.[26] The TB control statutes place DPH in an administrative, supervisory, and support role, leaving the bulk of the on-the-ground work to local health departments. Specifically, the statutes require DPH to maintain a TB control program and state that DPH is the "lead agency" for all TB control and prevention activities at the state level.[27]

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[19] *Ibid.*

[20] DPH, Fact Sheet, Tuberculosis Control Branch, *supra*, p. 2.

[21] DPH, *Report on Tuberculosis in California*, Tuberculosis Control Branch, August 2011, p. 2.

[22] *Id*, p. 5.

[23] *Ibid.*

[24] Health and Safety Code section 3285 (Statutes 1957, chapter 205).

[25] Health and Safety Code sections 120125, 120130, 121357, 121358(b), and 121350.

[26] Health and Safety Code sections 131080, 120130, and 120145.

[27] Health and Safety Code sections 121350 and 121357.

2. Powers and Duties of Local Health Officers

LHOs bear primary responsibility for TB control in California. An LHO is a city or county physician required by California law to oversee public health.[28] LHO duties vary by city and county, according to local ordinance; some act as the head of the county health department, others work within the department. However, all LHOs are ultimately responsible for ensuring that California's public health laws are implemented locally. Each county is required to have an LHO, and cities are required to appoint an LHO except when the city has conferred the powers and duties of the city LHO on the county LHO.[29] The three cities of Berkeley, Long Beach, and Pasadena are currently the only cities which have not conferred the powers and duties on the county LHO.

With regard to prevention of the spread of disease, including TB, California law has long provided:

> Each [LHO] knowing or having reason to believe that any case . . . exists, or has recently existed, within the territory under his or her jurisdiction, shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.[30]

Thus, while LHOs are charged with mandatory duties, they are also granted substantial discretionary authority to protect the public health. Health and Safety Code section 121365 requires LHOs to use every available means to investigate reported or suspected cases of active TB in their jurisdiction. Under Health and Safety Code section 121364, LHOs have discretion to perform compulsory examinations of persons they have reasonable grounds to believe are at heightened risk of TB exposure. Moreover, under section 121365 they have broad discretionary authority to issue *any order* deemed necessary to protect the public health or the health of any individual, including but not limited to the following specified orders:

- Of detention for purposes of examination;
- To complete a prescribed course of medication and if necessary, to follow infection control precautions;
- To follow a course of directly observed therapy (DOT) (if an active TB patient is unable or unwilling to complete a prescribed course of medication);
- Of detention in a health or other treatment facility if a person is substantially likely to have infectious TB and to transmit the disease;
- Of detention in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2) there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions;

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[28] Health and Safety Code sections 101000 and 101005.

[29] See Health and Safety Code section 101460.

[30] See Health and Safety Code section 120175 (Former Health and Safety Code section 3110 added by Statutes 1957, chapter 205 and repealed, renumbered and reenacted as section 120175 by Statutes 1995, chapter 415).

- For the exclusion from attendance at the workplace; and
- For home isolation.

3. Powers and Duties of Health Care Providers and Health Facilities

For purposes of background only, public and private health care providers and health facilities also have TB control related duties under the TB control statutes. Health care providers have a mandatory duty to report to the LHO (1) when they encounter a suspected or actual active TB patient and (2) when the patient ceases treatment for TB.[31] They have a mandatory duty to maintain written documentation of an active TB patient's adherence to an individual treatment plan.[32] In addition, a health care provider who treats an active TB patient is required either to examine all household contacts or refer them to the LHO for examination.[33] Finally, health facilities have a duty not to discharge or release a suspected or actual active TB patient until a written treatment plan has been approved by the LHO.[34]

4. Constitutional and Statutory Limits on the Powers and Duties of TB Control Professionals

The powers and duties of TB control professionals in California have the potential to infringe on a patient's constitutional rights. For example, an isolation or detention order may interfere with a TB patient's liberty interests. Liberty is a fundamental right under the United States and California Constitutions. The United State Supreme Court has held that a civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.[35] The analysis discusses these issues, as well as other federal statutory protections, with respect to the test claim requirements.

a. Contents of Health Orders

The test claim statutes require that any TB control related health order must state the legal authority on which the order was based.[36] In addition, it must include an individualized assessment of the person's situation or behavior that justifies the order and either (1) the less restrictive alternatives that were attempted and were unsuccessful or (2) the less restrictive alternatives that were considered and rejected, and why they were rejected.[37]

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[31] Health and Safety Code section 121362.

[32] *Ibid*.

[33] Health and Safety Code section 121363.

[34] Health and Safety Code section 121361.

[35] *Addington v. Texas* (1979) 441 U.S. 418, 425. Note that there are hundreds of state and federal cases holding that the liberty interest is a fundamental right and is protected by the due process requirements of the fifth and fourteenth amendments to the United State Constitution. *Addington* is but one example and others will be discussed in the analysis below.

[36] Health and Safety Code section 121367(a).

[37] Health and Safety Code section 121367.

b. Special Civil Detention Procedures

An LHO has the authority to detain a TB patient without prior court authorization under Health and Safety Code section 121365, but sections 121366, 121367, and 121368 codify the following rights of detainees:

- Upon a detainee's request, the LHO must apply for a court order authorizing continued detention within 72 hours of the request.
- Whether or not a detainee makes a request, a court order is required for detentions of more than 60 days.
- The LHO must seek further court review of a detention within 90 days of the initial court order and within 90 days of each subsequent court review.
- Where a court order is required, the LHO must prove the necessity of the detention by "clear and convincing" evidence.
- A person subject to detention has the right to counsel and to have counsel provided upon request.
- Orders must advise detainees of their rights regarding release requests, court orders, court review, and legal representation.
- Orders must be in writing and contain: the purpose of the detention; the legal authority under which the order is issued; an individualized assessment of the detainee's circumstances or behavior that is the basis for the order; and the less restrictive treatment alternatives that were unsuccessfully attempted or considered and rejected, and the reasons the alternatives were rejected.
- Orders must be accompanied by a separate notice that explains the detainee's right to request release; lists the phone number the detainee may call to request release; explains the detainee's right to counsel; and informs the detainee that, at the detainee's request, the LHO will notify two individuals of the detention.
- A detainee may only be detained for the amount of time necessary to fulfill the purpose of the detention.

c. Location of detention

Health and Safety code section 121358(a) provides that "individuals detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities."

d. Interpreters

Health and Safety Code section 121369(a) specifies that "language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided" for the purposes of executing TB related investigations and orders. Though the law does not specifically require health orders to be translated in writing, the translation of health orders (either orally or in writing) for non-English speakers is required.

e. Involuntary Treatment

With regard to compulsory testing and treatment, Health and Safety Code Section 121369(b) provides that nothing in sections 121365, 121366, or 121367 "shall be construed to permit or

require the forcible administration of any medication without a prior court order." Sections 121365(b) and (c) authorize orders requiring active TB patients to complete a course of medication or undergo directly observed therapy, with the caveat that the section "does not allow the forcible or involuntary administration of medication." Section 121365(a) authorizes LHOs to order the detention of patients for examination, but the section explicitly "does not authorize the [LHO] to mandate involuntary anergy testing."[38]

f. Religious Exemption

Since 1957, the law has provided, with limited exception, "no examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination, or organization and claims exemption on that ground."[39] [40] Moreover, such person "shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he or she can be safely quarantined and/or isolated in his or her own home or other suitable place of his or her choice."[41]

g. Criminal Sanctions for Failure to Comply With TB Health Orders

Failure to comply with a TB health order is a misdemeanor under Health and Safety Code section 120280 punishable by a fine and/or imprisonment in the county jail for a period of up to one year. Civil and criminal detainees are subject to different standards of due process and different types of confinement.

Health and Safety Code section 121365 specifies what must be done in response to noncompliance with TB control related orders. The LHO is required to report violations of section 121365 orders to the district attorney.[42] Upon receipt of a report, the district attorney is required to prosecute violations of section 121365 and is required to prosecute violations of other orders, if requested by the LHO.[43] If a persistently nonadherent active TB patient is convicted of a misdemeanor for failing to comply with a section 121365 order, the court may order the

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[38] "Anergy testing" is an additional test performed on HIV-infected or otherwise immune-compromised patients who test negative for TB, but are at high risk for infection with TB. Because the TB test relies upon the patient's immune response, it can result in false negatives for immune-compromised patients.

[39] Health and Safety Code section 121370.

[40] See Health and Safety Code section 3286, Statutes 1957, chapter 205, repealed, renumbered as Health and Safety Code section 121370, and reenacted by Statutes 1995, chapter 415.

[41] *Id.* Courts have ruled that states are not constitutionally obliged to offer religious exemptions under the United States Constitution. See, e.g., *Prince v. Massachusetts* (1944) 321 U.S. 158, p.p. 166-167; *Boone v. Boozman* (E.D. Ark. 2002) 217 F. Supp. 2d 938. Staff found no case law regarding whether such an exemption is required under the California Constitution. Nonetheless, the California Legislature has provided the exemption to those belonging to "well recognized" religions since before 1957 and so those exemptions are not new.

[42] Health and Safety Code section 121365.

[43] Health and Safety Code section 120300.

offender to be confined for up to one year.[44] Section 120280 states that the confinement may take place in "any appropriate facility, penal institution, or dwelling approved for the specific case by the [LHO]." As an alternative to confinement, the court may place the offender on probation for up to two years upon condition that the offender complies with the 121365 order.[45] The court can terminate probation and order the confinement of an offender who violates the terms of probation.[46]

5. Funding for TB Control

California law has long authorized state funding to counties for treatment of TB patients.[47] The 1994 Budget Act contained $17,418,000 to fund the Governor's Initiative to implement the Strategic Plan for Control and Elimination of Tuberculosis in California, portions of which were implemented through AB 803 and AB 804.[48] The state appears to have continued to appropriate funds in various amounts for tuberculosis control activities since that time. Health and Safety Code Sections 121350, 121355, 121357, 121380, 121390, 121450, 121455, and 121460 authorize the TB "subvention program" and charge DPH with establishing standards and procedures with which to condition the awarding of funds. In 2009, a new multi-variable funding formula modeled after the national TB allocation formula was developed by DPH in collaboration with the California Tuberculosis Controllers Association.[49] Based on information received from claimant, claimant received $4,579,366 from the state for TB control related activities for 2010 and claimant absorbed the remaining $565,066 of its TB control related costs.[50] This funding is discussed in greater detail in the analysis below under the issue of whether the new program or higher level of service imposes costs mandated by the state.

B. The Legislative History of California Tuberculosis Control Law

1. Early TB Control Laws

California has had TB control laws since the early 1900s. In 1957, the law was amended to give local health departments lead responsibility for TB control.[51] It required LHOs to investigate suspected TB cases[52] and directed them to examine persons reasonably suspected of active TB

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[44] Health and Safety Code section 120280.

[45] *Ibid*.

[46] *Ibid*.

[47] See *County of Sacramento v. Chambers* (1917) 33 Cal.App. 142 (finding that a state subsidy to counties for TB treatment was not an unconstitutional transfer of a state function to a local government or a gift of public funds).

[48] DOF, analysis of AB 804, dated August 9, 1994, p. 1, see also Assembly Committee on Health analyses of AB 803 and AB 804.

[49] DPH, Tuberculosis Control Local Assistance Funds Policies and Procedures Manual, Fiscal Year 2010-2011, p. 1.

[50] Claimant, response to request for additional information, *supra*, p.1.

[51] Health and Safety Code section 3285 (Statutes 1957, chapter 205).

[52] Health and Safety Code section 3110 Statutes 1957, chapter 205; repealed, renumbered and reenacted as Health and Safety Code section 120175 by Statutes 1995, chapter 415.

and isolate or quarantine active cases when necessary to protect public health.[53] The required procedure for doing so was to serve a written examination, quarantine, or isolation order on the person containing: "the name of the person to be isolated, the period of time during which the order would remain effective, the place of isolation or quarantine, and such other terms as may be necessary to protect the public health."[54] As under current law, there was no statutory requirement for the LHO to apply to court for civil enforcement of an order.[55] However, if a person violated a quarantine or isolation order, the LHO was required to notify the district attorney.[56] The district attorney was required to prosecute the alleged violation.[57] Violation of an examination or isolation order was a misdemeanor, punishable by confinement until compliance with the order but for no longer than six months.[58] California law has authorized state funding to counties for treatment of TB patients since at least 1915.[59] The 1957 law required the state health department to lease "any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the [LHO]," with the cost of care in state leased facilities deducted from the county subsidy.[60]

2. 1993 Amendments: AB 803 (Gotch)

In 1992, a California TB Elimination Task Force was convened by DHS, the California Conference of Local Health Officers[61] (CCLHO), the California Tuberculosis Controllers Association, and the American Lung Association of California. TB incidence had increased significantly in the United States in the 1980s, and there was a prevailing sense that California needed to redouble its TB control efforts. Additionally, the courts required that TB patients receive procedural due process protections not unlike those afforded mentally ill persons.[62] In 1994, the task force released a Strategic Plan for Tuberculosis Control and Elimination with a

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[53] Health and Safety Code section 3285 (Statutes 1957, chapter 205).

[54] Health and Safety Code section 3285 (Statutes 1957, chapter 205 and Statutes 1993, chapter 676).

[55] Compare Health and Safety Code section 3285(f) (Stats. 1957, ch. 205 and Stats. 1993, chapter 676) with section 121365 (Stats.1995, ch. 415).

[56] Health and Safety Code section 3285 (1957).

[57] Health and Safety Code section 3355 (1957 & 1993).

[58] Health and Safety Code section 3351 (1957 & 1993).

[59] See *County of Sacramento v. Chambers* (1917) 33 Cal.App. 142 (finding that a state subsidy to counties for TB treatment was not an unconstitutional transfer of a state function to a local government or a gift of public funds).

[60] Health and Safety Code section 3295 (1957). Current law, Health and Safety Code section 121390 requires DPH to lease the facilities it deems necessary for persons convicted of a section 120280 misdemeanor (3295 was repealed, renumbered and reenacted by Statutes 1995, chapter 415).

[61] The membership of CCLHO includes the 61 California LHOs: one from each of the 58 counties and one each from the three cities of Berkeley, Long Beach, and Pasadena.

[62] See, e.g., *Newark v. J.S.* (N.J. Super. Ct. Law Div. 1993) 652 A.2d 265.

number of recommendations for improving TB control in California. AB 803 and AB 804 (collectively referred to as the Gotch legislation) implement the plan and were sponsored by the Health Officers Association of California (HOAC) and supported by CCLHO and the American Lung Association of California.[63]

AB 803 added the due process and other federal law protections relating to TB orders and detention that, with minor modifications, are a key feature of the current statute. While authorizing LHOs to detain persons without a court order, the bill also included a provision, new to California law, authorizing LHOs to apply to court for civil enforcement of TB orders.

Thus, AB 803 provided LHOs a range of enforcement options. The Assembly Committee on Health analysis of AB 803 indicated that the intent was to establish a procedure "more in tune with current civil rights expectations that allow for gradually more restrictive measures for persistently nonadherent patients who threaten to spread infection because they do not respond to specific treatment orders. . . ."[64] The Assembly Ways and Means Committee analysis stated that the new procedures for enforcement would generate savings by "preventing the use of misdemeanor penalties and incarceration in jail." The bill also amended the reporting obligations of local detention facilities and the authority and responsibility of DHS (now DPH) and LHOs with respect to prisoners with TB.

3. 1994 Clean-up Legislation: AB 804 (Gotch)

AB 804 was introduced at the same time as AB 803 and was enacted in September 1994. HOAC sponsored and CCLHO supported it. AB 804 clarified the law enacted by AB 803 by: (1) allowing the transfer of TB patients without prior approval of treatment plans, to a general acute care hospital when an immediate need for higher care is required, or from any health facility to a state correctional institution; and (2) requiring that treatment plans for patients being discharged from a health facility be reviewed by the LHO within 24 hours from the time of receipt.

4. 1995 Reorganization of the Health and Safety Code

SB 1360, Statutes 1995, chapter 415 repealed, reorganized, renumbered, and reenacted the Health and Safety Code including the pre-1975 Health and Safety Code sections included in this test claim.

5. 1997 Amendments Shielding Health Care Providers From Civil and Criminal Liability; Prohibiting Housing TB Patients, Other Than Criminal Offenders, in Correctional Facilities; and Requiring Identification of a Site in Each Jurisdiction to House Recalcitrant TB Patients

Senate Bill 362, Statutes 1997, chapter 116, added a provision to Health and Safety Code section 121361 specifying that no health facility that declines to discharge, release, or transfer a person pursuant to section 121361 shall be civilly or criminally liable or subject to administrative sanction as a result if the health facility complies with section 121361 and acts in good faith.

Senate Bill 391, Statutes 1997, chapter 294 added section 121358 to the Health and Safety Code prohibiting housing TB Patients, other than criminal offenders, in correctional facilities and

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[63] See HOAC letters dated April 15, 1993, March 12, 1997, June 14, 2002, and,

[64] Assembly Committee on Health, Committee Analysis of AB 803, p. 3.

requiring identification of a site in each jurisdiction to house recalcitrant TB patients by January 1, 1998.

6. 2002 Amendment Permitting an LHO to Certify Unlicensed Public Health TB Workers as TB Skin Test Technicians and Requiring LHOs to Notify The Parole Agent Or Regional Parole Administrator When the LHO Has Reasonable Grounds to Believe The Parolee Has Active TB and the Parolee Ceases Treatment

Senate Bill 843, Statutes 2002, chapter 763 amended Health and Safety Code sections 121361 and 121362 and repealed and reenacted section 121360.5 to:

- Provide for certification of unlicensed TB skin test technicians as a cost-saving measure;
- Require that, in addition to the requirement in prior law to submit notice and a written treatment plan to the LHO in the county to which a parolee is being released upon discharge, a state correctional facility must submit notice to the LHO in the county that the parolee is being released from;
- Require Department of Corrections (DOC) to inform the parole agent, and other parole officials as necessary that the parolee has active or suspected active TB;
- Require the parole agent and other parole officials to coordinate with the LHO in supervising compliance with the treatment plan and notify the LHO if the parole is suspended because the parolee absconded from supervision; and
- Change the requirement that the LHO notify the medical officer of a parole region or the physician and surgeon designated by DOC when there are reasonable grounds to believe that the parolee has active TB and the parolee ceases treatment to a requirement that the LHO notify the parole agent or regional parole administrator.

II. Positions of the Parties and Interested Parties

A. Claimant's Position

Claimant alleges that the following activities are new and reimbursable under article XIII B, section 6 of the California Constitution:

Health and Safety Code sections 121361 and 121362

- Communication between LHOs, their staff, detention facility staff, and others; [65]
- Preparation of a treatment plan by medical staff of the detention facility prior to discharge, release or transfer of a TB patient; [66]
- Transmission of the treatment plan to the LHO;[67]
- LHO review of the treatment plan; [68] and

[65] Claimant, test claim, p. 5.

[66] *Ibid.*

[67] *Ibid.*

- Drafting, reviewing, and establishing policies, procedures, forms, and protocols and training to implement them for LHOs, their staff, detention facility staff, and others.[69]

Health and Safety Code section 121363

- Examination of the contacts of a TB patient by the LHO when a health care provider will not do so;[70] and
- LHO oversight of the case to ensure the contacts are reexamined properly which means increased communication between the LHO and health care providers.[71]

Health and Safety Code section 121364

- LHO preparation of written orders for examination.[72]

Health and Safety Code section 121365

- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding LHO orders and the training to implement them for LHOs, their staff, and others; [73]
- Staff time to: locate and detain TB patients; transport them to and from places of examination and housing; ensure that TB patients remain at home or are excluded from the workplace; [74] and
- Costs of detention including but not limited to housing and use of security or law enforcement personnel.[75]

Health and Safety Code section 121366

- LHO application for court order for continued detention upon TB patient's request for release or if detention will be more than 60 days; [76]
- LHO application to the court for further review within 90 days of initial order; [77]
- Counsel for LHO and detainee;[78]

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[68] *Ibid*.

[69] *Ibid*.

[70] Claimant, test claim, p. 5.

[71] Claimant, test claim, p. 6.

[72] Claimant, test claim, p. 6.

[73] Claimant, test claim, p. 9.

[74] *Ibid*.

[75] *Ibid*.

[76] Claimant, test claim, p. 9.

[77] Claimant, test claim, p.10.

[78] *Ibid*.

- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding this court process and training to implement them for LHOs, their staff, their counsel, counsel's staff, and counsel for the detainee such as the public defender and the public defender's staff and others;[79]
- The following activities on an expedited calendar: preparation of declarations; review of records; preparation of witnesses; assembling evidence; exchanging discovery; drafting pleadings; and, any other procedures necessary to ensure the matter is well prepared, placed on calendar, and timely heard; [80]
- Attendance of counsel for both sides at hearing and witnesses from the LHO's staff and the detainee; [81] and
- Transportation of detainee to and from court, security costs, copy costs, witness fees, and filing fees.[82]

Health and Safety Code section 121367

- Ensuring that LHO orders are in writing and include the following information: reasons for the detention, right to counsel, and right to request release from detention;[83]
- Preparing the following additional separate notices: right to counsel; right to request release; and right to have up to two individuals notified of the detention;[84]
- Reasonable efforts of the LHO to contact the individuals designated by the detainee;[85] and
- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding LHO orders and notices and training to implement them, especially training on the proper service of legal documents, for LHOs, their staff, their counsel, counsel's staff, and others.[86]

Health and Safety Code section 121368

- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding the situations that trigger release from detention and the training to implement them,

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[79] *Ibid*.

[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid*.

[83] Claimant, test claim, p. 11.

[84] *Ibid*.

[85] *Ibid*.

[86] *Ibid*.

especially training on the proper service of legal documents, for LHOs, their staff, their counsel, counsel's staff, and others.[87]

Health and Safety Code section 121369

- Use of interpreters, when necessary;[88]
- Delegation of LHO duties to the head of medical treatment in penal institutions;[89] and
- Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding the use of interpreters and delegation of LHO duties and the training to implement them for LHOs, their staff, detention facility staff, and others.[90]

B. Department of Finance's Position

DOF states that the claimant has identified a number of new activities related to the manner in which local health officials manage and control the spread and treatment of TB which it asserts are new and reimbursable mandates.[91] If the Commission reaches the same conclusion, the nature and extent of the specific activities required can be addressed in the parameters and guidelines.[92] DOF notes that it expects the county to be very specific regarding the activities necessary to comply with the test claim statutes since the they were effective nearly ten years prior to the test claim filing.[93]

C. Department of Health Services' Position

DHS contends that this test claim should be denied because:

- Many of the statutory requirements predate January 1, 1975 and thus do not meet Government Code section 17514's definition of costs mandated by the state.[94]
- Claimant, through the Health Officer's Association of California (HOAC), requested the test claim statutes. HOAC is the separate non-profit body of the statutorily established California Conference of Local Health Officers (CCLHO). HOAC was the sponsor of AB 803, Statutes 1993, chapter 676 and also sponsored all three of the subsequent amendments of the test claim statutes that are at issue in this test claim. HOAC could not have sponsored those bills without the consent of the member counties. Therefore, HOAC's request should be imputed to its member counties under Government Code section 17556(a).[95]

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[87] Claimant, test claim, p. 12.

[88] Claimant, test claim, p. 13.

[89] *Ibid*.

[90] *Ibid*.

[91] DOF, comments on the test claim, dated November 3, 2003, p. 1.

[92] *Ibid*.

[93] *Ibid*.

[94] DHS, comments on the test claim, *supra*, p.1.

[95] DHS, comments on the test claim, *supra*, p.1-2.

- The due process rights required by the test claim statutes were declared existing state law (Art. 1 §7(a) of the California Constitution) and federal law (Fifth and Fourteenth Amendments to the United States Constitution) by action of the courts.[96]
- The non-criminal detention proceedings are discretionary and thus the hearing costs for such proceedings do not impose a state-mandated "new program or higher level of service" which would trigger the right to reimbursement.[97]
- Offsetting savings may result in no net cost, for example: the option of outpatient treatment instead of confinement in a facility, as required under prior law; the reduction in the number of TB examinations required to be performed by the LHO; Medi-Cal or Medicare subsidized examinations for eligible beneficiaries; reduced exposure to monetary damages resulting from violation of due process rights.[98]

If the Commission finds there is a "new program or higher level of service," costs to the local agency are reduced because the State has provided instructions, model documents, and materials both in hard copy and on-line.[99]

D. Department of Public Health's Position

DPH has replaced DHS as the state agency responsible for TB control. DPH reasserts the arguments made by DHS discussed above, including the argument that the "activities described in the test claim statutes predate January 1, 1975," and adds the following:

- The State provides an annual award of funds to jurisdictions reporting an average of six or greater cases of TB which are intended to augment, not supplant, the funding for TB control that the locals have been historically responsible for.[100]
- State funding is currently being provided by the state for requirements imposed by the test claim statutes including: "food, shelter, incentives and enabler funds reimbursement," and reimbursement for civil detention.[101]
- Eligible local jurisdictions receive one or more of the following three types of local assistance funding: base awards and housing awards which are both issued as annual awards; and civil detention awards, which are invoiced and reimbursed throughout the year on a flow basis:

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[96] DHS, comments on the test claim, *supra*, p. 2, citing *Bloom v. State of Ill*., U.S. Ill., *supra*, 88 S. Ct. 1477; *U.S. v. Crouch*, C.A.5 (Tex.), *supra*, 84 F.3d 1487, *cert*. denied 117 S.Ct. 736.

[97] DHS, comments on the test claim, *supra*, p. 2, citing Health and Safety Code sections 121365, 121367, 121368, 121369 citing *San Diego Unified v. Commission on State Mandates, supra,* 33 Cal.4th 859 and *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal.4th 727.

[98] DHS, comments on the test claim, *supra*, p. 2.

[99] DHS, comments on the test claim, *supra*, p. 2 and Exhibit 9.

[100] DPH, comments on the test claim, May 2, 2011, p. 1.

[101] *Ibid*.

a. Base awards to fund staff and expenses related to completion of treatment and contact investigation are awarded annually to jurisdictions that report six or more TB cases using five-year surveillance data and are held constant for two years. Under some circumstances, they may be used for targeted testing in high risk populations in order to detect and treat latent TB. Eligible expenditures include salaries, benefits, equipment, supplies, training materials, local mileage and in state travel to TB related trainings. Jurisdictions reporting 6-19 cases receive a fixed award amount. Jurisdictions reporting 20 or more cases receive an award based on a formula that uses a five-year average of reported cases and case characteristics (e.g. homelessness, disease site, infectiousness, drug resistance).

b. Housing allocations are provided to jurisdictions with sizable TB patient populations based on historic costs of housing and related expenses for TB patients who are homeless or at-risk of homelessness. Housing allocations have two components:

   - Food, Shelter, Incentives and Enablers (FSIE) funds are used to provide services to enhance adherence, prevent homelessness, and allow the use of less restrictive alternatives to decrease or eliminate the need for detention. Eligible expenses include food, shelter, other "incentives and enablers," and personnel and costs for conducting designated activities.
   - Housing Personnel supports salaries and benefits for staff working directly with patients that are homeless, at risk of homelessness, or at risk for civil detention (e.g. outreach workers, social workers, public health nurses). Jurisdictions that do not receive a regular Housing Personnel allotment may submit requests for reimbursement. Those that do receive an allotment may submit supplemental invoices for expenses that exceed their allotment.[102]

c. Civil Detention awards from the state are provided through a regional facility in San Mateo County for unlimited use by jurisdictions that need a site to detain persistently non-adherent patients. Civil detention funds are also available to reimburse for the use of local facilities for civil detention of recalcitrant patients. Jurisdictions that opt to civilly detain recalcitrant TB patients are reimbursed for all eligible expenses submitted in accordance with the state guidance and reimbursement procedure. Consideration for reimbursement for detention is made on a case-by-case basis. Health and Safety Code section 121358(a) prohibits the use of these funds for costs of detention in correctional facilities.[103]

III. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service.

[102] DPH, comments on the test claim, May 2, 2011, p. 2.

[103] DPH, comments on the test claim, May 2, 2011, p. 3.

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[104] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[105]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[106]
2. The mandated activity either:
    a. Carries out the governmental function of providing a service to the public; or
    b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[107]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[108]
4. The mandated activity results in the local agency or school district incurring increased costs. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity. [109]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[110] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[111] In making its decisions, the Commission must strictly construe article XIII B,

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[104] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[105] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[106] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

[107] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

[108] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[109] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[110] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[111] *County of San Diego, supra,* 15 Cal.4th 68, 109.

section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[112]

This analysis addresses the following issues:

- Do the test claim statutes mandate a new program or higher level of service?
- Do the activities that mandate a new program or higher level of service result in increased cost mandated by the state?

A. Do the Test Claim Statutes Mandate a New Program or Higher Level of Service?

The TB control program has been in existence since shortly after the beginning of California statehood.[113] Many of the activities required by the test claim statutes are not new, since they have been constantly required since before January 1, 1975 under former Health and Safety Code sections 3000-3355.[114] These pre-1975 requirements include the requirements for LHOs to:

- "Take such measures as may be necessary to prevent the spread of any communicable disease or occurrence of additional cases;"[115]
- "Enforce orders, ordinances and statutes related to public health;[116]
- "Use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of [TB] in the infectious stages within his jurisdiction and to ascertain the sources of such infections;"[117]
- Make any order to examine in writing;[118]
- Make any order to isolate or quarantine in writing;[119]

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[112] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[113] Public Health Institute, TB and the Law Project, *California Tuberculosis Control Law*, James B. Simpson, J.D., M.P.H., Samantha Graff, J.D., and Marice Ashe, J.D., M.P.H, 2003, pp. 8-9.

[114] References to former sections 3000-3355 refer to those sections from 1957 to 1993 and not to versions that postdate the 1993 test claim legislation. Note that many of these former Health and Safety Code sections are actually renumbered and reenacted code sections that pre-dated 1957, but there is no need to trace them to their origins for purposes of mandate analysis. Many of these former Health and Safety Code sections were constantly in effect since before 1975 and were repealed, renumbered, and reenacted by Statutes 1995, chapter 415 and thus are not new.

[115] Former 3110 (Stats. 1957, ch. 205)/current section 120165.

[116] See former Health and Safety Code section 452, repealed and renumbered as 101030 by Statutes 1995, chapter 415.

[117] Compare former section 3285 (Stats. 1957, ch. 205) to current section 121365 which only changes the word "his" to "the."

[118] Former 3285(a) (Stats. 1957, ch. 205)/current section 121364.

[119] Former 3285(c) (Stats. 1957, ch. 205)/current section 121367(a)(4).

- Serve the isolation or quarantine order upon the TB patient;[120] and
- Report violations of orders issued to the district attorney in writing and include information in the LHOs possession relating to the isolation or quarantine order.[121]

Prior law also required the district attorney to prosecute all violations of former Health and Safety Code sections 3285 and 3351.[122]

1. **Requirements imposed on local detention facilities[123] and LHOs relating to notice and written treatment plans prior to the discharge, release, or transfer, or upon the discontinuance of treatment of a person known or reasonably believed to have active TB. (Health and Safety Code sections 121361 and 121362)[124]**

Health and Safety Code section 121361(a) and (e) prohibit local detention facilities from discharging or releasing from the facility a person with active TB or reasonably believed to have active TB unless notification and a written treatment plan have been received by the LHO. Section 121361(d) and (e) also prohibit a local detention facility from transferring a person with active TB or reasonably believed to have active TB to a local detention facility in another jurisdiction unless notification and a written treatment plan are received by the LHO and the chief medical officer of the detention facility receiving the person. When prior notification would jeopardize the person's health, the public safety, or the safety and security of the penal institution, then the notification and treatment plan "*shall be submitted"* within 24 hours of discharge, release, or transfer. (Emphasis added.)

Section 121361(a)(2) further requires the LHO to review for approval, within 24 hours of receipt, treatment plans submitted by a health facility.

Health and Safety Code section 121362 describes the contents of the written treatment plan to include the following information: patient name; address; date of birth; tuberculin skin test results; pertinent radiologic, microbiologic, and pathologic reports that are final or pending; updated clinical status and laboratory results at the time of discharge, release, or transfer; and any other information required by the LHO.

Section 121362 further requires the LHO to notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB. A parolee may be

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[120] Former 3285(d) (Stats. 1957, ch. 205)/current section 121367(a)(4).

[121] Former 3285(e) (Stats. 1957, ch. 205)/current section 121365.

[122] Health and Safety Code section 3355 (as amended by Stats. 1963, ch. 278)/current section 120300.

[123] A "local detention facility" as defined by Penal Code section 6031.4 is a jail or other local penal institution. Private penal institutions are excluded from the definition of "local detention facility."

[124] Originally sections 3281 and 3282, as added by Statutes 1993, chapter 676, amended by Statutes, 1994, chapter 65, repealed, renumbered and reenacted as current section 121361 by Statutes 1995, chapter 415, amended by Statutes 1997, chapter 116, and Statutes 2002, chapter 763.

presumed to have ceased TB treatment when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

Claimant alleges the following activities are required by Health and Safety Code sections 121361and 121362 and are new, reimbursable activities:

- "Communication between [LHOs], their staff, [local] detention facility staff and/or detention facility medical staff, and others";
- Preparation of "a treatment plan…by medical staff of the [local] detention facility prior to discharge, release or transfer of a [TB patient]";
- Transmission of the treatment plan to the LHO;
- LHO review of the treatment plan; and
- "Drafting, reviewing, and establishing policies, procedures, forms, and protocols and training to implement them for [LHOs], their staff, local detention facility staff and/or detention facility medical staff, and others."

The plain language of sections 121361 and 121362 mandate the following activities on local detention facilities and LHOs:

- Local detention facilities are mandated to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person when a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction,
- LHOs are mandated to:
    - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
    - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.

Immediately before the enactment of sections 121361 and 121362, local detention facilities were required to prepare written treatment plans for the medical care of any inmate in need of medical care pursuant to the minimum standards for state and local correctional facilities. Title 15 of the California Code of Regulations provided the following:

> According to the procedures established by the responsible physician and the facility administrator, a pre-screen is performed on all inmates prior to housing in the living area. The pre-screening shall be performed by a medically licensed

person or trained non-medical staff per the order of the written order of the physician responsible for health care at the facility.

There shall be a written plan to provide medical care for any inmate who appears at pre-screening to be in need of medical treatment or who requests medical treatment.[125]

Therefore, staff finds that the preparation of a written treatment plan for the person with TB, as requested by the claimant, does not constitute a new program or higher level of service.

However, submitting notification and the written treatment plan upon release, discharge, or transfer to the LHO and to the medical officer of the receiving facility are new requirements. In addition, the requirements imposed on the LHO to review for approval, within 24 hours of receipt, treatment plans submitted by a health facility and to notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB are new. These requirements are unique to local government and are intended to increase the communication between public officials to prevent the further spread of the disease.[126]

Accordingly, staff finds that Health and Safety Code sections 121361 and 121362 mandate a new program or higher level of service for following activities:

- For local detention facilities to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person when a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction.
- For LHOs to:
    - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
    - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable

[125] Title 15, California Code of Regulations, section 1207 (Register 82 No. 40).

[126] See generally the Assembly and Senate Committee and Floor analyses for AB 803 Stats. 1993, ch. 676), AB 804 (Stats. 1994, ch. 685) and SB 843 (Stats. 2002, ch. 763).

grounds to believe that a parolee has active TB and ceases treatment for TB.[127]

2. The requirements for health care providers who treat a TB patient to examine the contacts of the TB patient or to refer those contacts to the LHO (Health and Safety Code section 121363)[128]

Section 121363 generally requires public and private health care providers who treat a TB patient to examine the contacts of the TB patient or to refer those contacts to the LHO. As mentioned in the Introduction, this analysis does not address requirements imposed on public and private health care providers. However, claimant alleges that Health and Safety Code section 121363 imposes the following new, reimbursable activities:

- Examination of the contacts of a TB patient by the LHO when a health care provider will not do so.
- LHO oversight of the case to ensure the contacts are reexamined properly which means increased communication between the LHO and health care providers.

The test claim statutes added the provisions of Health and Safety Code section 121363 which provides:

> Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to the local health officer for examination. Each health care provider shall promptly notify the local health officer of the referral. When required by the local health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the local health officer or designee. If any abnormality consistent with tuberculosis disease is found, steps satisfactory to the local health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment. Contacts shall be reexamined at times and in a manner as the local health officer may require. When requested by the local health officer, a health care provider shall report the results of any examination related to tuberculosis of a contact.

The plain language of Health and Safety Code section 121363 does not impose *any* requirements on LHOs. Rather, it imposes requirements on public and private health care providers to examine contacts or to refer them to the LHO for examination. Nor is there a specific requirement in any other state law that LHOs perform such examinations. Moreover, even if one

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[127] With the exception of preparing the written treatment plans, the other activities requested by the claimant pursuant to sections 121361 and 121362 may be considered during the adoption of the parameters and guidelines. The Commission's regulations allow the Commission to consider and include activities in the parameters and guidelines that are reasonably necessary to comply with the mandated activities if there is substantial evidence in the record to support the finding. (Cal. Code Regs., tit. 2, § 1183.1(a)(4).)

[128] (Originally section 3283) as added by Statutes 1993, chapter 676, amended by Statutes, 1994, chapter 65, repealed, renumbered and reenacted as current section 121363 by Statutes 1995, chapter 415.

were to infer the alleged activities from the LHOs general duties in sections 121075 and 121365 to prevent the spread of contagious, infectious, or communicable diseases and to investigate reported or suspected cases of TB, those duties have continuously been the law since 1957 and are not new.[129] LHOs have had the following duties since at least 1957 and they remain in law today:

> Each [LHO] knowing or having reason to believe that any case . . . exists, or has recently existed, within the territory under his or her jurisdiction, shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.[130]

This statutory provision alone authorizes all manner of measures taken by LHOs, provided that the measures are necessary to prevent the spread of disease.

> Each [LHO] is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages in the jurisdiction, and to ascertain the sources of those infections.[131]

LHOs have long had the duties to investigate cases of TB, take measures to prevent the spread of TB and have been authorized, if not required, to examine suspected TB patients when necessary for the preservation and protection of the public health (as discussed below under section 121364).

Therefore, staff finds that the plain language of section 121363 (originally section 3283), as added by Statutes 1993, chapter 676, amended by Statutes, 1994, chapter 65, and repealed, renumbered and reenacted as current section 121363 by Statutes 1995, chapter 415, does not mandate a new program or higher level of service on the LHO.

3. The authority of LHOs to order TB examinations (Health and Safety Code section 121364)[132]

Health and Safety Code section 121364 generally authorizes the LHO to order TB examinations and requires such orders to be in writing. Claimant alleges the activity of "LHO preparation of written orders for examination" is a new, reimbursable activity imposed by Health and Safety Code section 121364.

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[129] Former section 3285(c) (Stats. 1957, ch. 205) as amended by statutes 1961, chapter 30, statutes 1966, chapter 1344, statutes 1965, chapter 1552.

[130] See Health and Safety Code section 3110 Statutes 1957, chapter 205; repealed, renumbered and reenacted as Health and Safety Code section 120175 by Statutes 1995, chapter 415.

[131] See former Health and Safety Code section 3285 added by Statutes 1957, chapter 205, amended by Statutes 1961, chapter 30; Statutes 1965, chapter 1344, Statutes 1965, chapter 1552, Statutes 1993, chapter 676(non-substantively to modernize and eliminate sexist usage), Statutes 1994, chapter 685 (but did not amend language quoted here), repealed, renumbered and reenacted as 121365 by Statutes 1995, chapter 415.

[132] (Originally Section 3284) as added by Statutes 1993, chapter 676; amended by Statutes 1994, chapter 685; and repealed, renumbered and reenacted as 121364 by Statutes 1995, section 415.

Since January 1, 1995, Health and Safety Code section 121364 has stated the following:

> (a) Within the territory under his or her jurisdiction, each [LHO] *may* order examinations for tuberculosis infection for the purposes of directing preventive measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the [LHO] has reasonable grounds to determine are at heightened risk of tuberculosis exposure.
>
> (b) An order for examination pursuant to this section *shall* be in writing and shall include other terms and conditions as may be necessary to protect the public health. [133]

(Emphasis added.)

Staff finds that the requirements imposed by section 121364, as amended by the test claim statutes, are not new. Prior law, former Health and Safety Code section 3285(c) (which was last amended by Statutes1965, chapter 1552) stated in pertinent part:

> Whenever the [LHO] *shall* determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of the public health, he *shall* make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to protect the public health. [134]

(Emphasis added.)

Thus, under prior law, whenever the LHO "determined on reasonable grounds that an examination of any person [was] necessary" for the preservation and protection of public health, the LHO was required to make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms as may be necessary to protect the public health. Although the language in the test claim statutes is slightly different now (e.g. saying "may" instead of the former "shall" which arguably makes it discretionary), the authority to issue an order for examination is not new; it still must be on reasonable grounds that there is a heightened risk of TB exposure. Additionally, the requirement that the order be in writing and include terms and conditions necessary to protect the public health is the same.

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[133] Health and Safety Code section 121364. Former 3285(c) added by Statutes 1957, chapter 205, repealed and reenacted as 3284 by Statutes 1993, chapter 676; amended by Statutes 1994, chapter 685; and repealed, renumbered as 121364 and reenacted by Statutes 1995, chapter 415.

[134] Former section 3285(c) as amended by Statutes 1965, chapter 1552. This language was deleted from section 3285(c) and amended into a new section 3284 by Statutes 1993, chapter 676 and was non-substantively amended by Statutes 1994, chapter 685; and repealed, renumbered as 121364, and reenacted by Statutes 1995, chapter 415.

Staff finds that Health and Safety Code section 121364[135] is not new and, thus, does not mandate a new program or higher level of service.

4. Authority of an LHO to issue various orders to protect the public health or the health of a particular person (Health and Safety Code section 121365)[136]

Health and Safety Code section 121365 requires the LHO to:

- "Use every available means to ascertain the existence of, and immediately investigate, all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections."
- "Follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department."

If the LHO determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the LHO is authorized by section 121365 to issue any orders deemed necessary to protect the public health or the health of any other person. These orders include but are not limited to the following specific orders:

- Of detention for purposes of examination;
- To complete a prescribed course of medication and if necessary, to follow infection control precautions;
- To follow a course of directly observed therapy (DOT) (if an active TB patient is unable or unwilling to complete a prescribed course of medication);
- Of detention in a health or other treatment facility if a person is substantially likely to have infectious TB and to transmit the disease;
- Of detention in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2) there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions;
- For the exclusion from attendance at the workplace; and
- For home isolation.

If the TB patient fails to comply with an order issued by the LHO, the LHO is authorized to request the court to enforce the order. In addition, if the order is violated, the LHO is required to

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[135] (Former section 3285(c)) repealed, renumbered and reenacted as 3284 by Statutes 1993, chapter 676; amended by Statutes 1994, chapter 685; and repealed, renumbered as 121364 and reenacted by Statutes 1995, chapter 415.)

[136] Originally codified in former section 3285 as amended by Statutes 1993, chapter 676 and Statutes 1994, chapter 685 and repealed, renumbered and reenacted as 121365 by Statutes 1995, section 415.

"advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof."

Claimant alleges that Health and Safety Code section 121365 imposes a reimbursable state-mandated program and also requests reimbursement for the following activities and costs:

- "Drafting, reviewing, and establishing policies, procedures, forms, and protocols regarding LHO orders and training to implement them for LHOs, their staff and others;"
- "Staff time to locate and detain TB patients; transport them to and from places of examination and housing; ensure that TB patients remain at home or are excluded from the workplace;" and
- "Costs of detention itself including but not limited to housing and use of security or law enforcement personnel."

For the reasons below, staff finds that Health and Safety Code section 121365, as added and amended by the test claim statutes, does not mandate a new program or higher level of service.

a. Authority given to the LHO to issue "less restrictive" orders to protect public health implements federal law and does not mandate a new program or higher level of service.

Before the enactment of the test claim statutes, former Health and Safety Code section 3285 (as last amended in 1965) required the LHO to issue orders of examination, quarantine, or isolation when necessary to protect public health. Section 3285 stated in relevant part the following:

> (c) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to the protect the public health. Nothing contained in this subdivision shall be construed to prevent any person whom the health officer determines should have an examination for infectious tuberculosis from having such an examination made by a physician of his own choice who is licensed to practice medicine under the provisions of Chapter 5 (commencing with Section 2000), Division 2 of the Business and Professions Code under such terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.
>
> (d) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be examined, the period of time during which the order shall remain effective, the place of the isolation or quarantine, and such other terms and conditions as may be necessary to the protect the public health.

Prior law also gave the LHO broad authority to take "such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases" when the LHO had reason to

believe that any case exists, or has recently existed, within the territory under his or her jurisdiction.[137]

The test claim statutes amended the provisions now found Health and Safety Code section 121365 to add language authorizing the LHO to issue the following additional orders when necessary to protect the public health or the health of any other person: to complete a prescribed course of medication, to follow a course of directly observed therapy, to be detained in a health or treatment facility, to be excluded from work, and any other "orders [the LHO] deems necessary to protect the public health or the health of any other person."

These additional orders were added "for the purpose of establishing a procedure 'more in tune with current civil rights expectations that allows for gradually more restricted measures for recalcitrant patients who threaten to spread infection because they do not respond to specific treatment orders'"[138] Health and Safety Code section 1213167, which is discussed later in this analysis, clarifies that the written orders issued by the LHO pursuant to section 121365 must set forth the "the less restrictive alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected."

The plain language of the statute gives the discretion to the LHO to issue the orders when necessary to protect the public health. In addition, the LHO's authority to issue the orders identified in section 121365 has been deemed "discretionary" by the court in a case alleging the negligence of a health officer in performing his duties.[139] Although it is recognized that there may be circumstances where the LHO has no true choice but to issue an order identified in section 121365 to protect public health, and those circumstances may reach the level of practical compulsion for purposes of mandates law, the Commission does not need to address that issue.[140]

As discussed below, the additional orders specified in section 121365 implement existing state and federal requirements under the Due Process Clause of the United States Constitution and the American with Disabilities Act (ADA) to achieve public health goals by using the least restrictive means to protect the public and the health of the person with TB. "When the federal government imposes costs on local agencies those costs are not mandated by the state and thus would not require a state subvention. Instead, such costs are exempt from local agencies' taxing

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[137] See Health and Safety Code section 3110 Statutes 1957, chapter 205; repealed, renumbered and reenacted as Health and Safety Code section 120175 by Statutes 1995, chapter 415.

[138] Assembly Committee on Health, Analysis of AB 803, as amended April 15, 1993, page 3.

[139] *Jones v. Czapkay* (1960) 182 Cal.App.2d 192, 200-202; see also, "TB Control and the Law, Frequently Asked Questions on Civil Commitment" issued by the Public Health Institute, described the broad discretion of the LHO.

[140] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 888, where the court conducted a similar analysis for due process hearings following the discretionary expulsion of a student.

and spending limitations" under article XIII B.[141] Thus, staff finds that Health and Safety Code section 121365 does not mandate a new program or higher level of service.

i. Existing State and Federal Due Process Law

When government takes an action against an individual that directly deprives that individual of a life, liberty, or property interest, government must comply with substantive due process protections afforded under the U.S. Constitution.[142] Substantive due process protects the individual against arbitrary action by government and, thus, requires government to have an appropriate justification for the deprivation.[143]

Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.[144,145] Courts, including those in California, have long held that placing someone under quarantine restrictions for infectious or contagious diseases like tuberculosis infringes upon the individual's right of liberty. In such cases, personal restraint can only be imposed where, under the facts of each case, reasonable grounds exist to justify the action taken.[146] In addition, due process requires that the restriction imposed on the individual be the least restrictive alternative available under the circumstances.[147]

> Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative

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[141] *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1593, citing *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556(c).

[142] *Addington v. Texas* (1979) 441 U.S. 418, 425; United States Constitution, 5th and 14th amendments; see also, due process provisions of the California Constitution, article 1, sections 7 and 15.

[143] *County of Sacramento v. Lewis* (1998) 523 U.S. 823, 845.

[144] *Addington v. Texas* (1979) 441 U.S. 418, 425.

[145] See also, *Meyer v. Nebraska* (1923) 262 U.S. 390, 398 (liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] . . . engage in any of the common occupations of life"); *Smith v. Texas* (1914) 233 U.S. 630, 636 ("In so far as a man is deprived of the right to labor, his liberty is restricted [and] his capacity to earn wages and acquire property is lessened.").

[146] *Jacobson v. Massachusetts* (1905) 197 U.S. 11, which upheld a compulsory vaccination program, finding that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint . . . as the safety of the general public may demand."; *In re Halko* (1966) 246 Cal.App.2d 553, 558, which addressed a challenge by a individual who had TB and was served with a quarantine order of isolation confining him to a hospital pursuant to former Health and Safety Code section 3285.

[147] *Covington v. Harris* (1969) 419 F.2d 617, 623.

> abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[148]

Thus, under existing federal due process law, local government is required to impose the least restrictive alternative available under the circumstances. The authority granted in Health and Safety Code section 121365 to issue less restrictive orders complies with, and implements this due process requirement.

ii. Existing Requirements under the Rehabilitation Act and the ADA

The least restrictive alternative requirement is also found in section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA). In 1973, Congress enacted the section 504 of the Rehabilitation Act of 1973 to extend the protections of the Civil Rights Act of 1964 to the disabled.[149] The Rehabilitation Act prohibits discrimination on the basis of physical or mental disability with respect to "any program or activity receiving federal financial assistance."

In 1990, Congress enacted the ADA, which extended the requirements of the Rehabilitation Act to all services, programs, and activities of all public entities, including those that do not receive federal financial assistance.[150] A "public entity" under the ADA is defined to include "any State or local government," and "any department, agency, [or] special purpose district."[151] "There is no significant difference in the analysis of the rights and obligations created by the ADA and the Rehabilitation Act."[152]

The Rehabilitation Act and the ADA commonly protect against discrimination in employment, housing, education, transportation, and public accommodations. These federal laws, however, also broadly prohibit a public entity from discriminating against "a qualified individual with a disability" on account of the individual's disability when providing a service. Title II of the ADA states the following:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity*. (Emphasis added.)[153]

In 1987, the United States Supreme Court determined that a person suffering from TB is a "qualified individual with a disability" under the Rehabilitation Act, and in 1993, the Code of

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[148] *Shelton v. Tucker* (1960) 364 U.S. 479, 488.

[149] 29 U.S.C. section 794; 34 Code of Federal Regulations, sections 104 et seq.; *Lloyd v. Regional Transp. Authority* (1977) 548 F.2d 1277, 1285.

[150] 42 U.S.C. section 12101, 28 C.F.R. sections 35.101 et seq.

[151] 42 U.S.C. section 12132(1)(A)(B).

[152] *Zuckle v. University of California* (1999) 166 F.3d 1041, 1045, fn. 11.

[153] 42 U.S.C. section 12132.

Federal Regulations that implement the ADA explicitly mandated that TB be deemed a disability under the ADA.[154]

In 1999, the U.S. Supreme Court decided the *Olmstead* case, which addressed the least restrictive alternative requirement in Title II of the ADA regarding the confinement of mentally disabled patients in Georgia. The court held that the unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination prohibited by Title II of the ADA.[155] The court noted Congress' findings when enacting the ADA that "unjustified segregation" of persons with disabilities is a form of discrimination.[156]

The court also noted two regulations that implement the ADA that: (1) require each public entity to administer services and programs in the most integrated setting appropriate to the needs of qualified individuals with disabilities, and (2) require each public entity to make reasonable accommodations in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.[157] The court held that the reasonable accommodations standard can be met when the state "demonstrates that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in *less restrictive settings*." (Emphasis added.)[158] The court further held that Georgia law expressed a preference for treatment in the most integrated setting appropriate by providing that "[i]t is the policy of the state that the *least restrictive alternative placement* be secured for every client at every state of his habilitation." (Emphasis added.)[159] The court remanded the case to the lower courts for consideration of the facts to these standards.

The due process and ADA requirement to consider the least restrictive alternatives available was addressed in *City of Newark v. J.S.*, a case involving the involuntary civil commitment of a homeless person with active TB.[160] Hospital authorities requested the city to intervene and issue an order of hospital confinement when J.S., a noncompliant patient with active TB, tried to leave the hospital against medical advice. J.S. had a prior history of disappearances and of releases against medical advice, and would return to the emergency room only when his health deteriorated. J.S. also failed to follow proper infection control guidelines or take proper medication when in the hospital and failed to complete treatment regimens following his prior releases.[161] The court, after summarizing the due process and ADA requirements, determined

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[154] *School Board of Nassau County v. Arline* (1987) 480 U.S. 273, 289 (*Arline*); 28 Code of Federal Regulations, section 35.104.

[155] *Olmstead v. Zimring* (1999) 527 U.S. 581, 596-597.

[156] *Id.* at page 600, citing 42 U.S.C. 12101(a)(2).

[157] *Id*. at page 592, citing 28 Code of Federal Regulations, sections 35.130(b)(7) and (d).

[158] *Id*. at page 605.

[159] *Id.* at page 603, fn. 13.

[160] *City of Newark v. J.S.* (1993) 652 A.2d 265. This case is not precedential, but is used to explain how the rules of due process and the ADA apply to TB control cases.

[161] *Id.* at page 268-269.

that a health officer seeking to infringe upon a person's liberty by imposing detention, confinement, isolation, or quarantine, must first establish by clear and convincing evidence that the person poses a significant risk of transmitting disease to others with serious consequences. The court explained that courts must guard against the risk that governmental action may be grounded in popular myths or irrational fears and, thus, the court must demand an individualized, fact-specific determination as to the person under consideration, which is "the key to all decision-making under the ADA."[162]

In addition, the least restrictive means should be used to achieve the clearly defined public health goal.[163] With respect to TB control, the court noted that compulsory directly observed therapy (which assures that the patient takes medication while being directly observed by a health care worker) should be used "only as a last resort; conceptually, it should be used as a less restrictive alternative to isolation or commitment."[164] After considering the evidence in the case, and based on the individual circumstances of the homeless, noncompliant TB patient, the court found that hospital confinement was the least restrictive mode of isolation.[165]

Accordingly, the test claim statute, Health and Safety Code section 121365, which authorizes the LHO to issue orders less restrictive than quarantine, isolation, or detention (e.g. orders for exclusion from the workplace, completion of medication, or directly observed therapy) to meet the public health goals of treating the TB patient and protecting the public from exposure to TB simply codifies the existing ADA requirement to consider the less restrictive alternatives available. Thus, staff finds that the authority in Health and Safety Code section 121365 to issue these orders does not mandate a new program or higher level of service.

b. <u>The requirements in section 121365 to use every available means to ascertain and investigate cases, to follow state and local rules, and to advise and report to the district attorney when orders are violated are not new.</u>

During the period of reimbursement, the first paragraph of Health and Safety Code section 121365 has stated the following:

> Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections. In carrying out the investigations, each local health officer shall follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department. If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer *may* issue any orders he or she deems necessary to protect the public health or the health of any other person, and

[162] *Id*. at pages 274-275.

[163] *Id.* at page 275.

[164] *Id*. at page 276.

[165] *Id.* at page 278.

may make application to a court for enforcement of the orders. Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof. (Emphasis added.)

The requirements to use every available means to ascertain and investigate cases of TB in the jurisdiction, to follow state and local rules, and to advise and report violations of orders to the district attorney are not new. Since at least 1965, state law has continuously imposed the same requirements on the LHO. Former Health and Safety Code section 3285, as amended in 1965, stated the following:

Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction, and to ascertain the sources of such infections. In carrying out the investigations, each health officer is invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed:

(a) To make examinations as are deemed necessary of persons reasonably suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of public health.

(b) *Follow local rules and regulations regarding examinations, quarantine, or isolation, and all general and special rules, regulations, and orders of the state department* in carrying out such examination, quarantine or isolation.

(c) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to the protect the public health. Nothing contained in this subdivision shall be construed to prevent any person whom the health officer determines should have an examination for infectious tuberculosis from having such an examination made by a physician of his own choice who is licensed to practice medicine under the provisions of Chapter 5 (commencing with Section 2000), Division 2 of the Business and Professions Code under such terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.

(d) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be examined, the period of time during which the order shall remain effective, the place of the isolation or quarantine, and such other terms and conditions as may be necessary to the protect the public health.

(e) Upon the making of an examination, isolation or quarantine order as provided in this section, a copy of such order shall be served upon the person named in such order.

(f) *Upon the receipt of information that any examination, quarantine or isolation order, made and served as herein provided, has been violated, the health officer shall advise the district attorney of the county in which the violation occurred, in writing, and shall submit to such district attorney the information in his possession relating to the subject matter of the examination, isolation, or quarantine order, and of such violation or violations thereof. . . .* (Emphasis added.) [166]

Accordingly, staff finds that the requirements to use every available means to ascertain and investigate cases of TB in the jurisdiction, to follow state and local rules, and to advise and report violations of orders to the district attorney do not mandate a new program or higher level of service.

c. <u>The authority in section 121365 to make application to a court for enforcement of orders does not mandate a new program or higher level of service.</u>

Health and Safety Code section 121365 authorizes the LHO to apply to the court for the enforcement of any orders issued under the TB control statutes as follows:

> If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer *may* issue any orders he or she deems necessary to protect the public health or the health of any other person, and *may* make application to a court for enforcement of the orders. (Emphasis added.)

The authority to "make application to a court for enforcement of the orders" is not a mandated activity. Health and Safety Code section 16 states: "'shall' is mandatory and 'may' is permissive." Thus, the fact that section 121365 says the LHO "may" make application to the court does not require performance of any activities mandated by the state. Rather the plain language of section 121365 authorizes, but does not require, the LHO to make such an application. Though LHOs have long been required to "enforce orders, ordinances, and statutes related to public health,"[167] they can do so by reporting the violation to the district attorney as they have been required to do since 1965.[168] This new statutory authority to make application to a court merely provides an additional means of enforcement. In fact, this authority is arguably not even new since an LHO could always file a civil complaint seeking a court order to compel compliance with any LHO order and requesting the imposition of civil penalties. Civil actions also can be used to obtain an injunction to prohibit an action that is contrary to the public health.

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[166] Former Health and Safety Code section 3285 as amended by Statutes 1965, chapter 1552.

[167] See former Health and Safety Code section 452, repealed and renumbered as 101030 by Statutes 1995, chapter 415.

[168] Health and Safety Code section 3285(f), as amended by statutes 1965, chapter 1552, repealed and renumbered as 121365(f) by Statutes 1995, chapter 415.

Therefore, staff finds that the authority to "make application to a court for enforcement of the orders" does not impose a new program or higher level of service.

5. Requirements imposed to protect the rights of the TB patient when an order is issued pursuant to Health and Safety Code section 121365 (Health and Safety Code sections 121366-121369)[169]

When an LHO issues an order under the authority provided by section 121365, sections 121366 through 121369 impose various requirements to protect the rights of the TB patient. The following requirements are imposed by sections 121367 and 121369 when the LHO issues any order under section 121365:

- That the orders be in writing and contain the following:
  - The legal authority under which the order is issued, including the particular sections of state law or regulations;[170]
  - An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order; [171]
  - The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected; [172]
  - The name of the person, the period of time during which the order shall remain effective, the location, payer source if known, and other terms and conditions as may be necessary to protect the public health; [173]
- That a copy of the order shall be served upon the person named in the order; and[174]
- "If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law."[175]

In addition, sections 121366-121368 impose the following requirements when the LHO issues an order of detention pursuant to section 121365:

- Upon a detainee's request, the LHO must apply for a court order authorizing continued detention within 72 hours of the request.[176]

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[169] (Originally sections 3285.1-3285.4) as added by Statutes 1993, chapter 676 and amended by Statutes 1994, chapter 685, and repealed, renumbered, and reenacted as sections 121366-121369 by Statutes 1995, chapter 415.

[170] Health and Safety Code section 121367(a)(1).

[171] Health and Safety Code section 121367(a)(2).

[172] Health and Safety Code section 121367(a)(3).

[173] Health and Safety Code section 121367(a)(4).

[174] *Ibid*.

[175] Health and Safety Code section 121369(a).

[176] Health and Safety Code section 121366.

- Whether or not a detainee makes a request, a court order is required for detentions of more than 60 days.[177]
- The LHO must seek further court review of a detention within 90 days of the initial court order and within 90 days of each subsequent court review. [178]
- The LHO must prove the necessity of the detention by "clear and convincing" evidence.[179]
- A person subject to detention has the right to counsel and to have counsel provided. [180]
- Each health order must advise the detainee of the purpose of the detention and of his or her rights regarding release requests, court orders, court review, and legal representation.[181]
- Each health order must be accompanied by a separate notice that: explains the detainee's right to request release; lists the phone number the detainee may call to request release; explains the detainee's right to counsel; and informs the detainee that the LHO will notify two individuals specified by the detainee of the detention.[182]
- A detainee may only be detained for the amount of time necessary to fulfill the purpose of the detention. [183]

These bulleted requirements were added to the Health and Safety Code for the first time by the test claim statutes. However, except for the requirement to provide counsel to non-indigent persons, these requirements are mandated by federal law, under the ADA and the procedural due process requirements, and, thus, do not mandate a new program or higher level of service within the meaning of article XIII B, section 6.[184]

a. <u>The ADA requires the provision of language interpreters and persons skilled in communicating with vision and hearing impaired individuals.</u>

Health and Safety Code section 121369(a) requires that when an order is issued under the TB control statutes and "if necessary," language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided "in accordance with applicable law." Federal law, under the ADA, requires a public entity to provide reasonable accommodations, including interpreters, when necessary to avoid discrimination.

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[177] *Ibid*.

[178] *Ibid*.

[179] *Ibid*.

[180] *Ibid*.

[181] Health and Safety Code section 121367(b)(1)-(4).

[182] Health and Safety Code section 121367(b)(5).

[183] Health and Safety Code section 121368.

[184] *Hayes, supra,* 1 Cal.App.4th 1564, 1593, citing *City of Sacramento, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556 (b) and (c).

Title II of the ADA prohibits a "public entity" from discriminating against "a qualified individual with a disability" on account of the individual's disability:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[185]

The courts have explained that the final clause of the quoted language "protects qualified individuals with a disability from being 'subjected to discrimination by any such entity,' and is not tied directly to the 'services, programs, or activities' of the public entity."[186] Thus, in instances of detention or arrest, the courts have found that the person detained may state a claim for discrimination under the ADA, even though no service was provided to the individual.[187]

Federal regulations adopted to implement the ADA require a public entity to make reasonable modifications in policies, practices, and procedures when the modifications are necessary to avoid discrimination.[188] The ADA regulations further provide that "[a] public entity shall take appropriate steps to ensure that communications with ... members of the public with disabilities are as effective as communications with others."[189] These steps include furnishing "appropriate auxiliary aids and services" to afford a disabled individual equal opportunity to participate in an activity of the public entity, as follows:

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.[190]

The ADA defines "auxiliary aids and services" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments."[191] The ADA regulations further provide that "auxiliary aids and services" include, among other things, "[q]ualified interpreters" and "telecommunications devices for deaf persons (TDD's)."[192]

Accordingly, the requirement in Health and Safety Code section 121369(a) to provide language interpreters and persons skilled in communicating with vision and hearing impaired individuals when issuing an order for TB control does not mandate a new program or higher level of service.

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[185] 42 United States Code, section 12132.

[186] *Bircoll v. Miami-Dade County* (2007) 480 F.3d 1072, 1084-1085.

[187] *Id.* at pages 1083-1085.

[188] 28 Code of Federal Regulations, section 35.130(b)(7).

[189] 28 Code of Federal Regulations, section 35.160(a).

[190] 28 Code of Federal Regulations, section 35.104(1).

[191] 42 United States Code, section 12102(1)(A).

[192] 28 Code of Federal Regulations, section 35.160(b)(1).

b. Except for providing counsel to non-indigent persons when an order of detention is issued, the remaining requirements are mandated by existing state and federal procedural due process requirements.

Except for the requirement to provide counsel to non-indigent persons, the remaining requirements in sections 121366 through 121369 are mandated by the procedural due process requirements of state and federal law.

Under mandates law, when the federal government imposes costs on local agencies those costs are not mandated by the state and do not require state subvention.[193] Moreover, reimbursement is not required for state rules or procedures that are intended to implement federal due process law, and whose costs are in context de minimis. Such rules enacted by the state, even if they allegedly exceed the minimum due process requirements of federal law, are considered part and parcel of the underlying federal mandate and are not reimbursable.[194] The California Supreme Court in *San Diego Unified School Dist*., a case addressing a request for reimbursement of due process hearing costs following a discretionary expulsion order, explained the rationale as follows:

> The record reveals that in the extended proceedings before the Commission, the parties spent numerous hours producing voluminous pages of analysis directed toward determining whether various provisions of Education Code section 48918 exceeded federal due process requirements. That task below was complicated by the circumstances that this area of federal due process law is not well developed. The Commission, which is not a judicial body, did as best it could and concluded that in certain respects the various provisions (as observed ante, footnote 11, predominately concerning notice, right of inspection, and recording requirements) "exceeded" the requirements of federal due process.
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> Even for an appellate court, it would be difficult and problematic in this setting to categorize the various notice, right of inspection, and recording requirements here at issue as falling either within or without the general federal due process mandate. The difficulty results not from the circumstances that, as noted, the case law in the area of due process procedures concerning expulsion matters is relatively undeveloped, but also from the circumstance that when such an issue is raised in an action for reimbursement, as opposed to its being raised in litigation challenging an actual expulsion on the ground of allegedly inadequate hearing procedures, the issue inevitably is presented in the abstract, without any factual context that might help frame the legal issue. In such circumstances, courts are – and should be – wary of venturing pronouncements (especially concerning matters of constitutional law).
>
> In light of those considerations, . . . challenged state rules or procedures that are intended to implement an applicable federal law- and whose costs are , in context,

[193] *Hayes, supra,* 1 Cal.App.4th 1564, 1593, citing *City of Sacramento, supra,* 50 Cal.3d 51, 76; see also, Government Code sections 17513, 17556(b) and (c).

[194] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 889.

> de minimis- should be treated as part and parcel of the underlying federal mandate.
>
> Applying that approach to the case now before us, we conclude there can be no doubt that the assertedly "excessive due process" aspects of Education Code section 48918 for which the District seeks reimbursement in connection with hearings triggered by discretionary expulsions . . . fall within the category of matters that are merely incidental to the underlying federal mandate, and that produce at most a de minimis cost. Accordingly, for purposes of the District's reimbursement claim, all hearing costs incurred under Education Code section 48918, triggered by the District's exercise of discretion to seek expulsion, should be treated as having been incurred pursuant to a mandate of federal law, and hence all such costs are nonreimbursable under Government Code section 17556, subdivision (c).[195]

Similarly here, the requirements imposed by sections 121366 through 131369 are intended to implement federal due process law.

The due process clause provides that the state shall not "deprive any person of life, liberty, or property without due process of law."[196] When an individual's liberty or property interest is affected by governmental action, due process applies and requires that certain procedural safeguards be provided to the individual. The United States Supreme Court has not yet addressed the due process requirements required in TB control cases. However, in cases involving the involuntary detention for medical treatment, the United States Supreme Court held that due process requires the individual be given written notice; an opportunity to be heard before a neutral decision maker; the ability to review and challenge the evidence supporting the action; a written statement of reasons for the decision; the availability of legal counsel, furnished by the state if the individual is indigent; and timely notice of these rights.[197]

Adequate notice under the due process clause has two components. It must inform affected parties of the action about to be taken against them and the procedures available for challenging that action.[198] In addition, government is generally required by the due process clause to provide an opportunity to object to the action before it deprives an individual of his or her liberty or property interest. However, in the context of communicable disease orders, "post-deprivation" objections are constitutional if the individual is considered an immediate danger to self or others and if the opportunity to object takes place within a reasonable time after the deprivation.[199] In addition, the United States Supreme Court determined that in cases dealing with the indefinite civil detention of mentally ill persons, due process requires the state to justify confinement by

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[195] *Id*. at page 890.

[196] U.S. Constitution, 5th and 14th Amendment; see also, due process provisions in the California Constitution, article 1, sections 7 and 15.

[197] *Vitek v. Jones* (1980) 445 U.S. 480, 494-495.

[198] *Atkins v. Parker* (1985) 472 U.S. 115, 152.

[199] *Menefee & Son v. Dept. of Food and Ag.* (1988) 199 Cal.App.3d 774, 781.

clear and convincing evidence – "a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concern of the state."[200]

All of the orders an LHO is authorized to issue under Health and Safety Code section 121365 for purposes of TB control implicate an individual's liberty or property interest. As indicated above, civil commitments of any kind, including those for detention, isolation, or quarantine, infringe upon the individual's right of liberty.[201] The right to liberty extends to the right of the individual to contract and to engage in any of the common occupations of life.[202] Thus, by directing a patient to stay at home, a home isolation order implicates the patient's basic liberty interest in being free from physical confinement.[203] By ordering a patient to stay away from his or her workplace, a work exclusion order could have an impact on liberty and property interests associated with being free to fulfill contractual obligations, engage in an occupation, and earn a living. It is well-settled law that even temporary deprivations of an individual's liberty or property interest triggers due process protections. The length or severity of the deprivation must be weighed in determining what kind of process is due -- not *whether* process is due.[204]

In 2007, the Second District Court of Appeal in *Levin v. Adalberto M.* addressed a case challenging a civil order of detention issued by an LHO to a TB patient. Following an analysis of the cases summarized above, the court held that the "procedures mandated by [Health and Safety Code] sections 121365 through 121369 satisfy federal and state due process requirements."[205,206] Thus, under the Supreme Court's decision in *San Diego Unified School*

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[200] *Addington v. Texas* (1979) 441 U.S. 418, 431.

[201] *Id*. at page 425.

[202] See *Meyer v. Nebraska, supra,* 262 U.S. 390, 398 (liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract [and] . . . engage in any of the common occupations of life"); *Smith v. Texas*, supra, 233 U.S. 630, 636 ("In so far as a man is deprived of the right to labor, his liberty is restricted [and] his capacity to earn wages and acquire property is lessened.")

[203] See also, *Demore v. Hyung Joon Kim* (2003) 538 U.S. 510, 541 ("the basic liberty from physical confinement l[ies] at the heart of due process").

[204] See *Fuentes v. Shevin* (1972) 407 U.S. 67, p. 86 ("The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 50-day deprivations of property"); *Goss v. Lopez* (1975) 419 U.S. 565, p. 576 (holding that a 10-day suspension from school is a cognizable deprivation of liberty and property). Note that due process standards apply equally to liberty and property deprivations. See *Wolff v. McDonnell* (1974) 418 U.S. 539, p. 558 and *Zinermon v. Burch* (1990) 494 U.S. 113, p. 131.

[205] *Levin v. Adalberto M.* (2007) 156 Cal.App.4th 288, 302.

[206] See also, "Menu of Suggested Provisions for State Tuberculosis Prevention and Control Laws," issued by the Centers for Disease Control and Prevention (CDC), which summarizes the constitutional due process requirements involved when issuing TB orders and identified the due process requirements codified by other state's statutes and regulations that comply with the due process clause that are the same or similar to those codified in the test claim statutes. Differences occur in the number of days that the LHO must seek a court order to continue the detention of a TB patient. (Exhibit __.) See also, "TB Control and the Law, Frequently Asked

Dist., the requirements identified in sections 121366 through 121369 following the issuance of an order by the LHO pursuant to section 121365 are mandated by federal law and are not reimbursable under article XIII B, section 6.

However, the requirement in Health and Safety Code section 121366 to provide counsel to *non-indigent* TB patients subject to a detention order goes beyond the requirements of federal due process law and is not considered "part and parcel" of the federal due process requirements. Section 121366 states that "any person who is subject to detention order shall have the right to be represented by counsel *and upon the request of the person, counsel shall be provided*." (Emphasis added.)

In *Vitek*, the United States Supreme Court held that the right to be represented by counsel is a requirement of due process law, but only must be furnished at no cost to the individual if the individual is indigent.[207] The plain language of section 121366 provides the right to counsel in the first part of the sentence – "any person who is subject to detention order shall have the right to be represented by counsel." The first part tracks federal due process. Section 121366 further provides, without limitation regarding the ability of the person to pay for counsel, that upon the request of "any" person, "counsel shall be provided." Thus, the plain language f section 121366 requires that counsel be provided at no cost to any individual, including non-indigent individuals subject to a detention order. Absent the requirement in section 121366, counties would not be required to provide counsel to non-indigent patients in TB control cases. The cost of providing counsel to appear in court to argue that the detention is not reasonable under the circumstances of the case and to represent the individual subject to a TB detention order, is not the same as the extra notice requirements following an expulsion order that were deemed "part and parcel" in the *San Diego Unified School Dist.* case, whose costs were considered "de minimis."

Thus, staff finds that the requirement in Health and Safety Code section 121366 to provide counsel to *non-indigent* TB patients subject to a detention order mandates a new program or higher level of service within the meaning of article XIII B, section 6.

B. There Are Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 and Government Code Section 17514 Which May Be Partially Offset by Local Fee Authority.

The final issue is whether the state-mandated activities impose costs mandated by the state,[208] and whether any statutory exceptions listed in Government Code section 17556 apply to the test claim. Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service." Government Code section 17564 requires reimbursement claims to exceed $1,000 to be eligible for reimbursement. Claimant asserts that it has costs exceeding one-thousand dollars per year.[209] In 2010, claimant had $5,144,431 in TB control related expenses.

Questions on Civil Commitment" issued by the Public Health Institute, describing the procedures in sections 121366 through 121269 as the "hallmark of procedural due process." (Exhibit ___.)

[207] *Vitek v. Jones* (1980) 445 U.S. 480, 495.

[208] *Lucia Mar, supra*, 44 Cal.3d 830, 835; Government Code section 17514.

[209] Claimant, test claim, *supra*, p. 14.

The state provided claimant with $4,579,366 for TB control related activities for 2010 and the claimant absorbed the remaining $565,066 of the costs.[210] The Commission, however, cannot find "costs mandated by the state" within the meaning of Government Code section 17514 if any exceptions in Government Code section 17556 apply, as discussed below. Claimant asserts that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here.[211]

1. There is No Evidence in the Record to Support a Finding That Claimant Requested the Test Claim Statutes Within the Meaning of Government Code Section 17556(a).

DHS asserts that if the Commission finds that there is a state-mandated program or higher level of service that it should deny the claim because the exception under Government Code section 17556(a) should apply in this case.[212] Government Code section 17556(a) prohibits the Commission from finding costs mandated by the state if the test claim is submitted by a local entity that requested the test claim statutes. Government Code section 17556(a) requires a specific request for the test claim legislation in the form of a resolution of the governing body of the city, county or school district claimant or a letter from the delegated representative of the governing body. However, there is no evidence in the record to support a finding that Government Code section 17556(a) applies in this case.

Government Code section 17556(a) defines a "request by the local agency" and prohibits reimbursement if a claim:

> …is submitted by a local agency or school district which requested legislative authority for that local agency …to implement the program specified in the statute, and that statute imposes costs upon that local agency… requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency… which requests authorization for that local agency …to implement a given program shall constitute a request within the meaning of this paragraph.

In support of its contention that Government Code section 17556(a) precludes reimbursement for counties that expressed support for the test claim statutes, DHS points to the fact that the legislation was specifically requested by the Health Officer's Association of California (HOAC). DHS argues that because claimant is a member of HOAC, HOAC's request of the legislation should be imputed to claimant.

Staff reviewed the author's bill file and the committee files and found evidence that the test claim legislation was sponsored by HOAC and supported by the claimant and numerous other counties.[213] In fact, the legislation was drafted by the Santa Cruz County LHO at the time, Ira Lubell, MD, who was also the chair of the California Medical Association's (CMA's) Advisory

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[210] Claimant, response to request for additional information, *supra*, p.1.

[211] Claimant, test claim, *supra*, p.p. 15-16.

[212] DHS, comments on the test claim, *supra*, p.p. 1-2.

[213] See letter from HOAC sponsoring the legislation and letters of support from various counties, including claimant.

Panel on Preventative Medicine at that time. However, a search of the County of Santa Clara Board of Supervisors Resolutions for the period of January 1993 to December 1994 showed no evidence of a specific request for this legislation or a delegation of authority to HOAC to advocate on its behalf.[214]

A local agency or school district must "request" legislative authority. The verb request means, "to make a request to or of; to ask for."[215] The resolutions and letters from counties make no request, but merely support the bill or the concepts therein. The word "support" is not synonymous with "request," and the statute is clear: making a "request" is the governing standard to trigger the exception to reimbursement. Staff finds that DHS's argument is incorrect and not supported by the plain meaning of Government Code section 17556(a); and that the letters submitted in support of the test claim legislation do not constitute a "request" within the meaning of section 17556(a).

If a statute cannot be understood based on its plain meaning, only then is it correct to refer to its legislative history.[216] For Government Code section 17556, even if the meaning were ambiguous regarding whether local government resolutions that support a bill constitute a request to implement a program, its legislative history emphasizes the distinction between requesting and supporting legislation.

Government Code section 17556 originated in Statutes 1977, chapter 1135, also known as Senate Bill No. 90 (1977-1978 Reg. Sess.), in former Revenue and Taxation Code section 2253.2.[217] The original bill precluded reimbursement for a "chaptered bill … requested by or on behalf of the local agency … which desired legislative authority to implement the program specified in the bill." The following year, section 2253.2 was amended by Statutes 1978, chapter 794 (Sen. Bill No. 1490 (1977-1978 Reg. Sess.)). The May 8, 1978 version of Senate Bill 1490 added the definition of request as follows:

> "*For purposes of this paragraph, a resolution from the governing body or a letter from a member or delegated representative of the governing body of a local agency …which expresses a desire for and support of legislation to authorize that local agency …to implement a given program shall constitute a "request"…*"

(Emphasis added). However, the June 21, 1978 version amended the sentence to be nearly identical[218] to its current form, as follows:

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[214] Claimant, response to request for additional information, *supra*, declaration of Jenny Yelin, May 13, 2011.

[215] The Merriam-Webster Dictionary (1997) page 627. Even though the plain meaning should be clear, a dictionary definition will sometimes emphasize that clarity.

[216] *In re York, supra*, 9 Cal.4th at p. 1142.

[217] The provisions of Senate Bill No. 90 (1977-1978 Reg. Sess.) governed the mandates process for the Board of Control, the Commission on State Mandate's predecessor. This former Revenue and Taxation Code section was repealed by Statutes 1988, chapter 160, a code maintenance bill.

[218] The word "legislative" was later amended out of the provision.

> "For purposes of this paragraph, a resolution from the governing body or a letter from a ~~member or~~ delegated representative of the governing body of a local agency …which ~~expresses a desire for and support of legislation to authorize~~ *requests legislative authorization for* that local agency …to implement a given program shall constitute a "request"..." (added italicized text in original).

Rejection of a specific provision contained in an act as originally introduced is persuasive that the act should not be interpreted to include what was left out.[219] Here, deleting the phrase "expresses a desire for and support of legislation," means that a "request of legislative authorization" should not be interpreted to include an expression of "desire for and support of legislation" because this phrase was left out of the final bill. In other words, the Legislature did not intend to preclude reimbursement for counties or other local entities that support legislation.

Though many local governments, including the claimant, supported the test claim legislation, support of a bill does not constitute a specific request for legislation under Government Code section 17556(a). Therefore, staff finds that the exception in Government Code section 17556(a) does not apply here.

2. Claimant Has Fee Authority For the Test Claim Activities Requiring Voter Approval Under Proposition 218 Which May Offset Some of Claimant's Costs But Which Does Not Eliminate the Mandate.

Government Code section 17556(d), states:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency … if, after a hearing, the commission finds any one of the following: [¶]…[¶] (d) The local agency … has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service.

Health and Safety Code section 101325 authorizes the imposition of a fee to pay the reasonable expenses of the LHO or other officers or employees incurred in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to public health. Health and Safety Code section 101325 provides:

> Whenever the governing body of any city or county determines that the expenses of the [LHO] or other officers or employees in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to public health, requires or authorizes its [LHO] or other officers or employees to perform specified acts that are not met by fees prescribed by the state, the governing body may adopt an ordinance or resolution prescribing fees to pay the reasonable expenses of the [LHO] or other officers or employees incurred in the enforcement. . . . The schedule of fees prescribed by ordinance or resolution of the governing body shall be applicable in the area in which the [LHO] or other officers and employees enforce any statutes, order, quarantine, or regulation prescribed by a state officer or department relating to public health.

[219] *Bollinger v. San Diego Civil Service Comm.* (1999) 71 Cal. App. 4th 568, 575.

The plain language of Health and Safety Code section 101325 authorizes the imposition of a fee to pay the reasonable expenses of the LHO or other officers or employees incurred in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to public health. "Any statutes" by definition includes the test claim statutes. However, this fee authority is limited to situations where the LHO or other officers or employees are required or authorized to perform specified acts that are not met by other fees prescribed by the state.[220] Therefore, any fee imposed pursuant to Health and Safety Code section 101325 cannot exceed a city or county's reasonable expenses for the required activities in excess of other fees prescribed by the state. However, this fee is subject to voter approval under Proposition 218 because it is imposed on a parcel and does not directly benefit the parcel. Thus, as explained below, Government Code section 17556(d) does not apply to deny the claim. Any fees recovered through section 101330, would be identified as offsetting revenue.

Health and Safety Code section 101330 specifies that the officer designated "to collect fees authorized by Section 101325, shall prepare a list of *parcels of real property subject to these fees*." Further, although it is called a "fee" in section 101325 but an "assessment" under section 101335 (which addresses the duties of the tax collector with regard to the fee), it does not meet the "special benefit" and "proportionality" requirements in Article XIII D, section 4 (a) for a special assessment and thus is a fee for purposes of Proposition 218 analysis. With some exceptions, local government fees or assessments that are incident to property ownership are subject to voter approval under article XIII D of the California Constitution, as added by Proposition 218 in 1996. Article XIII D defines a fee as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including a user fee or charge for a property-related service." It defines an assessment as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property [and] includes, but is not limited to, 'special assessment,' 'benefit assessment,' 'maintenance assessment,' and 'special assessment tax.'"

However, it also imposes "special benefit" and "proportionality" requirements on special assessments. These requirements are set forth in Article XIII D, section 4(a):

> An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel....

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[220] See 55 Op.Atty.Gen.174 (1961) (Specific fees authorized to be collected from licensees and registrants prevailed over authority granted to local governmental units to charge fees from health services under this section).

Because the health fee authorized by section 101325 would arguably provide a general benefit to all people in the jurisdiction by preventing the spread of TB, but not provide any special benefit to a parcel, it does not meet the special assessment requirements of article XIII D, section 4(a) of the California Constitution. Therefore, for purposes of Proposition 218, it would be treated as a property-related fee. Among other procedures, new or increased property-related fees require a majority-vote of the affected property owners, or two-thirds registered voter approval, or weighted ballot approval by the affected property owners.[221] Assessments must also be approved by owners of the affected parcels.[222]

The plain language of Government Code section 17556(d) prohibits the Commission from finding that the permit imposes "costs mandated by the state" if "[t]he local agency … has the *authority* to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service." [Emphasis added.] Under Proposition 218, the local agency has no authority to impose the fee without the consent of the voters or property owners.

Additionally, it is possible that the local agency's voters or property owners may never adopt the proposed fee or assessment, but the local agency would still be required to comply with the state mandate. Denying reimbursement under these circumstances would violate the purpose of article XIII B, section 6, which is to "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[223] Though some of the eligible claimants may have passed a fee under this provision which may be used to fund the costs of the TB program, the amount of the fee may not be sufficient to fund the program or they may not be able to increase the fee as the costs of the program increase.

In *Connell v. Superior Court*,[224] water districts argued that they lacked "sufficient" fee authority because it was not economically feasible for them to levy fees that were sufficient to pay the mandated costs. The court rejected the districts' argument that "authority" as used in the statute should be construed as a "practical ability in light of surrounding economic circumstances" because that construction cannot be reconciled with the plain language of section 17556, and would create a vague standard not capable of reasonable adjudication. The court also said that nothing in the fee authority statute in that case (Wat. Code, § 35470) limited the authority of the districts to levy fees "sufficient" to cover their costs. Thus, the court concluded that the plain language of section 17556 made the fee authority issue solely a question of law, and that the water districts could not be reimbursed due to that fee authority.[225] The *Connell* court determined that "the plain language of the statute [Gov. Code, § 17556, subd. (d)] precludes reimbursement where the local agency has the authority, i.e., the right or the power, to levy fees sufficient to cover the costs of the state-mandated program."[226] However, the Proposition 218

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[221] California Constitution, article XIII D, section 6(c).

[222] California Constitution, article XIII D, section 4 (d).

[223] *County of San Diego, supra,* 15 Cal.4th 68, 81.

[224] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382.

[225] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 398-402.

[226] *Id.* at page 401.

election requirement is not like the economic hurdle to fees in *Connell*. Absent compliance with the Proposition 218 election and other procedures, there is no legal authority to impose or raise fees within the meaning of Government Code section 17556(d). The voting requirement of Proposition 218 does not impose a mere practical or economic hurdle, as in *Connell*, but a legal and constitutional one. Without voter or property owner approval, the local agency lacks the "authority, i.e., the right or power, to levy fees sufficient to cover the costs of the state-mandated program."[227]

For these reasons, staff finds that local agencies do not have fee authority that is sufficient within the meaning of Government Code section 17556(d) to deny the test claim since the fee or assessment is conditioned on voter or property-owner approval under Proposition 218 (article XIII D). This conclusion is consistent with other recent test claim decisions.[228] However, the parameters and guidelines should identify a fee or assessment imposed pursuant to Health and Safety Code section 101325, at any time during the reimbursement period, as revenue that may offset the claimant's costs in performing the mandated activities.

3. Current State Funding For TB Control Activities Is Not Authorized for Use to Fund the Costs of the State Mandated New Program or Higher Level of Service.

State funding is currently being provided by the state for activities relating to TB control including "food, shelter, incentives and enabler funds reimbursement" and reimbursement for civil detention. Claimant provided information indicating that, at least for 2010, the state provided about 89 percent of the county's TB control costs.[229] Reimbursement is available for

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[227] *Connell v. Superior Court, supra,* 59 Cal.App.4th 382, 401.

[228] The issue of whether a local agency has sufficient fee authority for the mandated activities under Government Code section 17556(d), in light of the voter approval requirement for fees under article XIII D (Proposition 218) was decided by the Commission in *Municipal Storm Water and Urban Runoff Discharges* (03-TC-04, 03-TC-19, 03-TC-20, 03-TC-21) on July 30, 2009, and in *Discharge of Stormwater Runoff - Order No. R9-2007-0001*(07-TC-09) on March 26, 2010. In those test claim decisions, the Commission found that a local agency does not have sufficient fee authority within the meaning of Government Code section 17556 if the fee or assessment is contingent on the outcome of an election by voters or property owners. These decisions are being challenged on the issue of fee authority sufficiency in light of Proposition 218, among other issues, and are set for hearing later this summer. (*State of California Department of Finance, State Water Resources Control Board, et al v. Commission on State Mandates*, *County of Los Angeles, et al. Los Angeles County Superior Court*, Case No. BS130730 [Municipal Storm Water and Urban Runoff Discharges (03-TC-04, 03-TC-19, 03-TC-20, and 03-TC-21)], *State of California Department of Finance, State Water Resources Control Board, et al. v. Commission on State Mandates and County of San Diego, et al.,* Sacramento County Superior Court, Case No. 34-2010-80000604 [Discharge of Stormwater Runoff (07-TC-09)].)

[229] In 2010 claimant had $5,144,431 in unspecified TB control related expenses. The state provided $4, 579, 366 and the claimant absorbed $565,066 of the costs. (See Claimant, response to request for additional information, May 16, 2011, p.1.)

the cost of detentions for isolation (Health and Safety Code section 121365(d)) and completion of therapy (Health and Safety Code section 121365(e)).

However, these funds are specifically prohibited from being "dispersed to, or used by, correctional facilities" (Health and Safety Code section 121368). In addition, based on the comments submitted to the Commission by DPH, the costs of the LHO notification of and coordination with parole agents and parole officers, the activities imposed on local detention facilities, or the provision of counsel for non-indigent persons subject to an order to detain, do not appear to be authorized uses of the funds currently distributed by the state. These are the activities that staff finds to be new and subject to reimbursement pursuant to article XIII B, section 6 of the California Constitution.

CONCLUSION

Staff finds that Health and Safety Code sections 121361 and 121362 and 121366 as added or amended by Statutes 1993, chapter 676, Statutes 1994, chapter 685, Statutes 1997, chapter 116, and Statutes 2002, chapter 763 mandate a new program or higher level of service for counties and cities and within the meaning of article XIII B, section 6 of the California Constitution, and impose costs mandated by the state pursuant to Government Code section 17514, subject to offsetting revenues described in the analysis above, only for the following activities:

- For local detention facilities to:
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO when a person with active TB or reasonably believed to have active TB is discharged or released from the detention facility; and
    - Submit notification and a written treatment plan that includes the information required by Health and Safety Code section 121362 to the LHO and the medical officer of the local detention facility receiving the person when a person with active TB or reasonably believed to have active TB is transferred to a local detention facility in another jurisdiction.
- For LHOs to:
    - Review for approval within 24 hours of receipt only those treatment plans submitted by a health facility; and
    - Notify the medical officer of a parole region or a physician or surgeon designated by the Department of Corrections when there are reasonable grounds to believe that a parolee has active TB and ceases treatment for TB.[230]

[230] With the exception of preparing the written treatment plans, the other activities requested by the claimant pursuant to sections 121361 and 121362 may be considered during the adoption of the parameters and guidelines. The Commission's regulations allow the Commission to consider and include activities in the parameters and guidelines that are reasonably necessary to comply with the mandated activities if there is substantial evidence in the record to support the finding. (Cal. Code Regs., tit. 2, § 1183.1(a)(4).)

- For counties or specified cities to provide counsel to non-indigent TB patients who are subject to an order of detention.[231]

Staff further concludes that all other statutes pled in this claim do not constitute reimbursable state-mandated programs.

Recommendation

Staff recommends the Commission adopt this staff analysis and partially approve this test claim.

[231] Health and Safety Code section 121366.

COMMENTS ON DRAFT STAFF ANALYSIS

Chapter 676, Statutes of 1993, Chapter 685, Statutes of 1994, Chapter 294, Statutes of 1997, and Chapter 763, Statutes of 2002

Claim no. CSM-03-TC-14

Tuberculosis Control

County of Santa Clara, Claimant

Test claimant County of Santa Clara (hereinafter "County") concurs with the Draft Staff Analysis ("DSA") issued by Commission staff on August 16, 2011. We urge the Commission to find in accordance with the DSA regarding which aspects of the Tuberculosis Control program are a reimbursable state mandate under Article XIII B, section 6 of the California Constitution.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 12th day of September, 2011, at San Jose, California, by:

Juniper Downs, Lead Deputy County Counsel
County of Santa Clara

99 S.Ct. 1804
441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323
(Cite as: 441 U.S. 418, 99 S.Ct. 1804)

Supreme Court of the United States
Frank O'Neal ADDINGTON, Appellant,
v.
State of TEXAS.

No. 77-5992.
Argued Nov. 28, 1978.
Decided April 30, 1979.

In an indefinite commitment case, a probate court in Texas found that defendant was mentally ill and required hospitalization for his own welfare and protection as well as for the protection of others. The Beaumont Court of Civil Appeals, Ninth Supreme Judicial District, 546 S.W.2d 105, reversed, holding that the proper standard of proof was "beyond a reasonable doubt." The State was granted a writ of error by the Supreme Court of Texas, 557 S.W.2d 511. On grant of certiorari, the Supreme Court, Mr. Chief Justice Burger, held that to meet due process demands, the standard for use in commitment for mental illness must inform the fact finder that proof must be greater than the preponderance of evidence standard applicable to other categories of civil cases, but the reasonable-doubt standard is not constitutionally required.

Vacated and remanded.

Opinion after remand, 588 S.W.2d 569.

West Headnotes

[1] Federal Courts 170B 509

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk509 k. Mode of review and proceedings. Most Cited Cases

Where no challenge to constitutionality of any state statute was presented, appeal to United States Supreme Court was not authorized, and papers were construed as petition for writ of certiorari. 28 U.S.C.A. § 1257(2).

[2] Constitutional Law 92 4006

92 Constitutional Law
92XXVII Due Process
92XXVII(E) Civil Actions and Proceedings
92k3999 Evidence and Witnesses
92k4006 k. Degree or standard of proof. Most Cited Cases
(Formerly 92k311)

Function of standard of proof, as that concept is embodied in due process clause and in realm of fact-finding, is to instruct fact finder concerning degree of confidence society thinks he should have in correctness of factual conclusions for particular type of adjudication. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors considered; flexibility and balancing. Most Cited Cases
(Formerly 92k251.5)

Function of legal process is to minimize risk of erroneous decisions. U.S.C.A.Const. Amend. 14.

[4] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons subject to control or treatment. Most Cited Cases
(Formerly 92k1066)

State has legitimate interest under its parens patriae powers in providing care to its citizens who are unable because of emotional disorders to care for

themselves, and state also has authority under its police power to protect community from dangerous tendencies of some who are mentally ill. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51.

[5] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons subject to control or treatment. Most Cited Cases

Under Texas mental health code, state has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51.

[6] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons subject to control or treatment. Most Cited Cases

Loss of liberty by confinement for mental illness calls for showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; Code Miss.1972, § 41-21-75.

[7] States 360 4

360 States
360I Political Status and Relations
360I(A) In General
360k4 k. Status under Constitution of United States, and relations to United States in general. Most Cited Cases

Essence of federalism is that states must be free to develop variety of solutions to problems and not be forced into common, uniform mold.

[8] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4337 k. Commitment and proceedings therefor. Most Cited Cases
(Formerly 92k255(5))

Substantive standards for civil commitment for mental illness may vary from state to state, and procedures must be allowed to vary so long as they meet constitutional minimum. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[9] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4337 k. Commitment and proceedings therefor. Most Cited Cases
(Formerly 92k255(5))

Mental Health 257A 40.6(11)

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak40.6 Evidence
257Ak40.6(9) Weight and Sufficiency
257Ak40.6(11) k. Standard of proof in general. Most Cited Cases
(Formerly 257Ak41)

Reasonable-doubt standard is inappropriate in civil commitment proceedings, and use of term "un-

equivocal" is not constitutionally required, although states are free to use that standard. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[10] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4337 k. Commitment and proceedings therefor. Most Cited Cases
(Formerly 92k255(5))

To meet due process demands, standard for use in commitment for mental illness must inform fact finder that proof must be greater than preponderance-of-evidence standard applicable to other categories of civil cases. Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; U.S.C.A.Const. Amend. 14; Code Miss.1972, § 41-21-75.

[11] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4337 k. Commitment and proceedings therefor. Most Cited Cases
(Formerly 92k255(5))

Federal Courts 170B 513

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk513 k. Determination and disposition of cause. Most Cited Cases

Instruction used in proceeding in Texas for commitment for mental illness, such instruction employing the standard of "clear, unequivocal, and convincing" evidence, was constitutionally adequate, but determination of precise burden, equal to or greater than such standard, required to meet due process requirements was matter of state law to be left to Texas Supreme Court. U.S.C.A.Const. Amend. 14; Vernon's Ann.Civ.St. arts. 5547-31 to 5547-39, 5547-40 to 5547-57, 5547-42, 5547-51; Code Miss.1972, § 41-21-75.

****1805 *418** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellant's mother filed a petition for his indefinite commitment to a state mental hospital in accordance with Texas law governing involuntary commitments. Appellant had a long history of confinements for mental and emotional disorders. The state trial court instructed the jury to determine whether, based on "clear, unequivocal and convincing evidence," appellant was mentally ill and required hospitalization for his own welfare and protection or the protection of others. Appellant contended that the trial court should have employed the "beyond a reasonable doubt" standard of proof. The jury found that appellant was mentally ill and that he required hospitalization, and the trial court ordered his commitment for an indefinite period. The Texas Court of Appeals reversed, agreeing with appellant on the standard of proof issue. The Texas Supreme Court reversed the Court of Appeals' decision and reinstated the trial court's judgment, concluding that a "preponderance of the evidence" standard of proof in a civil commitment proceeding satisfied due process and that since the trial court's improper instructions in the instant case had benefited appellant, the error was harmless.

Held : A "clear and convincing" standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital. Pp. 1809-1813.

(a) The individual's liberty interest in the outcome of a civil commitment proceeding is of such weight and gravity, compared with the state's interests in providing care to its citizens who are unable, be-

cause of emotional disorders, to care for themselves and in protecting the community from the dangerous tendencies of some who are mentally ill, that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence. Pp. 1809-1810.

(b) Due process does not require states to use the "beyond a reasonable doubt" standard of proof applicable in criminal prosecutions and delinquency proceedings. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, distinguished. The reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it ****1806** may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. The state should ***419** not be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and the patient that are served by civil commitments. Pp. 1810-1812.

(c) To meet due process demands in commitment proceedings, the standard of proof has to inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases. However, use of the term "unequivocal" in conjunction with the term "clear and convincing" in jury instructions (as included in the instructions given by the Texas state court in this case) is not constitutionally required, although states are free to use that standard. Pp. 1812-1813.

Appeal dismissed and certiorari granted; 557 S.W.2d 511, vacated and remanded.

Martha L. Boston, Austin, Tex., for appellant.

James F. Hury, Jr., Galveston, Tex., for appellee.

Joel I. Klein, Washington, D. C., for the American Psychiatric Ass'n, as amicus curiae, by special leave of Court.

Mr. Chief Justice BURGER delivered the opinion of the Court.

The question in this case is what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an ***420** individual involuntarily for an indefinite period to a state mental hospital.

I

On seven occasions between 1969 and 1975, appellant was committed temporarily, Tex.Rev.Civ.Stat.Ann., Arts. 5547-31 to 5547-39 (Vernon 1958 and Supp. 1978-1979), to various Texas state mental hospitals and was committed for indefinite periods, Arts. 5547-40 to 5547-57, to Austin State Hospital on three different occasions. On December 18, 1975, when appellant was arrested on a misdemeanor charge of "assault by threat" against his mother, the county and state mental health authorities therefore were well aware of his history of mental and emotional difficulties.

Appellant's mother filed a petition for his indefinite commitment in accordance with Texas law. The county psychiatric examiner interviewed appellant while in custody and after the interview issued a Certificate of Medical Examination for Mental Illness. In the certificate, the examiner stated his opinion that appellant was "mentally ill and require[d] hospitalization in a mental hospital." Art. 5547-42 (Vernon 1958).

Appellant retained counsel and a trial was held before a jury to determine in accord with the statute:

"(1) whether the proposed patient is mentally ill, and if so

"(2) whether he requires hospitalization in a mental hospital for his own welfare and protection or the protection of others, and if so

"(3) whether he is mentally incompetent." Art. 5547-51 (Vernon 1958).

The trial on these issues extended over six days.

The State offered evidence that appellant suffered from serious delusions, that he often had threatened to injure both of his parents and others, that he had been involved in several ***421** assaultive episodes while hospitalized and that he had caused substantial property damage both at his own apartment and at his parents' home. From these undisputed facts, two psychiatrists, who qualified as experts, expressed opinions that appellant suffered from psychotic schi-

zophrenia and that he had paranoid tendencies. They also expressed medical opinions that appellant was probably dangerous both to himself and to others. They explained that appellant required hospitalization in a closed area to treat his condition because in the past he had refused to attend ****1807** outpatient treatment programs and had escaped several times from mental hospitals.

Appellant did not contest the factual assertions made by the State's witnesses; indeed, he conceded that he suffered from a mental illness. What appellant attempted to show was that there was no substantial basis for concluding that he was probably dangerous to himself or others.

The trial judge submitted the case to the jury with the instructions in the form of two questions:

"1. Based on clear, unequivocal and convincing evidence, is Frank O'Neal Addington mentally ill?

"2. Based on clear, unequivocal and convincing evidence, does Frank O'Neal Addington require hospitalization in a mental hospital for his own welfare and protection or the protection of others?"

Appellant objected to these instructions on several grounds, including the trial court's refusal to employ the "beyond a reasonable doubt" standard of proof.

The jury found that appellant was mentally ill and that he required hospitalization for his own or others' welfare. The trial court then entered an order committing appellant as a patient to Austin State Hospital for an indefinite period.

Appellant appealed that order to the Texas Court of Civil Appeals, arguing, among other things, that the standards for commitment violated his substantive due process rights and that any standard of proof for commitment less than that ***422** required for criminal convictions, *i. e.,* beyond a reasonable doubt, violated his procedural due process rights. The Court of Civil Appeals agreed with appellant on the standard-of-proof issue and reversed the judgment of the trial court. Because of its treatment of the standard of proof that court did not consider any of the other issues raised in the appeal.

On appeal, the Texas Supreme Court reversed the Court of Civil Appeals' decision. 557 S.W.2d 511. In so holding, the Supreme Court relied primarily upon its previous decision in *State v. Turner*, 556 S.W.2d 563 (1977), cert. denied, 435 U.S. 929, 98 S.Ct. 1499, 55 L.Ed.2d 525 (1978).

In *Turner*, the Texas Supreme Court held that a "preponderance of the evidence" standard of proof in a civil commitment proceeding satisfied due process. The court declined to adopt the criminal law standard of "beyond a reasonable doubt" primarily because it questioned whether the State could prove by that exacting standard that a particular person would or would not be dangerous in the future. It also distinguished a civil commitment from a criminal conviction by noting that under Texas law the mentally ill patient has the right to treatment, periodic review of his condition, and immediate release when no longer deemed to be a danger to himself or others. Finally, the *Turner* court rejected the "clear and convincing" evidence standard because under Texas rules of procedure juries could be instructed only under a beyond-a-reasonable-doubt or a preponderance standard of proof.

Reaffirming *Turner*, the Texas Supreme Court in this case concluded that the trial court's instruction to the jury, although not in conformity with the legal requirements, had benefited appellant, and hence the error was harmless. Accordingly, the court reinstated the judgment of the trial court.

[1] We noted probable jurisdiction. 435 U.S. 967, 98 S.Ct. 1604, 56 L.Ed.2d 58. After oral argument it became clear that no challenge to the constitutionality of any Texas statute was presented. Under 28 U.S.C. § 1257(2) no appeal is authorized; accordingly, construing***423** the papers filed as a petition for a writ of certiorari, we now grant the petition. [FN1]

FN1. See *Kulko v. California Superior Court*, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132 (1978); *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958); *May v. Anderson*, 345 U.S. 528, 72 S.Ct. 840, 97 L.Ed. 1221 (1953). As in those cases, we continue to refer to the parties as appellant and appellee. See *Kulko v. California Superior Court, supra*, 436 U.S., at 90

n. 4, 98 S.Ct., at 1696.

****1808** II

[2] The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Generally speaking, the evolution of this area of the law has produced across a continuum three standards or levels of proof for different types of cases. At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.[FN2] In the ***424** administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt. *In re Winship, supra*.

FN2. Compare Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B.U.L.Rev. 507 (1975) (reasonable doubt represented a less strict standard than previous common-law rules), with May, Some Rules of Evidence, 10 Am.L.Rev. 642 (1875) (reasonable doubt constituted a stricter rule than previous ones). See generally Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 Yale L.J. 1299 (1977).

The intermediate standard, which usually employs some combination of the words "clear," "cogent," "unequivocal," and "convincing," is less commonly used, but nonetheless "is no stranger to the civil law." *Woodby v. INS*, 385 U.S. 276, 285, 87 S.Ct. 483, 488, 17 L.Ed.2d 362 (1966). See also McCormick, Evidence § 320 (1954); 9 J. Wigmore, Evidence § 2498 (3d ed. 1940). One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases. See, *e. g., Woodby v. INS, supra*, at 285, 87 S.Ct., at 487 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353, 81 S.Ct. 147, 149, 5 L.Ed.2d 120 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796 (1943) (denaturalization).

Candor suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests or the nuances of a judge's instructions on the law may well be largely an academic exercise; there are no directly relevant empirical studies.[FN3] Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be ***425** unknowable, given that factfinding is a process shared by countless thousands of ****1809** individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence. Nonetheless, even if the particular standard-of-proof catchwords do not always make a great difference in a particular case, adopting a "standard of proof is more than an empty semantic exercise." *Tippett v. Maryland*, 436 F.2d 1153, 1166 (CA4 1971) (Sobeloff, J., concurring in part and dissenting in part), cert. dismissed *sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355, 92 S.Ct. 2091, 32 L.Ed.2d 791 (1972). In cases involving individual rights, whether criminal or civil, "[t]he standard of proof [at a minimum] reflects the value society places on individual liberty." 436 F.2d, at 1166.

FN3. There have been some efforts to evaluate the effect of varying standards of proof on jury factfinding, see, *e. g.*, L. S. E. Jury Project, Juries and the Rules of Evidence, 1973 Crim.L.Rev. 208, but we have found no study comparing all three standards of proof to determine how juries, real or mock, apply them.

III

[3] In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof. Moreover, we must be mindful that the function of legal process is to minimize the risk of erroneous decisions. See *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976); *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1341-1342, 2 L.Ed.2d 1460 (1958).

A

This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. See, *e. g., Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967). Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding ***426** of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

[4][5] The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill. Under the Texas Mental Health Code, however, the State has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others. Since the preponderance standard creates the risk of increasing the number of individuals erroneously committed, it is at least unclear to what extent, if any, the state's interests are furthered by using a preponderance standard in such commitment proceedings.

The expanding concern of society with problems of mental disorders is reflected in the fact that in recent years many states have enacted statutes designed to protect the rights of the mentally ill. However, only one state by statute permits involuntary commitment by a mere preponderance of the evidence, Miss.Code Ann. § 41-21-75 (1978 Supp.), and Texas is the only state where a court has concluded that the preponderance-of-the-evidence standard satisfies due process. We attribute this not to any lack of concern in those states, but rather to a belief that the varying standards tend to produce comparable results. As we noted earlier, however, standards of proof are important for their symbolic meaning as well as for their practical effect.

****1810** [6] At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within ***427** a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

B

Appellant urges the Court to hold that due process requires use of the criminal law's standard of proof-"beyond a reasonable doubt." He argues that the rationale of the *Winship* holding that the criminal law standard of proof was required in a delinquency proceeding applies with equal force to a civil commitment proceeding.

In *Winship*, against the background of a gradual assimilation of juvenile proceedings into traditional criminal prosecutions, we declined to allow the state's "civil labels and good intentions" to "obviate the need for criminal due process safeguards in juvenile courts." 397 U.S., at 365-366, 90 S.Ct., at 1073. The Court saw no controlling difference in loss of liberty and stigma between a conviction for an adult and a delinquency adjudication for a juvenile. *Winship* recognized that the basic issue-whether the individual in fact committed a criminal act-was ***428** the same in both proceedings. There being no meaningful distinctions between the two proceedings, we required the state to prove the juvenile's act and intent beyond a reasonable doubt.

There are significant reasons why different standards of proof are called for in civil commitment proceedings as opposed to criminal prosecutions. In a civil commitment state power is not exercised in a punitive sense.[FN4] Unlike the delinquency proceeding in *Winship*, a civil commitment proceeding can in no sense be equated to a criminal prosecution. Cf. *Woodby v. INS*, 385 U.S., at 284-285, 87 S.Ct., at 487-488.

> FN4. The State of Texas confines only for the purpose of providing care designed to treat the individual. As the Texas Supreme Court said in *State v. Turner*, 556 S.W.2d 563, 566 (1977):
>
> "The involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others."

In addition, the "beyond a reasonable doubt" standard historically has been reserved for criminal cases. This unique standard of proof, not prescribed or defined in the Constitution, is regarded as a critical part of the "moral force of the criminal law," *In re Winship*, 397 U.S., at 364, 90 S.Ct., at 1072, and we should hesitate to apply it too broadly or casually in noncriminal cases. Cf. *ibid.*

The heavy standard applied in criminal cases manifests our concern that the risk of error to the individual must be minimized even at the risk that some who are guilty might go free. *Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281 (1977). The full force of that idea does not apply to a civil commitment. It may be true that an erroneous commitment is sometimes as undesirable as an erroneous conviction, 5 J. Wigmore, Evidence § 1400 ****1811** (Chadbourn rev. 1974). However, even though an erroneous confinement should be avoided in the first instance, the layers of professional review and observation of the patient's condition, and the concern of family and ***429** friends generally will provide continuous opportunities for an erroneous commitment to be corrected. Moreover, it is not true that the release of a genuinely mentally ill person is no worse for the individual than the failure to convict the guilty. One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma. See Chodoff, The Case for Involuntary Hospitalization of the Mentally Ill, 133 Am.J.Psychiatry 496, 498 (1976); Schwartz, Myers & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 Arch.Gen.Psychiatry 329, 334 (1974). It cannot be said, therefore, that it is much better for a mentally ill person to "go free" than for a mentally normal person to be committed.

Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question-did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous. See *O'Connor v. Donaldson*, 422 U.S. 563, 584, 95 S.Ct. 2486, 2498, 45 L.Ed.2d 396

(1975) (concurring opinion); *Blocker v. United States*, 110 U.S.App.D.C. 41, 48-49, 288 F.2d 853, 860-861 (1961) (opinion concurring in result). See also *Tippett v. Maryland*, 436 F.2d, at 1165 (Sobeloff, J., concurring in part and dissenting in part); Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 Harv.L.Rev. 1288, 1291 (1966); Note, Due Proces and the Development of "Criminal" Safeguards ***430** in Civil Commitment Adjudications, 42 Ford.L.Rev. 611, 624 (1974).

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror-or indeed even a trained judge-who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. See *ibid.* Such "freedom" for a mentally ill person would be purchased at a high price.

That practical considerations may limit a constitutionally based burden of proof is demonstrated by the reasonable doubt standard, which is a compromise between what is possible to prove and what protects the rights of the individual. If the state was required to guarantee error-free convictions, it would be required to prove guilt beyond all doubt. However, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York, supra*, 432 U.S., at 208, 97 S.Ct., at 2326. Nor should the state be required to employ a standard of proof that may completely undercut its ****1812** efforts to further the legitimate interests of both the state and the patient that are served by civil commitments.

[7][8] That some states have chosen-either legislatively or judicially***431** -to adopt the criminal law standard [FN5] gives no assurance that the more stringent standard of proof is needed or is even adaptable to the needs of all states. The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. As the substantive standards for civil commitment may vary from state to state, procedures must be allowed to vary so long as they meet the constitutional minimum. See Monahan & Wexler, A Definite Maybe: Proof and Probability in Civil Commitment, 2 Law & Human Behavior 37, 41-42 (1978); Share, The Standard of Proof in Involuntary Civil Commitment Proceedings, 1977 Detroit College L.Rev. 209, 210. We conclude that it is unnecessary to require states to apply the strict, criminal standard.

FN5. Haw.Rev.Stat. § 334-60(b)(4)(I) (Supp. 1978); Idaho Code § 66-329(i) (Supp. 1978); Kan.Stat.Ann. § 59-2917 (1976); Mont.Rev.Codes Ann. § 38-1305(7) (1977 Supp.); Okla.Stat., Tit. 43A, § 54.1(C) (1978 Supp.); Ore.Rev.Stat. § 426.130 (1977); Utah Code Ann. § 64-7-36(6) (1953); Wis.Stat. § 51.20(14)(e) (Supp.1978-1979); *Superintendent of Worcester State Hospital v. Hagberg*, 374 Mass. 271, 372 N.E.2d 242 (1978); *Proctor v. Butler*, 117 N.H. 927, 380 A.2d 673 (1977); *In re Hodges*, 325 A.2d 605 (D.C.App.1974); *Lausche v. Commissioner of Public Welfare*, 302 Minn. 65, 225 N.W.2d 366 (1974), cert. denied, 420 U.S. 993, 95 S.Ct. 1430, 43 L.Ed.2d 674 (1975). See also *In re J. W.*, 44 N.J.Super. 216, 130 A.2d 64 (App.Div.), cert. denied, 24 N.J. 465, 132 A.2d 558 (1957); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky.App.1964) (dicta).

C

Having concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state. We note that 20 states, most by statute, employ the standard of "clear and convincing" evidence; [FN6] 3 states use ***432** "clear, *cogent*, and convincing" evidence; [FN7] and 2 states require "clear, *unequivocal* and convincing" evidence.[FN8]

FN6. Ariz.Rev.Stat.Ann. § 36-540 (1974); Colo.Rev.Stat. § 27-10-111(1) (Supp.1976); Conn.Gen.Stat. § 17-178(c) (1979); Del.Code Ann., Tit. 16, § 5010(2) (Supp.1978); Ga.Code § 88-501(u) (1978); Ill.Rev.Stat. ch. 91 1/2, § 3-808 (Supp.1977); Iowa Code § 229.12 (1979); La.Rev.Stat.Ann., § 28:55E (West Supp. 1979); Me.Rev.Stat.Ann., Tit. 34, § 2334(5)(A)(1) (1978); Mich.Stat.Ann. § 14.800(465) (1976) [M.C.L.A. § 330.1465]; Neb.Rev.Stat. § 83-1035 (1976); N.M.Stat.Ann. § 43-1-11C (1978); N.D.Cent.Code § 25-03.1-19 (1978); Ohio Rev.Code Ann. § 5122.15(B) (Supp.1978); Pa.Stat.Ann., Tit. 50, § 7304(f) (Purdon Supp.1978-1979); S.C.Code § 44-17-580 (Supp.1978); S.D.Comp.Laws Ann. § 27A-9-18 (1977); Vt.Stat.Ann., Tit. 18, § 7616(b) (Supp.1978); Md. Dept. of Health & Mental Hygiene Reg. 10.21.03G (1973); *In re Beverly*, 342 So.2d 481 (Fla.1977).

FN7. N.C.Gen.Stat. § 122-58.7(i) (1977 Supp.); Wash.Rev.Code § 71.05.310; *State ex rel. Hawks v. Lazaro*, 157 W.Va. 417, 202 S.E.2d 109 (1974).

FN8. Ala.Code § 22-52-10(a) (Supp.1978); Tenn.Code Ann. § 33-604(d) (Supp.1978).

In *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), dealing with deportation, and *Schneiderman v. United States*, 320 U.S. 118, 125, 159, 63 S.Ct. 1333, 1336, 1353, 87 L.Ed. 1796, dealing with denaturalization, the Court held that "clear, unequivocal, and convincing" evidence was the appropriate standard of proof. The term "unequivocal," taken by itself, means proof that admits of no doubt,[FN9] a burden approximating, if not exceeding, that used in criminal cases. The issues in *Schneiderman* and *Woodby* were basically factual and therefore susceptible of objective proof and the consequences to the individual were unusually drastic-loss of citizenship and expulsion from the United States.

FN9. See Webster's Third New International Dictionary 2494 (1961).

[9][10][11] We have concluded that the reasonable-doubt standard is inappropriate in civil commitment proceedings because, given****1813** the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment. Similarly, we conclude that use of the term "unequivocal" is not constitutionally required, although the states are free to use that standard. To meet due process demands, the standard has to ***433** inform the factfinder that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases.

We noted earlier that the trial court employed the standard of "clear, unequivocal and convincing" evidence in appellant's commitment hearing before a jury. That instruction was constitutionally adequate. However, determination of the precise burden equal to or greater than the "clear and convincing" standard which we hold is required to meet due process guarantees is a matter of state law which we leave to the Texas Supreme Court.[FN10] Accordingly, we remand the case for further proceedings not inconsistent with this opinion.

FN10. We noted earlier the court's holding on harmless error. See *supra*, at 1087.

Vacated and remanded.

Mr. Justice POWELL took no part in the consideration or decision of this case.

U.S.Tex.,1979.
Addington v. Texas
441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323

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Supreme Court of the United States
Charles M. ATKINS, Commissioner of the Massachusetts Department of Public Welfare, Petitioner
v.
Gill PARKER et al.
Gill PARKER, et al., Petitioners
v.
John R. BLOCK, Secretary, Department of Agriculture, et al.

Nos. 83-1660, 83-6381.
Argued Nov. 27, 1984.
Decided June 4, 1985.

The United States Secretary of Agriculture and the Massachusetts Commissioner of Public Welfare appealed from a judgment entered by the United States District Court for the District of Massachusetts, Frank H. Freedman, J., holding that they had deprived food-stamp recipients of due process of law when they reduced food stamp benefits without first providing recipients with constitutionally adequate notice. The Court of Appeals, 722 F.2d 933, affirmed in part, reversed in part, and remanded. Recipients who had petitioned for relief sought review of the Court of Appeals' modification of the District Court's remedy, and the Massachusetts Commissioner of Public Welfare cross-petitioned for writ of certiorari seeking review of holding on liability. Both the petition and cross petition were granted. The Supreme Court, Justice Stevens, held that (1) notice mailed by Massachusetts Department of Public Welfare describing in general terms effect of Congress' amendment of Food Stamp Act to reduce earned-income disregard using computing eligibility for food stamps complied with applicable statute and regulations and did not violate the due process clause.

Reversed.

Justice Brennan, dissented and filed an opinion in which Justice Marshall partially joined.

Justice Marshall dissented and filed an opinion.

West Headnotes

[1] Agriculture 23 2.6(4)

23 Agriculture
23k2.6 Food Stamp Program
23k2.6(4) k. Administrative Proceedings; Review. Most Cited Cases

Relevant language of provision of Food Stamp Act [7 U.S.C.A. § 2020(e)(10)] outlining requirements of a state plan of operation, which does not itself mandate any notice of adverse agency action but merely assumes that a hearing request by a household aggrieved by a state agency's action will be preceded by "individual notice of agency action," cannot be fairly construed as a command to give notice of a general change in law governing computation of eligibility for food stamp benefits. Food Stamp Act of 1964, § 11(e)(10), 7 U.S.C.A. § 2020(e)(10).

[2] Agriculture 23 2.6(4)

23 Agriculture
23k2.6 Food Stamp Program
23k2.6(4) k. Administrative Proceedings; Review. Most Cited Cases

Individual notice mailed by Massachusetts Department of Public Welfare to all food-stamp recipients in Massachusetts informing them that Congress had amended the Food Stamp Act [7 U.S.C.A. § 2014(e)] to reduce earned-income disregard used in computing eligibility for food stamps complied with notice requirements of Food Stamp Act [7 U.S.C.A. § 2020(e)(10)] and applicable regulations, despite failure to inform recipients of amendment's specific impact on their entitlement to food stamps. Food Stamp Act of 1964, §§ 5(e), 11(e)(10), 7 U.S.C.A. §§ 2014(e), 2020(e)(10).

[3] Agriculture 23 2.6(4)

23 Agriculture
23k2.6 Food Stamp Program
23k2.6(4) k. Administrative Proceedings; Review. Most Cited Cases

Even if it was assumed that mass change in computing eligibility for food stamps arising from Congress' amendment of Food Stamp Act [7 U.S.C.A. § 2014(e)] increased risk of erroneous reductions in benefits, that assumption would not support claim that notice mailed by Massachusetts Department of Public Welfare to all food stamp recipients in Massachusetts, plainly informing each household of opportunity to request a fair hearing and of right to have its benefit level frozen if a hearing was requested, was inadequate in view of fact that every affected recipient who contacted Department of Public Welfare had his or her benefit level frozen, and received a fair hearing before any loss of benefit occurred; thus, Department's procedures provided adequate protection against any deprivation based on an unintended mistake. Food Stamp Act of 1964, § 5(e), 7 U.S.C.A. § 2014(e).

[4] Constitutional Law 92 4118

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)5 Social Security, Welfare, and Other Public Payments
92k4118 k. Food Stamps and Programs. Most Cited Cases
(Formerly 92k278.7(3), 92k277(1))

Food-stamp benefits are a matter of statutory entitlement for persons qualified to receive them, and thus are appropriately treated as a form of "property" protected by due process; accordingly, procedures that are employed in determining whether an individual may continue to participate in statutory program must comply with commands of the Constitution. U.S.C.A. Const.Amends. 5, 14; Food Stamp Act of 1964, § 2 et seq., 7 U.S.C.A. § 2011 et seq.

[5] Constitutional Law 92 4110

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)4 Government Property, Facilities, and Funds
92k4109 Public Services
92k4110 k. In General. Most Cited Cases
(Formerly 92k291.6, 92k291.5)

Procedural component of the due process clause does not impose a constitutional limitation on power of Congress to make substantive changes in law of entitlement to public benefits. U.S.C.A. Const.Amends. 5, 14.

[6] Constitutional Law 92 4115

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)5 Social Security, Welfare, and Other Public Payments
92k4115 k. In General. Most Cited Cases
(Formerly 92k278.7(1))

A welfare recipient is not deprived of due process when legislature adjusts benefit levels; legislative determination provides all process that is due. U.S.C.A. Const.Amends. 5, 14.

[7] Agriculture 23 2.6(4)

23 Agriculture
23k2.6 Food Stamp Program
23k2.6(4) k. Administrative Proceedings; Review. Most Cited Cases

Participants in food-stamp program had no greater right to advance notice of legislative amendment to Food Stamp Act [7 U.S.C.A. § 2014(e)] reducing earned-income disregard used in computing eligibility for food stamps than did any other voters; thus, because substantive reduction in level of recipients' benefits was direct consequence of statutory amendment, recipients had no basis for challenging procedure that caused them to receive a different, less valuable property interest after amendment became effective. Food Stamp Act of 1964, § 5(e), 7 U.S.C.A. § 2014(e).

[8] Constitutional Law 92 4118

92 Constitutional Law

92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)5 Social Security, Welfare, and Other Public Payments
92k4118 k. Food Stamps and Programs. Most Cited Cases
(Formerly 92k278.7(3))

Notice mailed by Massachusetts Department of Public Welfare to all food-stamp recipients in Massachusetts after Congress had amended the Food Stamp Act [7 U.S.C.A. § 2014(e)] to reduce earned-income disregard used in computing eligibility for food stamps advising recipients that reduction in earned-income disregard might result in either a reduction or termination of their benefits, that they had a right to request a hearing, and that their benefits would be reinstated if a hearing was requested within ten days of notice satisfied due process, since Congress could presume that such a notice relative to a matter as important as a change in household's food-stamp allotment would prompt an appropriate inquiry if it was not fully understood. U.S.C.A. Const.Amends. 5, 14; Food Stamp Act of 1964, § 5(e), 7 U.S.C.A. § 2014(e).

****2521 *115** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In 1981, Congress amended the Food Stamp Act to reduce from 20 percent to 18 percent the earned-income disregard used in computing eligibility for food stamps. Thereafter, the Massachusetts Department of Public Welfare (Department) mailed a notice to all food-stamp recipients in the State with earned income advising them that the reduction in the earned-income disregard might result in either a reduction or termination of their benefits, that they had a right to request a hearing, and that their benefits would be reinstated if a hearing was requested within 10 days of the notice. Petitioners in No. 83-6381 (hereafter petitioners), recipients of the notice, brought a class action in Federal District Court, alleging that the notice was inadequate and seeking injunctive relief. After the court issued a temporary injunction, the Department sent a second notice similar to but somewhat more extensive than the first ****2522** notice. Petitioners also attacked the adequacy of this notice. The court again ruled in petitioners' favor and held that the notice violated the Due Process Clause of the Fourteenth Amendment. The Court of Appeals agreed.

Held:

1. The second notice complied with the statute and regulations. The relevant language of 7 U.S.C. § 2020(e)(10)-which does not itself mandate any notice at all but merely assumes that a hearing request by a household aggrieved by a state agency's action will be preceded by "individual notice of agency action"-cannot be fairly construed as a command to give notice of a general change in the law. The legislative history does not suggest that Congress intended to eliminate the distinction between requiring advance notice of an "adverse action" based on the particular facts of an individual case and the absence of any requirement of individual notice of a "mass change" in the law. And the notice in question complied with the applicable regulation requiring individual ***116** notices of a "mass change" but not an adverse action notice when benefits are reduced or terminated as a result of a "mass change." Pp. 2526-2528.

2. The second notice did not violate the Due Process Clause. Pp. 2528-2531.

(a) Even if it is assumed that the mass change increased the risk of erroneous reductions in benefits, that assumption does not support the claim that the notice was inadequate. The notice plainly informed each household of the opportunity to request a fair hearing and the right to have its benefit level frozen if a hearing was requested. Pp. 2529-2530.

(b) This case does not concern the procedural fairness of individual eligibility determinations, but rather involves a legislatively mandated substantive change in the scope of the entire food-stamp program. The procedural component of the Due Process Clause does not impose a constitutional limitation on Congress' power to make such a change. A welfare recipient is not deprived of due process when Congress adjusts benefit levels; the legislative process provides all the process that is due. Here, the participants in the food-stamp program had no greater right to advance notice of the change in the law than did any other

voters. Because the substantive reduction in the level of petitioners' benefits was the direct result of the statutory amendment, they have no basis for challenging the procedure that caused them to receive a different, less valuable property interest after the amendment became effective. As a matter of constitutional law, there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Pp. 2530-2531.

722 F.2d 933 (CA 1 1983), reversed.

Samuel A. Alito argued the cause for the federal respondent in No. 83-6381 in support of petitioner in No. 83-1660. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman,* and *Bruce G. Forrest. Ellen L. Janos,* Assistant Attorney General of Massachusetts, argued the cause for petitioner in No. 83-1660. With her on the briefs were *Francis X. Bellotti,* Attorney General, ***117** and *E. Michael Sloman* and *Carl Valvo,* Assistant Attorneys General.

Steven A. Hitov argued the cause for Parker et al. in both cases. With him on the briefs was *J. Paterson Rae.*†

† *Neil Hartigan,* Attorney General of Illinois, *Linley E. Pearson,* Attorney General of Indiana, *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, *Bronson C. La Follette,* Attorney General of Wisconsin, and *F. Thomas Creeron III,* Assistant Attorney General, filed a brief for the State of Illinois et al. as *amici curiae* urging reversal.

Cynthia G. Schneider filed a brief for the National Anti-Hunger Coalition as *amicus curiae* urging affirmance.

Kenneth O. Eikenberry, Attorney General, and *Charles F. Murphy,* Assistant Attorney General, filed a brief for the State of Washington as *amicus curiae.*

Justice STEVENS delivered the opinion of the Court.

In November, and again in December 1981, the Massachusetts Department of Public Welfare mailed a written notice to over 16,000 recipients advising them that a recent change in federal law might result in either a reduction or a termination of their food-stamp benefits. The notice did not purport to explain the precise impact of the change on each individual recipient. The question this case presents is whether that notice violated any federal statute or regulation, or the Due Process Clause of the Fourteenth Amendment. Unlike the District Court and the Court of Appeals, we conclude that there was no violation.

In an attempt to "permit low-income households to obtain a more nutritious diet ****2523** through normal channels of trade," [FN1] Congress created a federally subsidized food-stamp program. The Secretary of Agriculture prescribes the standards for eligibility for food stamps,[FN2] but state agencies are authorized to make individual eligibility determinations and to distribute the food stamps to eligible households, which may use them to purchase food from approved, retail food stores.[FN3] The eligibility of an individual household, and the amount of its food-stamp***118** allotment, are based on several factors, including the size of the household and its income.[FN4] Certifications of eligibility expire periodically and are renewed on the basis of applications submitted by the households.[FN5]

FN1. 7 U.S.C. § 2011.

FN2. § 2014.

FN3. §§ 2013(a), 2020(a).

FN4. § 2014.

FN5. §§ 2012(c), 2014(f), 2015(c).

Prior to 1981, federal law provided that 20 percent of the household's earned income should be deducted, or disregarded, in computing eligibility.[FN6] The purpose of the earned-income disregard was to maintain the recipients' incentive to earn and to report income. In 1981 Congress amended the Food Stamp Act to reduce this deduction from 20 percent to 18 percent.[FN7] That amendment had no effect on households with no income or with extremely low income, but caused a reduction of benefits in varying amounts, or a complete termination of benefits, for families whose income placed them close to the border between eligibility and ineligibility.[FN8]

FN6. § 2014(e) (1976 ed., Supp. II).

FN7. See 95 Stat. 360, 7 U.S.C. § 2014(e).

FN8. The Government states that it is "advised that the reductions involved did not exceed $6 per month for a four-member household if the household remained eligible for benefits." Brief for Federal Respondent 7. It does not indicate where in the record this information is located; nor does it indicate the source of the "advice."

On September 4, 1981, the Department of Agriculture issued regulations providing for the implementation of the change in the earned-income disregard and directing the States to provide notice to food-stamp recipients.[FN9] That directive indicated that the form of the notice might comply with the regulations dealing with so-called "mass changes," [FN10] ***119** rather than with the regulations dealing with individual "adverse actions." [FN11]

FN9. 46 Fed.Reg. 44722 (1981). The regulation provided that the change should begin no later than 90 days from the date of implementation, with October 1, 1981, as the last date for state agencies to begin implementation (absent a waiver).

FN10. *Ibid.* The portion of 7 CFR § 273.12(e) (1985), which discusses the notice required for mass changes, provides in relevant part:

"(e) *Mass changes.* Certain changes are initiated by the State or Federal government which may affect the entire caseload or significant portions of the caseload. These changes include adjustments to the income eligibility standards, the shelter and dependent care deductions, the Thrifty Food Plan, and the standard deduction; annual and seasonal adjustments to Social Security, SSI, and other Federal benefits, periodic adjustments to AFDC or GA payments; and other changes in the eligibility criteria based on legislative or regulatory actions.

"(2) ... (ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed."

FN11. The section on adverse actions, 7 CFR § 273.13 (1985), provides in relevant part:

"(a) *Use of notice.* Prior to any action to reduce or terminate a household's benefits within the certification period, the State agency shall, except as provided in paragraph (b) of this section, provide the household timely and adequate advance notice before the adverse action is taken."

"(b) *Exemptions from notice.* Individual notices of adverse action are not required when:

"(1) The State initiates a mass change as described in § 273.12(e)."

In November, the Massachusetts Department of Public Welfare (Department) ****2524** mailed a brief, ambiguously dated notice to all food-stamp recipients with earned income advising them that the earned-income deduction had been lowered from 20 percent to 18 percent and that the change would result in either a reduction or a termination of their benefits. The notice was printed on a card, in English on one side and Spanish on the other. The notice stated that the recipient had a right to request a hearing "if you disagree with this action," and that benefits would be reinstated if a hearing was requested within 10 days of the notice.[FN12]

FN12. App. to Pet. for Cert. in No. 83-1660, pp. A. 44-A. 45; App. 3.

On December 10, 1981, petitioners in No. 83-6381 commenced this action on behalf of all Massachusetts households ***120** that had received the notice. They alleged that the notice was inadequate as a matter of law and moved for a temporary restraining order. On December 16, 1981, after certifying the

action as a class action, and after commenting that the "notice was deficient in that it failed to provide recipients with a date to determine the time in which they could appeal," the District Court enjoined the Department from reducing or terminating any benefits on the basis of that notice.[FN13]

FN13. App. to Pet. for Cert. in No. 83-1660, pp. A. 45-A. 46.

The Department, in compliance with the District Court's order, mailed supplemental benefits for the month of December to each of the 16,640 class members. It then sent out a second notice, in English and Spanish versions, dated December 26, which stated in part:

" * * * *IMPORTANT NOTICE-READ CAREFULLY* * * *

"RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR:364.400).

"*YOUR RIGHT TO A FAIR HEARING:*
"YOU HAVE THE RIGHT TO REQUEST A FAIR HEARING IF YOU DISAGREE WITH THIS ACTION.***121** IF YOU ARE REQUESTING A HEARING, YOUR FOOD STAMP BENEFITS WILL BE REINSTATED ... IF YOU HAVE QUESTIONS CONCERNING THE CORRECTNESS OF YOUR BENEFITS COMPUTATION OR THE FAIR HEARING PROCESS, CONTACT YOUR LOCAL WELFARE OFFICE. YOU MAY FILE AN APPEAL AT ANY TIME IF YOU FEEL THAT YOU ARE NOT RECEIVING THE CORRECT AMOUNT OF FOOD STAMPS." [FN14]

FN14. App. 5. Each recipient was provided with a card that he could mail to obtain a hearing; a recipient could also obtain a hearing by placing a telephone call or by asking for a hearing in person. App. to Pet. for Cert. in No. 83-1660, p. A. 48.

Petitioners filed a supplemental complaint attacking the adequacy of this notice, and again moved for a preliminary injunction. In October 1982, the District Court consolidated the hearing on that motion with the trial on the merits and again ruled in petitioners' favor. The District Court found that there was a significant risk of error in the administration of the food-stamp program, particularly with the implementation of the change in the earned-income disregard, and that the failure to provide each recipient with an adequate notice increased the risk of error. In essence, the District Court concluded that ****2525** the December notice was defective because it did not advise each household of the precise change in its benefits, or with the information necessary to enable the recipient to calculate the correct change; because it did not tell recipients whether their benefits were being reduced or terminated; and because the reading level and format of the notice made it difficult to comprehend.[FN15] Based on the ***122** premise that the statutorily mandated reduction or termination of benefits was a deprivation of property subject to the full protection of the Fourteenth Amendment,[FN16] the court held that the Due Process Clause had been violated.[FN17]

FN15. *Id.*, at A. 100. The District Court wrote:

"The risk of erroneous deprivation of benefits is increased in this case by the lack of adequate notice. The December notice did not inform the affected food stamp households of the exact action being taken, that is, whether their food stamp allotment was being reduced or terminated. There was no mention of the amount by which the benefits were being reduced. And finally, the December notice lacked the information necessary to enable the household to determine if an error had been made. Therefore, without the relevant information to determine whether an error had been made, the risk of an erroneous

deprivation is increased." *Id.*, at A. 90-A. 91.

FN16. The District Court concluded:

"It is clear that the entitlement to food stamps benefits is a property interest subject to the full protection of the Fourteenth Amendment. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Therefore, given the existence of a constitutionally protected property interest, the question is what process is due." *Id.*, at A. 86.

FN17. The District Court also held that the December notice violated the timely notice requirements of 7 U.S.C. § 2020(e)(10) and 7 CFR § 273.12(e)(2)(ii) (1985), App.Pet. for Cert. in No. 83-1660, p. A. 98; that the notice required to implement the earned-income disregard had to comport with 7 CFR § 273.13(a) (1985), App. to Pet. for Cert. in No. 83-1660, p. A. 98, and that the notice violated multilingual notice requirements, *id.*, at A. 104-A. 105.

As a remedy, the District Court ordered the Department "to return forthwith to each and every household in the plaintiff class all food stamp benefits lost as a result of the action taken pursuant to the December notice" between January 1, 1981, and the date the household received adequate notice, had its benefits terminated for a reason unrelated to the change in the earned-income disregard, or had its file recertified.[FN18] The District Court also ordered that all future food-stamp notices issued by the Department contain various data, including the old and new benefit amounts, and that the Department issue regulations, subject to court approval, governing the form of future food-stamp notices.[FN19]

FN18. *Id.*, at A. 101.

FN19. *Id.*, at A. 102-104.

The United States Court of Appeals for the First Circuit agreed with the District Court's constitutional holding, indicated***123** its belief that Congress could not have "intended a constitutionally deficient notice to satisfy the statutory notice requirement," and thus affirmed the District Court's holding that "the December notice failed to satisfy the notice requirements of 7 U.S.C. § 2020(e)(10) and 7 CFR § 273.12(e)(2)(ii)." *Foggs v. Block*, 722 F.2d 933, 939-940 (1983).[FN20] The Court of Appeals held, however, that the District Court had erred in ordering a reinstatement of benefits and in specifying the form of future notices. [FN21]

FN20. However, the Court of Appeals disagreed that the December notice failed to satisfy the notice requirements of 7 CFR § 273.13(a) (1985). *Foggs v. Block*, 722 F.2d, at 940.

FN21. *Id.*, at 941.

Petitioners in No. 83-6381 sought review of the Court of Appeals' modification of the District Court's remedy, and the Department, in No. 83-1660, cross-petitioned for a writ of certiorari seeking review of the holding on liability. We granted both the petition and the cross-petition, and invited the Solicitor General to participate in the argument. 467 U.S. 1250, 104 S.Ct. 3532, 82 L.Ed.2d 838 (1984). We conclude that the notice was lawful, and therefore have no occasion to discuss the remedy issue that the petition in No. 83-6381 presents. ****2526** Because there would be no need to decide the constitutional question if we found a violation of either the statute or the regulations,[FN22] we first consider the statutory issue.

FN22. *Escambia County, Florida v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 1579, 80 L.Ed.2d 36 (1984) (*per curiam*) ("normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"); *Ashwander v. TVA*, 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring).

I

The only reference in the Food Stamp Act to a notice is contained in § 2020(e), which outlines the requirements of a state plan of operation. Subsection (10) of that section provides that a state plan must grant a fair hearing, and a prompt determination, to any household that is aggrieved by ***124** the action of a state agency. A proviso to that subsection states that

any household "which timely requests such a fair hearing after receiving individual notice of agency action reducing or terminating its benefits" shall continue to receive the same level of benefits until the hearing is completed. FN23

FN23. 7 U.S.C. § 2020(e)(10) provides, in relevant part:

> "The State plan of operation ... shall provide ...
>
> "(10) for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program or by a claim against the household for an overissuance: *Provided*, That any household which timely requests such a fair hearing after receiving individual notice of agency action reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action until such time as the fair hearing is completed and an adverse decision rendered or until such time as the household's certification period terminates, whichever occurs earlier...."

The language of the proviso does not itself command that any notice be given, but it does indicate that Congress assumed that individual notice would be an element of the fair-hearing requirement. Thus, whenever a household is entitled to a fair hearing, it is appropriate to read the statute as imposing a requirement of individual notice that would enable the household to request such a hearing. The hearing requirement, and the incidental reference to "individual notice", however, are by their terms applicable only to "agency action reducing or terminating" a household's benefits. Therefore, it seems unlikely that Congress contemplated individual hearings for every household affected by a general change in the law.

[1] The legislative history of § 2020(e)(10) sheds light on its meaning. As originally enacted in 1964, the Food Stamp Act contained no fair-hearing requirement. See 78 Stat. 703-709. In 1971, however, in response to this Court's decision***125** in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), Congress amended the Act to include a fair-hearing provision,FN24 and in the Food Stamp Act of 1977, § 2020(e)(10) was enacted in its present form.FN25 The legislative history of the Food Stamp Act of 1977 contains a description of the then-existing regulations, which were promulgated after the 1971 amendment, and which drew a distinction between the requirement of notice in advance of an "adverse action" based on the particular facts of an individual case, on the one hand, and the absence of any requirement of individual notice of a "mass change," on the other. FN26 That history contains no suggestion that Congress intended to eliminate that distinction; to ****2527** the contrary, Congress expressly recognized during the period leading to the enactment of the Food Stamp Act of 1977 the distinction between the regulatory requirement regarding notice in the case of an adverse action and the lack of such a requirement in the case of a mass change.FN27 Read against this background, the relevant statutory language-which does not ***126** itself mandate any notice at all but merely assumes that a request for a hearing will be preceded by "individual notice of agency action"-cannot fairly be construed as a command to give notice of a general change in the law.FN28

FN24. 84 Stat. 2051; see H.R.Rep. No. 95-464, pp. 285-286 (1977), U.S.Code Cong. & Admin.News 1977, p. 1704; 7 U.S.C. § 2019(e)(8) (1976 ed.) (state agency must provide "for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of a State agency").

FN25. 91 Stat. 972.

FN26. See H.R.Rep. No. 95-464, at 285-289 (summarizing the existing rules governing fair hearings).

FN27. *Id.*, at 289 ("The Committee bill would retain the fair hearings provision of the law intact and would encourage the Department to enforce its excellent regulations and instructions on the subject.... The Department should also be certain that, although its regulations do not require individual no-

tice of adverse action when mass changes in program benefits are proposed, they should require the states to send precisely such notices well in advance when the massive changes mandated by this bill are about to be implemented so that the individuals affected are fully aware of precisely why their benefits are being adversely affected. Hearings would, of course, be unnecessary in the absence of claims of factual error in individual benefit computation and calculation. All states should be overseen to be certain that their individual notices in non-mass change adverse action contexts recite the household's fair hearing request rights").

FN28. Prior to the enactment of the Food Stamp Act of 1977, although individual notices of adverse action were not required by the regulations when mass changes in benefits were instituted because of changes in the law affecting, among other items, income standards or other eligibility criteria, see 7 CFR § 271.1(n)(2)(i) (1975), the States were required to "publicize the possibility of a change in benefits through the various news media or through a general notice mailed out with [food stamp allotment] cards and with notices placed in food stamp and welfare offices." § 271.1(n)(3); see also 39 Fed.Reg. 25996 (1974).

[2] Nor can we find any basis for concluding that the December notice failed to comply with the applicable regulations. Title 7 CFR § 273.12(e)(2)(ii) (1984) provides:

"(ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed."

This regulation reflects the familiar distinction between an individual adverse action and a mass change. The statement that a notice of adverse action is not required when a change of benefits results from a mass change surely implies that individual computations are not required in such cases. The two requirements that are imposed when a mass change occurs are: (1) that "individual" notice be sent and (2) that it "inform them of the change." In this case, a separate individual notice was sent to each individual household and it did "inform them of the change" in the program that Congress had mandated. Since the word "change" in the regulation ***127** plainly refers to the "mass change," the notice complied with the regulation.[FN29]

FN29. It may well be true, as petitioners argue, that the computerized data in the Department's possession made it feasible for the agency to send an individualized computation to each recipient, and that such a particularized notice would have served the Commonwealth's interest in minimizing or correcting predictable error. What judges may consider common sense, sound policy, or good administration, however, is not the standard by which we must evaluate the claim that the notice violated the applicable regulations.

Moreover, present regulations protect the food-stamp household by providing, upon request, the ongoing right to access to information and materials in its case file. 7 CFR § 272.1(c)(2) (1985). Further, upon request, specific materials are made available for determining whether a hearing should be requested, § 273.15(i)(1). If a hearing is requested, access to information and materials concerning the case must be made available prior to the hearing and during the hearing, § 273.15(p)(1).

II

Since the notice of the change in the earned-income disregard was sufficient under****2528** the statute and under the regulations, we must consider petitioners' claim that they had a constitutional right to advance notice of the amendment's specific impact on their entitlement to food stamps before the statutory change could be implemented by reducing or terminating their benefits. They argue that an individualized calculation of the new benefit was necessary in order to avoid the risk of an erroneous reduction or termi-

nation.

[3] The record in this case indicates that members of petitioners' class had their benefits reduced or terminated for either or both of two reasons: (1) because Congress reduced the earned-income disregard from 20 percent to 18 percent; or (2) because inadvertent errors were made in calculating benefits. These inadvertent errors, however, did not necessarily result from the statutory change, but rather may have been attributable to a variety of factors that can occur in the administration of any large welfare program.[FN30] For example,***128** each of the named petitioners, presumably representative of the class, see Fed.Rule Civ.Proc. 23(a), appealed a reduction in benefits. None identified an error resulting from the legislative decision to change the earned-income disregard. But even if it is assumed that the mass change increased the risk of erroneous reductions in benefits, that assumption does not support the claim that the actual notice used in this case was inadequate. For that notice plainly informed each household of the opportunity to request a fair hearing and the right to have its benefit level frozen if a hearing was requested. As the testimony of the class representatives indicates, every class member who contacted the Department had his or her benefit level frozen, and received a fair hearing, before any loss of benefit occurred. Thus, the Department's procedures provided adequate protection against any deprivation based on an unintended mistake. To determine whether the Constitution required a more detailed notice of the mass change, we therefore put the miscellaneous errors to one side and confine our attention to the reductions attributable to the statutory change.

> FN30. See App. to Pet. for Cert. in No. 83-1660, pp. A. 50-A. 52 (Cecelia Johnson), A. 53 (Gill Parker), A. 55 (Stephanie Zades), A. 55-A. 56 (Madeline Jones). By hypothesis, an inadvertent error is one that the Department did not anticipate; for that reason, the Department could not give notice of a reduction that was simply the consequence of an unintended mistake.

[4] Food-stamp benefits, like the welfare benefits at issue in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), "are a matter of statutory entitlement for persons qualified to receive them." *Id.*, at 262, 90 S.Ct., at 1017 (footnote omitted). Such entitlements are appropriately treated as a form of "property" protected by the Due Process Clause; accordingly, the procedures that are employed in determining whether an individual may continue to participate in the statutory program must comply with the commands of the Constitution. *Id.*, at 262-263, 90 S.Ct., at 1017-1018.[FN31]

> FN31. Thus, in *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976), this Court wrote:
>
> > "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, *e.g.*, *Richardson v. Belcher*, 404 U.S. 78, 80-81, 92 S.Ct. 254, 256-257, 30 L.Ed.2d 231 (1971); *Richardson v. Perales*, 402 U.S. 389, 401-402, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 1372, 4 L.Ed.2d 1435 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created 'property' interest protected by the Fifth Amendment."

***129** [5] This case, however, does not concern the procedural fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program. Such a change must, of course, comply with the substantive limitations on the power ****2529** of Congress, but there is no suggestion in this case that the amendment at issue violated any such constraint. Thus, it must be assumed that Congress had plenary power to define the scope and the duration of the entitlement to food-stamp benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program. The procedural component of the Due Process Clause does not "impose a constitutional limitation on the power of Congress to make substantive changes in the

law of entitlement to public benefits." *Richardson v. Belcher*, 404 U.S. 78, 81, 92 S.Ct. 254, 257, 30 L.Ed.2d 231 (1971).

[6] The congressional decision to lower the earned-income deduction from 20 percent to 18 percent gave many food-stamp households a less valuable entitlement in 1982 than they had received in 1981. But the 1981 entitlement did not include any right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same level of property entitlement. Before the statutory change became effective, the existing property entitlement did not qualify the legislature's power to substitute a different, less valuable entitlement at a later date. As we have frequently noted: "[A] welfare recipient is not deprived of due process when the legislature ***130** adjusts benefit levels.... [T]he legislative determination provides all the process that is due." FN32

> FN32. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-433, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982); see also *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174, 101 S.Ct. 453, 459, 66 L.Ed.2d 368 (1980); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575, 99 S.Ct. 802, 805, 59 L.Ed.2d 1 (1979); *Flemming v. Nestor*, 363 U.S. 603, 608-611, 80 S.Ct. 1367, 1371-1372, 4 L.Ed.2d 1435 (1960).

[7] The participants in the food-stamp program had no greater right to advance notice of the legislative change-in this case, the decision to change the earned-income disregard level-than did any other voters.FN33 They do not claim that there was any defect in the legislative process. Because the substantive reduction in the level of petitioners' benefits was the direct consequence of the statutory amendment, they have no basis for challenging the procedure that caused them to receive a different, less valuable property interest after the amendment became effective.

> FN33. Cf. *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445, 36 S.Ct. 141, 142, 60 L.Ed. 372 (1915) ("Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule").

The claim that petitioners had a constitutional right to better notice of the consequences of the statutory amendment is without merit. All citizens are presumptively charged with knowledge of the law, see, *e.g.*, *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 45 S.Ct. 491, 494, 69 L.Ed. 953 (1925). Arguably that presumption may be overcome in cases in which the statute does not allow a sufficient "grace period" to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it. See *Texaco, Inc. v. Short*, 454 U.S. 516, 532, 102 S.Ct. 781, 793, 70 L.Ed.2d 738 (1982). In this case, however, not only was there a grace period of over 90 ***131** days before the amendment became effective, but in addition, every person affected by the change was given individual notice of the substance of the amendment.FN34

> FN34. Thus, even under the position espoused in dissent in *Texaco*, there would be no merit to the claim in this case. As Justice BRENNAN wrote:
>
> > "As a practical matter, a State cannot afford notice to every person who is or may be affected by a change in the law. But an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption. If it is to survive the scrutiny that the Constitution requires us to afford laws that deprive persons of substantial interests in property, an enactment that relies on that presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied." 454 U.S., at 544, 102 S.Ct., at 800.

****2530** [8] As a matter of constitutional law there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Surely Congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that this notice was constitutionally insufficient is to reject that premise.[FN35]

> FN35. In the case before us, the constitutional claim is particularly weak because the relevant regulations provided that any recipient who claimed that his benefit had been improperly computed as a result of the change in the income deduction was entitled to a reinstatement of the earlier benefit level pending a full individual hearing. 7 CFR § 273.12(e)(2)(ii) (1985). Petitioners do not contend that there was a failure to comply with this regulation. This, of course, would be a different case if the reductions were based on changes in individual circumstances, or if the reductions were based on individual factual determinations, and notice and an opportunity to be heard had been denied.

The judgment of the Court of Appeals is reversed.

It is so ordered.

***132** Justice BRENNAN, with whom Justice MARSHALL joins as to Part I, dissenting.

When the Massachusetts Department of Public Welfare (Department) implemented the 1981 statutory reduction in food stamp benefits for persons with earned income, it sent out form notices telling over 16,000 recipients that their benefits would be "reduced ... or ... terminated" without specifying which. App. 5. The notices contained no information about any particular recipient's case. The District Court declared the notices unlawful under the Due Process Clause as well as the relevant regulation and statute "because ... [they] did not contain the individual recipient's old food stamp benefit amount, new benefit amount, or the amount of earned income that was being used to compute the change." [FN1] The Court of Appeals agreed, finding the notices statutorily and "constitutionally deficient" because they "failed to inform." *Foggs v. Block*, 722 F.2d 933, 940 (CA1 1983). The Court today reverses, finding that "individual computations" are not required by regulation, statute, or Constitution. *Ante*,at 2528. I disagree with the Court's interpretation of all three authorities. Accordingly, I dissent.

> FN1. Order, *Foggs v. Block*, No. 81-0365-F, p. 2 (Mass., Mar. 24, 1982), reprinted in App. to Pet. for Cert. in No. 83-1660, p. 100 (hereinafter Pet. App.).

I

Title 7 CFR § 273.12(e)(2)(ii) (1985) requires that "when a household's food stamp benefits are reduced or terminated as a result of a mass change ... [s]tate agencies shall send individual notices to households to inform them of the change." [FN2] ***133** When Congress reduced the statutory earned-income deduction in 1981, the Secretary of Agriculture ordered state agencies implementing the change to provide the "individual notices" required by ****2531** this regulation. 46 Fed.Reg. 44722 (1981). Both courts below held, however, that the vague form notices in this case failed to fulfill the "individual notice" requirement. 722 F.2d, at 940; Pet.App. 98. Although the phrase apparently has never been administratively defined,[FN3] I believe the logic of the regulation, as well as its history and evident function in the administrative scheme requires inclusion of precisely the sort of individualized information found necessary by the District Court.

> FN2. The regulation provides in full:
>
> "A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed."

> FN3. The record contains no evidence that

food stamp program authorities have ever advanced a particular construction of the phrase prior to this litigation. Indeed, in his opening brief to this Court, the Secretary did not address the regulatory argument, but contended instead that "any argument, independent of the constitutional argument, that the Massachusetts notice was in violation of the Food Stamp Act or the 'mass change' regulations" should be left open to the recipients on remand. Brief for Federal Respondent 44, n. 38. Thus the Secretary's position on the meaning of the "individual notice" regulation was not presented until his reply brief was filed. Because this interpretation apparently has been developed *pendente lite*, the normal canon requiring deference to regulatory interpretations made by an agency that administers a statute, *e.g.*, *Jewett v. Commissioner*, 455 U.S. 305, 318, 102 S.Ct. 1082, 1090, 71 L.Ed.2d 170 (1982), has no application here. See *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50, 103 S.Ct. 2856, 2870, 77 L.Ed.2d 443 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 422, 91 S.Ct. 814, 826, 28 L.Ed.2d 136 (1971) (opinion of Black, J.) (rejecting "too-late formulations, apparently coming from the Solicitor General's office").

First, the sentence in § 273.12(e)(2)(ii) that requires "individual notices" of mass changes is immediately followed by a second requirement:

> "If a household requests a fair hearing [after receiving a mass change notice], benefits shall be continued at the former level *only if the issue being appealed is that food stamp eligibility or benefits were improperly computed*." 7 CFR § 273.12(e)(2)(ii) (1985) (emphasis added).

***134** The Court quotes this language, *ante*, at 2528, and then ignores it. It seems apparent, however, that an aggrieved food stamp recipient cannot possibly contend in good faith, let alone demonstrate, that his request for a hearing is based on a claim that his benefits have been "improperly computed" if the only notice he receives tells him nothing at all about the computation or new amount of the benefit.[FN4] Moreover, state agencies cannot possibly exercise their discretion under this regulation to decide not to continue benefits if the requestor cannot rationally specify his appeal grounds.[FN5] Unless this final provision of the mass change regulation at issue is to be rendered effectively meaningless, the individual notices mandated for a mass change must include the minimum of individualized data necessary for a recipient to surmise, at least, that his benefits have been miscalculated. That minimum amount of data is all that the District Court required in these cases.[FN6]

FN4. As the Court of Appeals noted, "[t]hese recipients may have been well informed about their right to appeal, but they did not have enough information to know whether or not to exercise that right." *Foggs v. Block*, 722 F.2d 933, 939 (CA1 1983).

FN5. Similar delegations of authority elsewhere in the food stamp regulations are likewise called into question by the Court's ruling today. See 7 CFR § 273.15(k)(1) (1985) ("When benefits are reduced or terminated due to a mass change, participation on the prior basis shall be reinstated only if the issue being contested is that food stamp ... benefits were improperly computed or that Federal law or regulation is being misapplied or misinterpreted by the State agency"); § 271.7(f) ("State agencies shall not be required to hold fair hearings unless the request for a fair hearing is based on a household's belief that its benefit level was computed incorrectly ... or that the rules were misapplied or misinterpreted").

FN6. Apart from its discussion of the regulation, the Court emphasizes the fact that the form notice mailed by the Department in these cases informed recipients that "[y]ou have the right to request a fair hearing if you disagree with this action." *Ante*, at 2529. It seems relatively clear, however, that under 7 CFR § 273.15(k)(2)(ii) (1985) and, perhaps, § 271.7(f), aggrieved households have no "right" to a hearing based merely on disagreement with a change in the law. Perhaps the Court intends either to limit its approval of form notices to circumstances in which a

state agency allows appeals and fair hearings no matter what the reason, or to require that appeals must always be permitted if mass change notices are vague. Otherwise, nothing in the Court's opinion would appear to prohibit state agencies from omitting such appeal rights in the future while still providing no more than the uninformative notice approved by the Court today.

***135 **2532** A careful examination of the history of § 273.12(e)(2)(ii) also suggests that "individual notices" mean notices containing some individualized information. The Secretary's food stamp regulations originally required that, "[p]rior to *any* action to terminate or reduce a household's program benefits," state agencies had to give each household "in detail the reasons for the proposed action." 7 CFR § 271.1(n) (1972) (emphasis added). This notice requirement made no exception for "mass changes" in the law. In 1974, however, the Secretary granted state agencies the option of providing "general notice" of mass changes, either by a notice "mailed to all recipients," 39 Fed.Reg. 25996 (1974), or by pervasive publicity.[FN7] The form notice used in these cases presumably would have met this "general notice" requirement if general notice had been all that was required in 1981. In 1978, however, the Secretary subdivided the mass change regulation to address different types of changes. 43 Fed.Reg. 47915-47916 (1978). Subsection (e)(1) paralleled the 1974 mass change regulation, permitting notice of certain state and federal adjustments by pervasive publicity, "general notice mailed to households," or "individual notice." Subsection (e)(2) was new, however, and required "individual notices to households to inform them of the change."[FN8] Although the ***136** difference between "general notices mailed to households" and "individual notices" was never defined by the Secretary, he directed that notice of the 1981 earned-income deduction change be given pursuant to subsection (e)(2), thereby requiring "individual" as opposed to "general" notice.

FN7. "When [a notice of adverse action] is not required ..., the State agency shall publicize the possibility of a change in benefits through the various news media or through a general notice mailed out with ATP cards and with notices placed in food stamp and welfare offices." 7 CFR § 271.1(n)(3) (1975).

FN8. The relevant provisions stated:

"(e) *Mass changes*....

"(1) *Federal adjustments to eligibility standards, allotments, and deductions, State adjustments to utility standards*....

"(ii) Although a notice of adverse action is not required, State agencies may send an individual notice to households of these changes. State agencies shall publicize these mass changes through the news media; posters in certification offices, issuance locations, or other sites frequented by certified households; or general notices mailed to households.....

"(2) *Mass changes in public assistance* ....

"(ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change...." 7 CFR § 273.12(e) (1979).

In the absence of some contrary indication, normal construction of language requires the conclusion that the Secretary employed different terms in the same regulation to mean different things. See *Crawford v. Burke*, 195 U.S. 176, 190, 25 S.Ct. 9, 12, 49 L.Ed. 147 (1904); R. Dickerson, The Interpretation and Application of Statutes 224-225 (1975). And it is clear that the difference between the two types of notice must lie in their informational content, "general" versus "individual," because *both* types of notice must be mailed to individual households.[FN9] "General notices mailed to households" required no more than a form letter of identical content mailed to each of a large number of affected households; in contrast, "individual notice" going to many households must imply some more particularized, "individual" content.

FN9. Thus the fact that "a separate individual notice was sent to each individual household," *ante*, at 2528, proves nothing.

****2533** Finally, the Court argues that the regulatory decision not to require a "notice of adverse action" for mass changes "surely implies" a decision to forgo "individual computations" as well. *Ante*, at 2528. No such implication is logically required, however. The Court apparently fails to understand that "notice of adverse action" is a technical term of art used in the food stamp regulations to describe a special type of ***137** notice containing other information besides "the reason for the proposed action." [FN10] Thus when the Secretary proposed § 273.12(e)(2)(ii) in 1978, he distinguished "individual" mass change notice from a "notice of adverse action" by noting the information that a mass change notice need not contain:

> FN10. In 1981, when the Department acted in this case, a "notice of adverse action" was required to contain
>
> > "in easily understandable language ... [t]he proposed action; the reason for the proposed action; the household's right to request a fair hearing; the telephone number and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing.... If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service." 7 CFR § 273.13(a)(2) (1981).

"Although households are not entitled to a notice of adverse action for mass changes[,] the regulations propose that States send households an individual notice which informs the household of the change but does not grant the household continuation rights if the household appeals the State agency action. In this way, households are advised of the change and can adjust household budgets accordingly." 43 Fed.Reg. 18896 (1978).[FN11]

> FN11. The Secretary erred in stating that households affected by mass changes had no right to continued benefits, since the regulations proposed on the same day clearly specified a right to continued benefits "if the issue being appealed is the computation of benefits." 43 Fed.Reg. 18931 (1978). But unlike a notice of adverse action, the proposed mass change notice was not required to inform recipients of that right.

Nothing was said to suggest that individual computations were not required in either type of notice. Indeed, by stating a purpose of providing affected households sufficient information so that they could adjust their budgets, the plain implication is to the contrary: each household was to be notified of mass changes in individual terms. It is difficult ***138** to imagine how one could otherwise adjust one's household budget "accordingly." [FN12]

> FN12. To the extent that the Court suggests that there is a difference between types of action ("adverse" as opposed to "mass") rather than in types of notice, *ante*, at 2528, or that notice is required of "individual adverse action[s]" but not of mass changes, *ante*, at 2527, it is apparent that the Court misapprehends the "familiar distinction between the individual adverse action and a mass change." *Ante*, at 2528. In terms of effect on the individual, there is no difference under either label. The "action"-a reduction in benefits-is exactly the same. Moreover, households affected in either case must receive "individual notice" and have some right to a fair hearing. The only difference is in the number of recipients affected and the amount of additional information their notices must contain.

As far as I can tell, there has been no contemporaneous or consistent administrative interpretation of the regulation at issue; indeed, there has been no interpretation at all. Based on the language, function, and history of the regulation itself, however, any logical implication to be drawn is that the "individual notice" required by § 273.12(e)(2)(ii) comprehends some amount of individualized benefit data.[FN13] Conscious as well of the constitutional****2534** questions otherwise raised, I would affirm the judgment below on this ground alone.[FN14]

> FN13. It should not go unnoted that just as the concept of "individual notice" silently appeared in the 1978 mass change regula-

tions, the concept of "general" notice has now *disappeared* from the regulations without explanation. See 46 Fed.Reg. 44712, 44726 (1981) (proposing new § 273.12(12)(e)); 7 CFR § 273.12(e) (1985). It is ironic that although the concept of "general notice mailed to households" has thus passed from the regulatory scheme without a murmur, the majority today reincarnates it under the label of "individual notice," by approving the vague form notices that were used in these cases.

FN14. The recipients' petition for certiorari in No. 83-6381, questioning the Court of Appeals' vacation of the District Court's injunctive relief, is not considered by the Court today. See *ante*, at 2526. I need say only that on this record, I do not find that the Court of Appeals exceeded its remedial discretion.

II

I can agree with the Court that the relevant statutory section, 7 U.S.C. § 2020(e)(10), may not of itself require "individual***139** computations." The Court goes beyond this holding, however, to suggest that § 2020(e)(10) permits no notice at all of reductions based on legislated changes in benefit levels. *Ante*, at 2528. Because all parties concede that some form of notice was required, the Court's broader statutory discussion is unnecessary to its decision. I find the Court's suggestion to be an erroneous reading that will cause needless confusion for food stamp administrators and recipients alike.

Although the Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U.S.C. §§ 2011-2029, is federally supervised, it is administered largely by separate agencies of the States.[FN15] Thus reductions in food stamp benefit levels, even if federally mandated, can be implemented only by state agencies. Section 2020(e)(10) requires that when a state agency acts, it must provide "for the granting of a fair hearing and a prompt determination thereafter to *any* household aggrieved by the action of the state agency under *any* provision of its plan of operation ..." (emphasis added). It further mandates continuation of the prior level of food stamp benefits pending decision for "any household which timely requests such a fair hearing *after receiving individual notice of agency action reducing or terminating its benefits*" (emphasis added). As the Secretary acknowledges, the plain language of § 2020(e)(10) "*presupposes* the existence of notice." Reply Brief for Federal Respondent 11. The Court's conclusion that § 2020(e)(10) "does not itself mandate any notice at all," *ante*, at 2528, is thus true only in the formalistic sense that words of command are not used. A congressional presupposition that notice will be sent, expressed in a statute directed to state agencies, can have no different legal effect than would a straightforward command.

FN15. Title 7 U.S.C. § 2020(d) directs that each "State agency ... shall submit for approval" by the Secretary of Agriculture a "plan of operation specifying the manner in which [the food stamp] program will be conducted within the State in every political subdivision." State agencies are directly "responsible for the administration of the program within [each] State." 7 CFR § 271.4(a) (1985).

***140** No distinction between types of "agency action"-mass or individual-appears in the language of § 2020(e)(10), and the statute's legislative history demonstrates that no distinction was intended. The controlling House Report explained that after *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), fair hearings would be required in all cases where a food stamp claimant will be "aggrieved" by *any* agency action, "whether it be a termination or reduction of benefits, a denial of an application for benefits, or other negative action...." H.R.Rep. No. 95-464, p. 285 (1977). The Report went on to recite Congress' understanding that notice of all such "negative actions" was normally provided in all cases,[FN16] and indeed, such was the administrative practice in 1977. Although "notices of adverse action" were not always required, the 1977 regulations required *some* form of notice even for "mass changes." ****2535**7 CFR §§ 271.1(n)(2) and (3) (1977). Congress was thus well aware of, and legislated on the basis of, the contemporaneous administrative practice of providing notice of mass changes, and must be presumed to have intended to maintain that practice absent some clear indication to the contrary. *Haig v. Agee*, 453 U.S. 280, 297-298, 101 S.Ct. 2766, 2776-2777, 69 L.Ed.2d 640 (1981).[FN17]

FN16. "Each household must be notified in a timely manner usually ten days prior to the

time the agency's decision will take effect." H.R.Rep. No. 95-464, p. 285 (1977), U.S.Code Cong. & Admin.News 1977, p. 2221; accord, S.Conf.Rep. No. 95-418, p. 197 (1977) (adopting House bill which requires "State agency notice of reduction or termination of [a household's] benefits").

FN17. The Court rests its statutory argument on its view of the regulatory "background," which allegedly included a "distinction between the regulatory requirement regarding notice in the case of an adverse action and the *lack of such a requirement* in the case of a mass change." *Ante,* at 2527 (emphasis supplied). No such distinction existed, however. The regulations in effect in 1977 plainly stated a requirement of notice of mass changes, 7 CFR § 271.1(n)(3) (1977), as the Court itself notes, *ante,* at 2528, n. 28. Congress' approval of the 1977 administrative practice, therefore, cannot support the Court's suggestion that Congress thereby approved of no notice at all in the mass change context.

Aside from language and legislative history, the logic of the statutory scheme is distorted by the Court's suggestion ***141** that notice is not required when mass reductions result from legislation. Notice is, of course, "an element of the fair hearing requirement" of § 2020(e)(10), *ante,* at 2527, because it allows recipients whose benefits will be reduced or terminated to determine whether or not to request a fair hearing. Cf. *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 171-172, 71 S.Ct. 624, 648-649, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice"). Congress expressed its view in 1977 that there would be little occasion to claim a fair hearing when legislative changes in benefit levels were implemented: "Hearings would, of course, be unnecessary *in the absence of claims of factual error in individual benefit computation and calculation.*" H.R.Rep. No. 95-464, at 289 (emphasis added).[FN18] Similarly, Congress directed that if in the course of a fair hearing "a determination is made that the sole issue being appealed is ... *not a matter of fact or judgment relating to an individual case,*" then benefits need not be continued under the proviso of § 2020(e)(10). *Id.,* at 286 (emphasis added). These very statements, however, demonstrate Congress' understanding that households affected by mass changes could request a fair hearing, and were *entitled* to a hearing if their claim was, among other things, miscalculation of benefits.[FN19] The Court does not discuss these legislative remarks. But congressionaldiscussion ***142** of guidelines for winnowing appeals simply makes no sense if no notice at all of mass reductions was intended.

FN18. We previously have affirmed the view that because the distinction between factual and policy-based appeals is often difficult to identify, the Due Process Clause constrains state agencies to err on the side of allowing hearings in doubtful or ambiguous cases. *Carleson v. Yee-Litt,* 412 U.S. 924, 93 S.Ct. 2753, 37 L.Ed.2d 152 (1973) (summarily aff'g *Yee-Litt v. Richardson,* 353 F.Supp. 996 (ND Cal.)).

FN19. The Court's statement that "it seems unlikely that Congress contemplated individual hearings for every household affected by a general change in the law," *ante,* at 2527, is thus unobjectionable, but it has no apparent bearing on whether Congress contemplated *notice* of mass reductions so that fair hearings could be requested in appropriate cases before benefits are cut off.

Notice of reductions in benefit levels is thus the necessary predicate to implementation of the statutory fair hearing requirement. Indeed, the Court apparently accepts this view, stating that "whenever a household is entitled to a fair hearing, it is appropriate to read the statute as imposing a requirement of individual notice that would enable the household to request such a hearing." *Ante,* at 2527. It is clear, however, that Congress intended and the regulations guarantee that mass reductions rightfully may be appealed if the claim is miscalculation. Yet the Court concludes there is no statutory "command to give ****2536** notice of a general change in the law." *Ante,* at 2528. This conclusion may generally be correct with regard to *enactment* of changes in the law, see *Texaco, Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), but the plain terms of § 2020(e)(10) require notice of "agency action" taken to *implement* the law, if that action will result in "reduc[tion] or terminat[ion] of ... benefits." Because legislated mass

changes, like any other changes, can be implemented only by the action of state agencies, the notice requirement of § 2020(e)(10) is fully implicated in the mass change context.

The unambiguous purpose of the fair hearing and benefit continuation requirements of § 2020(e)(10) is to prevent erroneous reductions in benefits until a claim of error can be resolved. General changes in the law, no less than individual exercises of caseworker discretion, are likely to result in error when implemented, as the facts of these cases indicate and the Court acknowledges. *Ante,* at 2529 ("[E]rrors ... can occur in the administration of any large welfare program"). Timely and adequate notice permits the affected recipient to surmise whether an error has been made; if the recipient invokes the statutory right to a fair hearing, the agency then determines whether the recipient is correct. That reductions are implemented massively rather than on a case-by-case basis alters not at all this sensible administrative ***143** scheme, operating as intended under § 2020(e)(10). By reading the statute not to require any notice at all when reductions or terminations of benefits are the result of agency implementation of a "general change in the law," the Court finds an exception not indicated by the statute, its legislative history, or relevant regulations, and not supported by any logical view of the food stamp administrative process. Federal administrators have required state agencies to give some form of notice of mass changes since before § 2020(e)(10)'s enactment until today. The Court's contrary suggestion, offered in cases where the discussion is unnecessary to the result, will disrupt an administrative scheme that appears to work smoothly without the Court's help.

III

Because food stamp benefits are a matter of statutory entitlement, recipients may claim a property interest only in the level of benefits to which they are entitled under the law, as calculated under whatever statutory formula is provided. Congress may reduce the entitlement level or alter the formula through the normal legislative process, and that process pretermits any claim that Congress' action constitutes unconstitutional deprivation of property. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-433, 102 S.Ct. 1148, 1155-1156, 71 L.Ed.2d 265 (1982).

Arguing from similar premises, the Court concludes that the food stamp recipients in these cases had no special right to "advance notice of the legislative change" in the earned-income deduction in 1981. *Ante,* at 2529-2530. The recipients, however, have never contended that they had a right to "advance notice" of the enactment of congressional legislation,[FN20] and I do not intend to argue for that proposition here. "It is ***144** plain that sheer impracticality makes it implausible to expect the State *itself* to apprise its citizenry of the enactment of a statute of general applicability." *Texaco, Inc. v. Short, supra,* 454 U.S., at 550, 102 S.Ct., at 803 (BRENNAN, J., dissenting) (emphasis in original).

FN20. See, *e.g.,* Brief for Respondents Parker et al. 47, and n. 26 ("This is not a case in which the plaintiffs have challenged the authority of Congress to decrease the amount of [food stamp benefits]." "[T]he plaintiffs seek only to have the admittedly valid change in the program applied correctly to their individual cases"); see also Reply Brief for Respondents Parker et al. 9; Record, Amended Supplemental Complaint ¶ 1 (Jan. 6, 1982).

****2537** Instead, these cases involve the *implementation* of Congress' decision by its agents, the various state agencies that administer food stamp programs across the country. Owing to factors unique to the state agency and having nothing to do with Congress, implementation of the change in Massachusetts resulted in the *erroneous* reduction of food stamp benefits for a number of households. *Ante,* at 2528-2529; see *infra,* at 2541, and n. 27. Because recipients have a constitutionally cognizable property interest in their proper statutory entitlement levels, it is deprivation of those interests by the state agency, and not the passage of legislation by Congress, that requires our constitutional attention in this case.[FN21]

FN21. Unlike the statute analyzed in *Texaco, Inc. v. Short,* 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982), the 1981 earned-income deduction change was not "self-executing," and as *Texaco* held, it is "essential" to distinguish "self-executing feature[s] of [a] statute" from actions taken subsequently to implement the legislative command. *Id.,* at 533, 102 S.Ct., at 794. *Texaco* examined a challenge to a state law providing that min-

eral interests unused for 20 years *automatically* would revert to the surface owner unless a "statement of claim" was filed. *Id.*, at 518, 102 S.Ct., at 786. Appellants claimed this law would effect an unconstitutional taking of their interests without due process unless they were notified when "their 20-year period of nonuse was about to expire." *Id.*, at 533, 102 S.Ct., at 794. While upholding the statute, the Court repeatedly emphasized its "self-executing" character, and carefully noted that the Constitution would govern any action taken later to terminate finally appellants' property interests: "It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted, ... the *full procedural protections of the Due Process Clause ... including notice ... must be provided.*" *Id.*, at 534, 102 S.Ct., at 794 (emphasis supplied); see also *id.*, at 535, 102 S.Ct., at 795 ("The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of" the law); *id.*, at 537, 102 S.Ct., at 796 (distinguishing precedents on the ground that "the property interest was taken only after a specific determination that the deprivation was proper"). *Texaco* thus plainly acknowledged that due process protections were required to prevent *erroneous applications* of the statute. As I also noted in *Texaco*, if "[t]he State may ... feasibly provide notice when it asserts an interest directly adverse to particular persons, [it] may in that circumstance be constitutionally compelled to do so." *Id.*, at 550, 102 S.Ct., at 803 (BRENNAN, J., dissenting).

***145** By focusing primarily on the "red herring" notice-of-legislative-change issue, the Court avoids explicit application of the multifactored interest-balancing test normally applied in our due process precedents. I understand the Court to make two basic arguments, however, in dismissing the recipients' constitutional claim to individualized notice of the Department's action. The first is to suggest that no notice at all is required when "inadvertent errors" are involved; such errors simply may be "put ... to one side." At 2529. The second is that the form notice employed here sufficed to "adequately protect" the recipients' interests in any case, because recipients can be presumed to know the law regarding the earned-income deduction change and the notice told them how to appeal. *Ante*, at 2530-2531.

My consideration of these arguments is informed by two unchallenged facts. First, although not mentioned by the Court, when the Department sent its form notice and implemented the earned-income deduction change in December 1981, its officials knew that a substantial data entry backlog in its computerized record system meant that its food stamp files contained inaccurate earned-income information for a number of recipients. App. 85-89 (testimony of the Department's Systems Director); *id.*, at 214 (testimony of the Deputy Director of the Department's computerized file system); see also 722 F.2d, at 938-939; Pet. App. 77-80. Thus the Department knew full well that when it took action to implement the legislative change, the food stamp benefits of a number of recipients were likely to be erroneously reduced or terminated. While the absence of such clear foreknowledge ***146** might not make a constitutional****2538** difference, its presence here surely sharpens the constitutional analysis.

Second, the officials in charge of the Department's computer systems testified without contradiction that it was "not a problem" to generate a notice containing the individualized information ordered by the District Court, since that information was already contained in the computers, and that the necessary programming might have taken "a few hours." App. 224; see *id.*, at 80-84, 217-227. Thus the District Court's finding, unquestioned by the Court today, was that it was likely that individualized notices could have been provided in December 1981 "without causing any delay" or any "real hardship" to the Department. Pet.App. 74-75, 94.

A

In my view, the Court's offhand discussion of "inadvertent errors" is fogged by an unspoken conceptual confusion in identifying the constitutional deprivation claimed in these cases. In traditional cases arising under the Due Process Clause, a governmental deprivation of property is not difficult to identify: an individual possesses a set amount of property and the government's action either does, or does not, deprive the individual of some or all of it. Where "new" property interests-that is, statutory entitlements-are

involved, however, claimants have an interest only in their benefit level as correctly determined under the law, rather than in any particular preordained amount. Thus, while *any* deprivation of tangible property by the State implicates the Due Process Clause, only an *erroneous* governmental reduction of benefits, one resulting in less than the statutorily specified amount, effects a deprivation subject to constitutional constraint. It is the error, and not the reduction *per se*, that is the deprivation.

Keeping this point in mind, it is readily apparent that this Court's application of the Due Process Clause to governmental administrative action has not only encompassed, but ***147** indeed has been premised upon, the need for protection of individual property interests against "inadvertent" errors of the State. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978), to name but a few examples, all involved administrative decisionmaking presumed to operate in good faith yet subject to normal and foreseeable, albeit unintentional, error.[FN22] Properly applied, regulations****2539** that govern administrative decisions ***148** in such cases cannot deprive recipients of property, because a welfare or utility service recipient whose entitlement *should* be reduced or terminated under relevant statutes can claim no valid interest in continuation. Administrative decisions that affect statutory entitlements may often be correct. But when administrative error-that is, the deprivation-is foreseeable as a general matter and certain to occur in particular cases, constitutional procedures are interposed to ensure correctness insofar as feasible.[FN23]

> FN22. Although the Court does not define "inadvertent errors," its opinion and the facts of these cases indicate that the phrase describes errors made in good faith or unintentionally, rather than errors that could not possibly have been expected. Thus the Court acknowledges that such errors are well known to "occur in the administration of any large welfare program." *Ante*, at 2529; see also *Memphis Light, Gas & Water Division v. Craft*, 436 U.S., at 18, 98 S.Ct., at 1564 ("[T]he risk of erroneous deprivation, given the necessary reliance on computers, is not insubstantial") (footnote omitted). Indeed, the testimony indicating that the Department knew that the stale data in its computer system would be used to determine new benefit levels suggests that the Court's characterization of the resulting errors as "inadvertent" is a charitable one.
>
> In a footnote, the Court states that "[b]y hypothesis, an inadvertent error is one that the Department did not anticipate; for that reason, the Department could not give notice of a reduction that was simply the consequence of an unintended mistake." *Ante*, at 2529, n. 30. In light of the Department's testimony and the Court's recognition that administrative errors are well known to occur in welfare programs, I can surmise only that the Court means that the Department did not anticipate which particular individuals would be erroneously affected, for the foreseeability of error against some portion of the class is clear and undisputed. See Brief for State Petitioner 60-61. The Court's further assertion that the Department "could not give notice of a reduction that was simply the consequence of an unintended mistake," is simply misguided. The reductions *per se* were the consequence of *Congress'* action, not the Department's, and they were certainly intended. The amount of the reductions was easily calculated, and notice could have been given. Only the Department's miscalculations were in any sense "unintended mistakes." While notice that a particular error would be made was, perhaps, impossible, notice of the reduction was both possible and required, for the very reason that only the recipients could identify particular errors before they took effect.

FN23. One need not indisputably prove error before constitutional protections may be invoked; only a foreseeable probability of error need be shown. See, *e.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) (requiring a "legitimate *claim* of entitlement") (emphasis added); *Fuentes v. Shevin*, 407 U.S. 67, 86,

92 S.Ct. 1983, 1997, 32 L.Ed.2d 556 (1972) ("Fourteenth Amendment's protection of 'property' ... has never been interpreted to safeguard only the rights of *undisputed* ownership") (emphasis added).

"[A] primary function of legal process is to minimize the risk of erroneous decisions," *Mackey v. Montrym*, 443 U.S. 1, 13, 99 S.Ct. 2612, 2618, 61 L.Ed.2d 321 (1979). Consequently, a foreseeable action that may cause deprivation of property must be "*preceded* by notice." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950) (emphasis added).[FN24] As we made clear in *Goldberg*, 397 U.S., at 267, 90 S.Ct., at 1020, in statutory entitlement cases the Due Process Clause normally requires "timely and adequate notice detailing the reasons" for proposed adverse administrative action. Such process is constitutionally required whenever the action may be "challenged ... as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Id.*, at 268, 90 S.Ct., at 1020.

FN24. See also *Roller v. Holly*, 176 U.S. 398, 409, 20 S.Ct. 410, 413, 44 L.Ed. 520 (1900) ("That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of law to which no citation of authority would give additional weight"); *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified").

***149** Thus, in my view, it is a novel and ill-considered suggestion to "put ... to one side" unintended but foreseeable administrative errors that concededly had adverse effects on valid property interests. Such errors are at the *heart* of due process analysis. If the Constitution provides no protection against the visiting of such errors on statutory entitlement claimants, then the development of this Court's "new property" jurisprudence over the past 15 years represents a somewhat hollow victory. The fact that errors inevitably occur in the administration of any bureaucracy requires the conclusion that when the State administers a property entitlement program, it has a constitutional obligation to provide *some* type of notice to recipients before it implements adverse changes in the entitlement level, for the very reason that "inadvertent" erroneous reductions or terminations of benefits-that is, deprivations of property-are otherwise effected without any due process of law.[FN25]

FN25. The Secretary argues that such errors "would likely be detected" after they occurred, "with corrective payments to all." Brief for Federal Respondent 25-26. Since the Department contends that the particular errors committed were unknown to it, however, it is not clear how they would be detected absent specific notice to the recipients. See *Vargas v. Trainor*, 508 F.2d 485, 490 (CA7 1974), cert. denied, 420 U.S. 1008 (1975). Because the Department notably does not contend that every error that occurred in this case has in fact been detected, the Court of Appeals' order directing the Department "to check its files to ensure that [it] properly calculated the benefit reduction of each recipient," 722 F.2d at 941, a remedy suggested by the Department itself, *ibid.*, was appropriate.

More importantly, however, the likelihood of postdeprivation correction is largely irrelevant to the constitutional inquiry regarding *notice*. Cf. *Mathews v. Eldridge*, 424 U.S. 319, 340, 96 S.Ct. 893, 905, 47 L.Ed.2d 18 (1976) (postdeprivation process relevant to whether predeprivation evidentiary hearing is required); but see *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985) ("some form of pretermination hearing" is generally required). To paraphrase *Memphis Light, Gas & Water Division v. Craft*, 436 U.S., at 20, 98 S.Ct., at 1566, "[a]lthough [food stamp benefits] may be restored ultimately, the cessation of essential [benefits] for any appreciable time works uniquely final deprivation," and adequate notice therefore must precede the adverse action.

***150 **2540** B

Because the errors in these cases cannot merely be ignored, I turn to the central constitutional inquiry: what process was due in light of "the practicalities and peculiarities of the case"? *Mullane v. Central Hanover*

Bank & Trust Co., supra, at 314, 70 S.Ct., at 657. Experience demonstrates that balanced consideration of a number of factors is required: the importance of the private interest affected, the risk of erroneous deprivation under the system challenged, the protective value of the different procedures proposed, and the government's interests, including any "fiscal and administrative burdens" created by different procedures. *Logan v. Zimmerman Brush Co.*, 455 U.S., at 434, 102 S.Ct., at 1156; *Mathews v. Eldridge*, 424 U.S., at 334-335, 96 S.Ct., at 902-903. These interests are relevant to determining the "content of the notice" as well as its timing and other procedural claims. *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975). Although the interests normally relevant to the constitutional due process inquiry are often characterized as "competing," *e.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1494, 84 L.Ed.2d 494 (1985), the record makes clear that the Department failed to demonstrate any countervailing interest in not providing individualized notices in these cases.

1. *Importance of the Interest.* The importance of the correct level of food stamp benefits to eligible households cannot be overstated. Designed "[t]o alleviate ... hunger and malnutrition" and allow poverty level families "to purchase a nutritionally adequate diet," Pub.L. 91-671, § 2, 84 Stat. 2048, the food stamp program by definition provides benefits only to those persons who are unable to afford even a minimally adequate diet on their own. An erroneous reduction or break in benefits, therefore, may literally deprive a recipient "of the very means by which to live." *Goldberg*, 397 U.S., at 264, 90 S.Ct., at 1018.[FN26]

FN26. Census statistics indicate that the median annual income of all households receiving food stamps was less than $6,000 in 1982. Bureau of the Census, Characteristics of Households and Persons Receiving Selected Noncash Benefits: 1982, p. 19 (1984). "The 1984 poverty threshold is $8,280 for a family of three and $10,610 for a family of four." House Committee on Ways and Means, Children in Poverty, 99th Cong., 1st Sess., 196 (Comm.Print 1985). See also *Mathews v. Eldridge, supra*, 424 U.S., at 340, 96 S.Ct., at 905 ("[W]elfare assistance is given to persons on the very margin of subsistence").

151** 2. *Risk of Error.* Both courts below found that the likelihood of error by the Department in implementing the earned-income deduction change was substantial. 722 F.2d, at 939; Pet. App. 88-95. The Court does not challenge that evaluation, and it is amply supported by the record. The existence of implementation errors was unchallenged at trial.[FN27] Because of a severe*2541** data entry backlog in the Department's computers during the fall of 1981, an undetermined number of food stamp recipients' files contained erroneous earned income figures.[FN28] Thus, although the mathematical operation necessary to implement the statutory change was theoretically simple, its actual performance in Massachusetts necessarily carried with it a high risk of error.

FN27. For example, a random sample of less than one-third of the 16,000 households that received the Department's December 1981 notice showed that 585 households listed as having *no* earned income nevertheless received the notice. Of these, 211 households experienced a change in their benefit level, although by statutory definition no change should have occurred. Pet.App. 81-82. Thus the Court's statement that Congress' "amendment had no effect on households with no income," *ante*, at 2523, is simply wrong with regard to implementation of the law in Massachusetts.

FN28. Data for over 9,000 of the households that received the notice at issue in these cases were contained in the affected computer system. Pet.App. 78. Over two-thirds of the data entries scheduled for this system had not been processed during the relevant period, and the District Court concluded that "it was more likely than not" that the correct earned-income information "for any of the [affected] households ... was not entered ... prior to implementation of the change in the earned income disregard." *Id.*, at 79.

The Department did not challenge the recipient's proof regarding the risk of error at trial, but instead argued as it ***152** does here that any such risk was caused not by the statutory change but by its ministerial implementation based on pre-existing data in the

files. As indicated above, however, it is precisely that implementation, and not the statutory change, that the recipients have challenged throughout. The foreseeable risk of the Department's errors stands unrefuted.

3. *Value of Additional Procedures.* Adequate notice under the Due Process Clause has two components. It must inform affected parties of the action about to be taken against them as well as of procedures available for challenging that action. *Memphis Light*, 436 U.S., at 13, 98 S.Ct., at 1562; *Mullane*, 339 U.S., at 314, 70 S.Ct., at 657. These requirements serve discrete purposes: adequate notice of the action itself permits the individual to evaluate its accuracy or propriety and to determine whether or not to contest it; notice of how to appeal ensures that available error-correction procedures will be effective. In *Memphis Light, supra,* the second component was examined, and I have no doubt that the Court today correctly concludes that recipients of the mass change notice here were adequately informed of the "procedure for protesting." 436 U.S., at 15, 98 S.Ct., at 1563; see *ante,* at 2529.

These cases are the converse of *Memphis Light,* however, and the subtle yet vital failure of the notice here is that it completely failed to inform recipients of the particular action proposed to be taken against them *by the Department.*[FN29] The ***153** notice included only a single vague statement about some impending impact on food stamp benefits: due to *Congress'* action, recipient's benefits would "either be reduced ... or ... terminated." App. 5. The defendant in this lawsuit, however, is the Massachusetts Department of Public Welfare, not Congress, and the action of which notice was required was, it bears repeating, *not* Congress' decision to change the law but rather the Department's application of that changed law to individual recipients.[FN30] "Central to the evaluation of ****2542** any administrative process is the nature of the relevant inquiry." *Mathews*, 424 U.S., at 343, 96 S.Ct., at 907. In these cases the administrative inquiry was uncomplicated: what was the current earned income of each recipient, and what should his reduced food stamp benefit be after Congress' change was applied to that figure? The obvious value of notice of those simple factual determinations [FN31] is that they ***154** were the *only* data that would have enabled each recipient to "choose for himself whether to ... acquiesce or contest," *Mullane, supra,* 339 U.S., at 314, 70 S.Ct., at 657, by filing a benefit-preserving appeal.[FN32]

FN29. The Court finds that the form notice here was adequate simply because it explained how to appeal and, if a recipient contacted the Department, their benefits were not reduced until a hearing was held. *Ante,* at 2529. This rationale ignores the first component of notice that our cases recognize: notice of the proposed action. This notice told recipients only of Congress' change, and did not even identify the Department's action ("reduced *or* terminated," App. 5), let alone provide sufficient information to evaluate it. See n. 4, *supra*. By approving a form of notice that encourages recipients to appeal whether they have a reason or not, the Court likely adds to the costs of welfare administration. Moreover, as noted above, n. 6, no regulation required the Department to continue a recipient's benefits absent some claim of factual error. Unless the Court intends to impose such a requirement under the Constitution by its decision today, its ground for decision fails to support its constitutional conclusion.

FN30. The Secretary was a party in the District Court only on the theory that the mass change regulation was unconstitutional. The District Court did not so hold, however, and its order ran solely against the state agency. The Department's authorities wrote and designed the particular form notice at issue, and only the errors caused by the Department's actions were the subject of challenge. In evaluating the adequacy of the notices, therefore, the value of additional information in preventing the Department's errors is the appropriate focus of analysis.

FN31. It is conceded that implementation of the 1981 law required the Department to make these determinations in each individual case. See, *e.g.*, Brief for State Petitioner 65 (implementation "required a computer recalculation of each household's benefits"). I thus fail to understand the Court's suggestion that "[t]his, of course, would be a different case if the reductions were based on ... individual factual determinations." *Ante,* at 2531, n. 35. The Court might intend to distinguish

actions requiring simple mathematical determinations from application of laws requiring greater judgment or discretion on the part of administrators. But we have never before suggested that such a distinction might make a difference, nor does the Court provide any analytical justification for such a conclusion today. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), clearly stated that the procedural protections of the Due Process Clause apply whenever the potential for erroneous decision based on "incorrect or misleading factual premises or ... misapplication of rules or policies to the facts of particular cases" exists. *Id.*, at 268, 90 S.Ct., at 1020. See also *Yee-Litt v. Richardson*, 353 F.Supp. 996 (ND Cal.1973).

FN32. The Secretary reports that households normally receive their first reduced benefit allotment "a few weeks after the notice." Brief for Federal Respondent 37. The form notice here, however, provided that recipients had a right to continued benefits pending a fair hearing only if their request were *received* within 10 days from the date of the notice. App. 5; see 7 CFR §§ 273.15(k)(1), 273.13(a)(1) (1981). Otherwise, a recipient had only a right to reimbursement for erroneously reduced benefits "as soon as administratively feasible" after prevailing in a fair hearing. 7 CFR § 273.15(r)(2) (1981).

The Court ultimately brushes aside any value that individualized notice may have had, stating that "citizens are presumptively charged with knowledge of the law," and asserting that "[s]urely Congress can presume that [a form] notice relative to a matter as important as a change in a food-stamp allotment would prompt an appropriate inquiry if not fully understood." *Ante*, at 2531. This reasoning is wholly unpersuasive. First, I am unwilling to agree that "[t]he entire structure of our democratic government," *ante*, at 2531, rests on a presumption that food stamp recipients know and comprehend the arcane intricacies of an entitlement program that requires over 350 pages in the Code of Federal Regulations to explain and voluminous state manuals to administer. I am more certain that the premises of our polity include minimal protections for the property interests of the poor.

Moreover, in *Memphis Light*, the Court flatly rejected the argument that the poor can protect themselves without ***155** process. The dissent there argued that "a homeowner surely need not be told how to complain about an error in a utility bill." 436 U.S., at 26, 98 S.Ct., at 1569 (STEVENS, J., dissenting). The Court ruled, however, that "skeletal notice" was constitutionally insufficient because utility customers are "of various levels of education, experience and resources," and "the uninterrupted continuity of [utility service] is essential to health and safety." *Id.*, at 14-15, n. 15, 98 S.Ct., at 1563, n. 15. See also *Mathews v. Eldridge*, *supra*, 424 U.S., at 349, 96 S.Ct., at 909 ("[P]rocedures [must be] tailored ... to 'the capacities and circumstances of those who are to be heard' ") (citation omitted).****2543** In this case, over 45% of affected food stamp recipients in Massachusetts had not completed high school. App. 127. In such circumstances recipients must be "informed clearly." *Memphis Light*, 436 U.S., at 14-15, n. 15, 98 S.Ct., at 1563, n. 15.

Additionally, this record reveals that the Court's reliance on the protective value of an "appropriate inquiry" is misplaced. The notice here did indeed state that recipients should call their local welfare office if they had "questions concerning the correctness of [their] benefits computation." App. 5. Putting aside the fact that the notice did not *inform* any recipient of his "benefits computation," the testimony of the representative named plaintiffs at trial was uniformly that the local welfare workers they called about the notice were either unaware of it or could not explain it. *Id.*, at 131 (Zades), 139 (Parker), 149 (Johnson). With no help forthcoming at the local level, the 10-day appeal period was virtually certain to expire before even those recipients who called would receive a specific explanation enabling them intelligently to decide whether or not to appeal.

Finally, the *Mathews* inquiry simply does not countenance rejection of procedural alternatives because a court finds existing procedures "adequate" in some ad hoc sense, without evaluation of whether additional procedures might have been more protective at little or no cost to the government. Yet the Court discusses neither the protective value of individualized***156** notice in this context nor the burden, if any, that it would impose on the Department.

4. *Governmental Interests.* The District Court concluded that only four simple facts were necessary to transform this vague notice into one that adequately informed affected individuals about the Department's action in their particular cases: "whether [their benefits] were being reduced or terminated" and "the individual recipient's old food stamp benefit amount, new benefit amount, [and] the amount of earned income that was being used to compute the change." Pet.App. 100. These data were already contained in the Department's computerized files, and the computers could have been programmed to print the individualized information on the form notices with little additional time or effort.[FN33] The District Court's finding, not questioned by the Court today, was that programming the computer to provide such individual information is "neither a difficult nor burdensome procedure," *id.*, at 75-76, and that had the Department requested that such individualized data be printed on the December 1981 notices, it was likely that it could have been accomplished "without causing any delay...." *Id.*, at 74, 75. This record, therefore, can support no argument that individualized notice would have been a burden for the Department.[FN34]

FN33. App. 80-84, 217-227. Indeed, prior to trial below the same computer system generated a list of recipients containing precisely the information found necessary by the District Court. Pet.App. 80. In light of this evidence, it is unsurprising that, as the District Court stated, "the Commonwealth [did] not argue the conservation of scarce fiscal resources." *Id.*, at 92-93. See also *Philadelphia Welfare Rights Organization v. O'Bannon*, 525 F.Supp. 1055, 1060 (ED Pa.1981) (administrative burden in providing individualized notice of state implementation of the 1981 earned-income deduction change was "negligible").

FN34. The District Court also found that individualized notice would "operat[e] to benefit the agency because such a notice should reduce the amount of client visits and phone calls to the agency seeking clarification, reduce the amount of unnecessary appeals, and free up the time of the caseworkers for other tasks." Pet.App. 76-77; see App. 95-96 (expert testimony that vague mass change notice throws agency into "administrative chaos"). This finding is due deference in this Court. Although the Court properly rejects such evidence in its discussion of the regulations and statute, *ante*, at 2528, n. 29, our constitutional precedents require that the "fiscal and administrative burdens" of process enter the analysis once it is determined that notice of some kind is required under the Due Process Clause. *Mathews*, 424 U.S., at 335, 96 S.Ct., at 903; see *Mullane*, 339 U.S., at 317, 70 S.Ct., at 658 (considering "practical difficulties and costs" of types of notice).

***157 **2544** IV

The Court's regulatory conclusion is unconvincing, and its statutory dictum is unfortunate. But I am most troubled by the Court's casual suggestion that foreseeable "inadvertent" errors in the administration of entitlement programs may be ignored in determining what protection the Constitution provides. Such administrative error all too often plagues governmental programs designed to aid the poor.[FN35] If well-meaning mistakes that might be prevented inexpensively lie entirely outside the compass of the Due Process Clause, then the convenience of the administrative state comes at the expense of those least able to confront the bureaucracy. I respectfully dissent.

FN35. See, *e.g.*, Hearing on Children, Youth, and Families in the Northeast before the House Select Committee on Children, Youth and Families, 98th Cong., 1st Sess., 51, 53 (1983); Hearings on HEW Efforts to Reduce Errors in Welfare Programs (AFDC and SSI) before the Subcommittee on Oversight of the House Committee on Ways and Means, 94th Cong., 2d Sess. (1976).

Justice MARSHALL, dissenting.

I share Justice BRENNAN's view that the logic of the relevant regulation, 7 CFR § 273.12(e)(2)(ii) (1985) requires the sort of notice that the lower courts ordered here. The regulation contemplates a notice that allows families to "adjust household budgets" according to changes in benefit levels, ***158** 43 Fed.Reg. 18896 (1978), and I fail to see how a notice that does not inform recipients of their new benefit levels can serve this purpose. Given that this interpretation of the regulation disposes of the cases, I find

no need to reach the other issues addressed by the Court or by the dissent. I therefore join Part I of Justice BRENNAN's dissent.

U.S.Mass.,1985.
Atkins v. Parker
472 U.S. 115, 105 S.Ct. 2520, 86 L.Ed.2d 81, 53 USLW 4686

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480 F.3d 1072, 34 NDLR P 107, 20 Fla. L. Weekly Fed. C 371
(Cite as: 480 F.3d 1072)

United States Court of Appeals,
Eleventh Circuit.
Steven M. BIRCOLL, Plaintiff-Appellant,
v.
MIAMI-DADE COUNTY, a political subdivision of the State of Florida, Defendant-Appellee.

No. 06-11098.
March 7, 2007.

Background: Deaf motorist brought cause of action against county, alleging that his arrest for driving under the influence (DUI) and subsequent detention violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA). County moved for summary judgment. The United States District Court for the Southern District of Florida, No. 05-20954-CV-FAM,Federico A. Moreno, J., 410 F.Supp.2d 1280, granted county's motion for summary judgment, and motorist appealed.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:
(1) waiting for oral interpreter before taking field sobriety tests was not reasonable modification of police procedures, in which officer who stopped motorist on suspicion of driving under the influence (DUI) had to engage to accommodate motorist's profound deafness;
(2) arresting officer took steps reasonably necessary to establish effective communication at police station; and
(3) even assuming that corrections officers failed to accommodate motorist's disability, by requiring him to use ordinary telephone to attempt to communicate his arrest to his girlfriend, this lack of accommodation did not injure motorist or support cause of action under the ADA.

Affirmed.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

Federal Courts 170B 802

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk802 k. Summary Judgment. Most Cited Cases

Court of Appeals reviews district court's grant of summary judgment *de novo*, drawing all facts and inferences in light most favorable to nonmoving party.

[2] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases

Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

Civil Rights 78 1090

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1089 Prisons

78k1090 k. In General. Most Cited Cases

Words "eligibility" and "participation," as used in section of the Americans with Disabilities Act (ADA) defining a "qualified individual with a disability," to whom provisions of the ADA apply, as individual with disability who, with or without reasonable modifications or provision of auxiliary aids and services, meets essential eligibility requirements for receipt of services or for participation in programs or activities provided by public entity, do not imply voluntariness on part of applicant who seeks benefits from the public entity, so as to preclude application of the ADA to prisoners, arrestees or other persons being detained against their will. Americans with Disabilities Act of 1990, § 201(2), 42 U.S.C.A. § 12131(2).

[3] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases

Americans with Disabilities Act's (ADA's) "reasonable modification" principle does not require public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only to make "reasonable modifications" that would not fundamentally alter nature of service or activity of public entity or impose an undue burden. Americans with Disabilities Act of 1990, § 201(2), 42 U.S.C.A. § 12131(2).

[4] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases

In order to state claim under the Americans with Disabilities Act (ADA), plaintiff generally must prove: (1) that he is qualified individual with a disability; (2) that he was either excluded from participation in, or denied benefits of, public entity's services, programs or activities, or was otherwise discriminated against by public entity; and (3) that this exclusion, denial of benefit, or discrimination was by reason of plaintiff's disability. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[5] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases

Final clause of provision of the Americans with Disabilities Act (ADA) generally prohibiting a public entity, by reason of any otherwise qualified individual's disability, from excluding him from participation in or denying him the benefits of its services, programs, or activities, or from subjecting him to discrimination, is not tied directly to the services, programs, or activities of public entity, and is in nature of catch-all clause that prohibits all discrimination by public entity, regardless of context. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[6] Civil Rights 78 1020

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1020 k. Accommodations in General. Most Cited Cases

"Reasonable modification" inquiry under the Americans with Disabilities Act (ADA) is highly fact-specific inquiry; what is a reasonable modification to accommodate an otherwise eligible individual's disability must be decided case-by-case based on numerous factors. Americans with Disabilities Act of 1990, § 201(2), 42 U.S.C.A. § 12131(2).

[7] Civil Rights 78 1088(4)

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

Waiting for oral interpreter before taking field sobriety tests was not reasonable modification of police procedures, in which officer who stopped motorist on suspicion of driving under the influence (DUI) had to engage to accommodate motorist's profound deafness and to avoid discriminating against him in violation of provisions of the Americans with Disabilities Act (ADA), given exigent circumstances of DUI stop on side of highway, the on-the-spot judgment required of police, and serious public safety concerns in DUI criminal activity. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[8] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

Police officer who stopped motorist on suspicion of driving under the influence (DUI), upon being informed of his deafness, did not have to accommodate his disability by not asking him to perform any field sobriety tests and by immediately arresting him and taking him to the police station for blood-alcohol breath test; proposed accommodation was not reasonable, as penalizing deaf DUI suspects and not affording them opportunity to perform field tests to show their sobriety. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[9] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

Actual communication between police officer and deaf motorist whom he had stopped on suspicion of driving under the influence (DUI) was not so ineffective that oral interpreter was necessary to guarantee that motorist was on equal footing with DUI suspects who were not hearing-impaired, and to protect motorist's rights under the Americans with Disabilities Act (ADA), where motorist admitted that he read lips and usually understood 50% of what was said, where officer, in addition to verbal instructions, gave physical demonstrations, and where motorist understood that he was being asked to perform field sobriety tests and actually tried to perform at least three of those tests. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[10] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

To take reasonable steps to accommodate the disability of profoundly deaf motorist who had been arrested for driving under the influence (DUI), as required under the Americans with Disabilities Act (ADA), arresting officer had to take appropriate steps to ensure that his communication with motorist was as effective as with other individuals arrested for DUI. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[11] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

What steps are reasonably necessary to establish effective communication at police station with hear-

ing-impaired arrestee, in order to satisfy arrestee's rights under the Americans with Disabilities Act (ADA), will depend on all the factual circumstances of case, including, but not limited to: (1) abilities of, and usual and preferred method of communication used by, the hearing-impaired arrestee; (2) nature of the criminal activity involved and the importance, complexity, context, and duration of police communication at issue; (3) location of the communication and whether it is one-on-one communication; and (4) whether arrestee's requested method of communication imposes undue burden or fundamental change, and whether another effective, but non-burdensome, method of communication exists. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[12] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

There is no bright-line rule for what steps are reasonably necessary to establish effective communication at police station with hearing-impaired arrestee, in order to satisfy arrestee's rights under the Americans with Disabilities Act (ADA); inquiry is highly fact-specific, and court will examine all factual circumstances to ascertain whether officer achieved effective communication. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[13] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

Arresting officer took steps reasonably necessary to establish effective communication at police station with the profoundly deaf motorist whom he arrested for driving under the influence (DUI), and did not discriminate against motorist in violation of provision of the Americans with Disabilities Act (ADA), where officer not only read consent form aloud to motorist twice in lighted room to afford him an opportunity to lip read, but provide him with written copy of form, and where motorist acknowledged that he could read English; motorist's own failure to read what officer provided him did not constitute discrimination. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[14] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and Detention. Most Cited Cases

Even assuming that corrections officers failed to accommodate hearing-impaired arrestee's disability by allegedly denying him access to a teletypewriter, a telecommunications device for the deaf, following his arrest, and in requiring him to use ordinary telephone to attempt to communicate his arrest to his girlfriend, this lack of accommodation did not injure arrestee or support cause of action under the Americans with Disabilities Act (ADA), where arresting officer had agreed to place phone call on arrestee's behalf to his girlfriend, and where girlfriend successfully received the message that he had been arrested and picked him up when he was released. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

***1075** Jay M. Levy, Jay M. Levy, P.A., Miami, FL, for Plaintiff-Appellant.

Eric Alexander Hernandez, Miami, FL, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, HULL and BOWMAN,[FN*] Circuit Judges.

FN* Honorable Pasco M. Bowman II, United States Circuit Judge for the Eighth Circuit,

sitting by designation.

HULL, Circuit Judge:

This case arises out of Plaintiff-Appellant Steven M. Bircoll's DUI arrest. Bircoll, who is deaf, sued Defendant-Appellee Miami-Dade County, Florida ("Miami-Dade"), alleging that its law enforcement officers violated Title II of the Americans with Disabilities Act ("ADA") and the Rehabilitation Act by discriminating against him because of his disability. Specifically, Bircoll claims that the officers failed to reasonably modify their procedures in order to ensure effective communication with Bircoll. This case presents an issue of first impression in this circuit as to the applicability of the ADA and the Rehabilitation Act to police conduct during arrests.

I. FACTUAL BACKGROUND

We first discuss Bircoll's disability and the events during his arrest. [FN1]

FN1. We recite the facts in the light most favorable to Bircoll. *See Vinyard v. Wilson*, 311 F.3d 1340, 1343 n. 1 (11th Cir.2002).

A. Bircoll's Disability

Bircoll is a profoundly deaf individual with no hearing in his left ear and ten percent hearing in his right ear. When wearing his hearing aid, Bircoll has a twenty percent hearing capacity.

Bircoll, who has been deaf for most of his life, was raised in the hearing world. Bircoll graduated from a mainstream high school and attended two years of community college. Bircoll reads, writes, and speaks English. Although Bircoll sometimes relies on other people to speak for him and uses his friends and relatives for help, Bircoll's primary form of communication is lipreading. Bircoll has been lipreading for over thirty years. Bircoll does not know or use sign language.

Bircoll is more effective in reading lips if he is facing the speaker with good light and little background noise. Bircoll has greater success in communicating with speakers who do not have facial hair, make few facial expressions, and keep their hands away from their faces. When reading lips, Bircoll usually understands about fifty percent of what is said. Bircoll speaks with a speech impediment.

As for telephone communication, Bircoll usually communicates with an amplified telephone (one that is louder than a normal phone) and a teletypewriter, a telecommunication***1076** device for the deaf ("TDD phone"). Bircoll also has a cell phone that he uses primarily for emergencies, such as calling someone to say he will be late. Bircoll cannot hear on the cell phone, but he will make the phone call, do the talking, and hang up.[FN2]

FN2. Bircoll as a teenager had a snowmobile accident that injured his legs. Because of that accident, one leg is shorter than the other. Bircoll has trouble balancing and standing for prolonged periods of time, cannot run, and sometimes limps when he walks. Bircoll's hearing impairment also affects his balance and causes dizziness.

B. Traffic Stop

On April 6, 2001, Bircoll went to dinner around 9:00 p.m. with his then-girlfriend. He was wearing his hearing aid that evening. Bircoll testified that he had less than one drink, a 7-Up with whiskey. Bircoll did not finish his drink because his stomach was bothering him. Around midnight or 1:00 a.m. on April 7th, Bircoll argued with his girlfriend and drove her back to their shared home. Bircoll went into their house, argued with his girlfriend, and then left in his car.

After about an hour of driving south on I-75, Bircoll exited the interstate. He stopped at a gas station to ask for directions back to I-75. As he was leaving the gas station, Bircoll stopped and made a right turn out of a parking lot and arrived at an intersection with a flashing red light where he stopped again. Because trees and bushes were obstructing his view, Bircoll pulled into the intersection to see if there were any oncoming cars. When Bircoll saw that it was clear, he turned left. As Bircoll was trying to determine which ramp to take for I-75, he saw lights flashing in his mirror. Bircoll realized a police officer was pulling him over and stopped.

Sergeant Charles Trask, a police officer with the Miami-Dade County Police Department, was in his patrol car and observed Bircoll's car pull forward into the intersection, reverse because of an oncoming car, and then turn left. Trask pulled Bircoll over at approximately 3:00 a.m. on April 7, 2001. Trask stated

that Bircoll failed to stop at both the right turn from the parking lot and at the flashing red light where Bircoll turned left. Trask noted that Bircoll delayed in pulling his vehicle over after Trask activated the overhead lights of his police car.

C. Field Sobriety Tests

As Trask approached Bircoll's car, Bircoll rolled down his window. When Trask tried to speak to him, Bircoll informed Trask that he was deaf and had a speech impediment. Either by virtue of his lipreading or hearing aid, or a combination of both, Bircoll was able to respond to Trask during the traffic stop.

Trask asked Bircoll how many drinks he had consumed that night. Bircoll responded that he had not been drinking. When Bircoll spoke, Trask realized that Bircoll had a speech impediment but also noticed that Bircoll responded to sound.

Trask told Bircoll to step out of his car, and Bircoll did. Trask asked Bircoll for his driver's license and registration, which Bircoll provided. Once Bircoll was out of the car, Trask realized that Bircoll smelled of alcohol and had red and watery eyes. Trask offered to communicate by fingerspelling in American Sign Language, but Bircoll responded that he did not understand sign language.[FN3]

> FN3. According to his depositions and affidavit, Trask knows the American Sign Language alphabet because he learned to use it fingerspelling with his developmentally delayed son. Bircoll's brief alleges that Trask spoke a made-up sign language, but Bircoll submitted no evidence to support this claim.

***1077** Trask contends that he established face-to-face communication with Bircoll, that he spoke loudly, and that Bircoll spoke back in understandable English. Bircoll, however, states that he had difficulty understanding Trask, that there was "little lighting" and it was "almost dark,"[FN4] that Trask was standing five or six feet away, that Trask's heavy moustache obscured his mouth, and that Trask had to repeat himself "a lot of times."

> FN4. Trask claims that he left his headlights on, and utility poles with lights were in the area.

Bircoll testified that Trask told him if Bircoll would do what Trask told him, Bircoll would be free to go. Trask began to administer field sobriety tests. According to Bircoll, when Trask began instructing him, Bircoll asked if Trask could "call somebody to help me out with this."[FN5] Trask did not do so, but instructed Bircoll to perform the tests. In his deposition, Bircoll admitted that he understood Trask was asking him to perform sobriety tests, but he did not understand why.

> FN5. In his deposition, Bircoll was asked:
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> > Q: Did you ask for an interpreter at that time?
> >
> > A: As a matter of fact, I asked him to call somebody to help me out with this.

As to the first sobriety test, Trask instructed Bircoll on the Romberg balance exercise. In that test, the individual must keep his feet together, hold his arms by his side, tilt his head back, close his eyes, and count silently for thirty seconds. Trask gave Bircoll verbal instructions and a physical demonstration of the exercise. Trask testified that Bircoll passed this test.

Bircoll admits that he tried the Romberg balance test but contends that he did not complete this test. After he closed his eyes, Trask continued talking. Bircoll opened his eyes in order to read Trask's lips. When Trask ordered him to close his eyes, Bircoll stated that he needed to be able to see to read Trask's lips. Bircoll testified that he again suggested that they should get "a lawyer or somebody."[FN6] Bircoll also stated that Trask shined the flashlight in his eyes, that Trask had heavy facial hair, and that he had a hard time understanding Trask. Bircoll told Trask several times that he was deaf and could not hear.

> FN6. In his deposition, Bircoll described this sobriety test as follows:
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> > He told me close my eyes, put my head back, and then he was saying something, and I opened my eyes trying to listen to him. He said no, no, close your eyes, put your head back. I said, sir, I need to look at your face. I can't hear you when you are

> talking to me.
>
> We did that a couple of times. He got animated and frustrated, and I knew there was a problem here. And then I told him maybe we should get a lawyer or somebody or at least call somebody because he was getting frustrated.

As to the second test, Bircoll performed the one-leg stand exercise, standing on one leg for thirty seconds. Trask gave Bircoll verbal instructions and a physical demonstration of the exercise. Bircoll testified that he had no problems performing this test. Trask contends that Bircoll failed the test because he waved and raised his arms and shuffled his feet to maintain his balance.

As to the third test, Trask gave verbal instructions and demonstrated the walk-and-turn test. In that test, the individual must walk in a straight line, turn, and walk back in the same line. Bircoll understood the instructions and attempted to perform the test, but asked if he could remove his boots. Bircoll had trouble balancing because of his knee injury and his boots. According to Bircoll, after removing his ***1078** shoes, he had no trouble walking straight. Trask contends that Bircoll did not maintain his balance and failed the exercise.

As to the fourth test, Bircoll does not remember performing the finger-to-nose test, where the individual must tilt his head back, close his eyes, and touch his index finger to the tip of his nose. Bircoll denied that Trask ever asked him to do this, and testified that he did not complete any test that required him to close his eyes. Trask contends that he verbally instructed and demonstrated the test for Bircoll and that Bircoll failed the finger-to-nose test because he did not keep his eyes closed, missed the tip of his nose, and did not use the correct hand.

Around 3:30 a.m., or thirty minutes after the stop, Trask concluded that Bircoll was too impaired to drive and arrested him for driving under the influence. Trask told Bircoll he was under arrest for DUI, handcuffed Bircoll, and put him in the police car. According to Bircoll, Trask did not inform Bircoll that he was under arrest or read him his rights. After waiting for the tow truck for Bircoll's car, Trask and Bircoll arrived at the police station at 4:10 a.m.

D. Intoxilyzer Consent Form

Once Bircoll arrived at the police station, another police officer, Officer Everett Townsend, tried to communicate with him and obtain his consent to take an Intoxilyzer test. Bircoll told Townsend that he was deaf. Townsend sat down on Bircoll's left side about a foot away. Townsend had two copies of the Intoxilyzer consent form. Townsend read from one form and handed the other form to Bircoll to read. Bircoll acknowledges that Townsend handed him "a piece of paper" but denies that Townsend asked him to read it.[FN7]

> FN7. Miami-Dade filed the deposition of Bircoll taken in a malpractice case that Bircoll filed against the attorney who represented him in his DUI case (the "malpractice deposition"). When questioned about the consent form (identified as Exhibit B) in the malpractice deposition, Bircoll admitted that the officer "handed me the piece of paper and I was trying to read it and he was trying to talk to me." When asked when the piece of paper was given to him, Bircoll said it was "[a]fter I was arrested" and "[a]t the police station."
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> In his deposition in this case, Bircoll stated that "I remember him handing me a piece of paper," but Bircoll denied that he was asked to read it.

The consent form advises a DUI arrestee that he will be offered a breath and/or urine test, and that if he refuses to take the test, his driver's license will be suspended, as follows:

> You are under arrest for driving under the influence of alcohol and/or a chemical substance and/or a controlled substance. You will be offered a Breath Test for determining the alcohol content of you[r] breath and/or a Urine Test for detecting the presence of a chemical and/or controlled substance. Should you refuse to take either of the tests, the Department of Highway Safety and Motor Vehicles will suspend your privilege to operate a motor vehicle for a period of twelve (12) months.... Your refusal to submit to a breath and/or urine test upon request of a law enforcement official shall be admissible into evidence in any criminal proceeding. You may, at your

> own expense, have other Chemical or Physical Tests performed to determine the alcohol content of your blood or breath, or to detect the presence of a chemical and/or controlled substance.

Bircoll does not deny that Townsend read aloud the consent form twice. In fact, Bircoll states that he did not read the form himself because Townsend continued talking to Bircoll and Bircoll did not look away from Townsend's face and down at the ***1079** form he was given. However, Bircoll also states that because they were side by side and not facing each other, Bircoll had trouble understanding Townsend. Bircoll testified that Townsend "was talking towards the other way."

As Townsend read aloud the consent form for the first time, Bircoll asked if he could get his wallet, which contained a "Driver's Rights Card." This card states that any consent to a test is not voluntary, as follows:

> In compliance with the requirements of Florida's Implied Consent Law *I will* consent to submit to tests of my breath, urine, blood or other bodily substances which you may designate, provided the test I am offered is properly done.... However, since I maintain that you do not have probable cause to make this request for a chemical test, my consent is given under protest and is no way voluntary.

Townsend stopped reading, photocopied the card, and wrote on the photocopy that Bircoll, upon being shown the consent language on the card, advised that his consent was not voluntary and he was "not consenting to anything." After copying the card, Townsend finished reading the consent form once and then read the form aloud a second time.

Bircoll claims that he requested an interpreter "many times" while he was at the police station. However, Townsend in his affidavit stated that "Bircoll never asked for an interpreter in my presence." Officer James Dooner was also there and stated that Bircoll never asked for an interpreter in his presence.

In addition, Townsend made notes on the two consent forms. On the first form, Townsend wrote "my copy I read from" and recorded that Bircoll said, "I hear you, but I don't understand the law. I understand what you said but I don't understand the law. I['m] not going to consent to anything." The notes on the back say that the consent form was read to Bircoll, that Bircoll was asked if he read English, and that Bircoll was given a consent form to read as well.

On the second form, Townsend wrote, "handed to defendant to read" and noted that he advised Bircoll that he would read aloud so that Bircoll could read his lips. The second form notes that Bircoll stated he would not sign anything.

Bircoll's version of the events differs materially. Bircoll denies that he ever said he understood what the police were saying but did not understand the law. Instead, Bircoll claims he told the officer that he did not understand what the officer was saying. Bircoll also denies saying that he would not consent to anything. Bircoll testified that he never refused to take the Intoxilyzer test and that the police never asked him to take it.

Townsend testified that "[a]lthough it is not usually the practice to give arrestees telephone calls at the Substation," he called Bircoll's girlfriend and informed her of Bircoll's situation. Bircoll's girlfriend stated in her deposition that she found out Bircoll had been arrested for DUI because "[t]he cops called me."

E. Jail

Around 9:15 a.m., Bircoll was transferred from the station to Turner Guilford Knight Correctional Facility ("TGK"). Pursuant to TGK's intake procedures, Bircoll's jail card, which contains information about Bircoll and his arrest, was affixed with an ADA stamp.

After he was fingerprinted and photographed, Bircoll was allowed to make phone calls. Bircoll pointed out to an officer that the phone was a pay phone and told him that he could not hear on a pay ***1080** phone. According to Bircoll, the officer replied that the pay phone was all that was available and that Bircoll could choose to use it or not. Bircoll then used a regular telephone by dialing his home number three or four times and screaming into it. He hoped that someone would listen to the messages on the answering machine and come get him.

Captain Greg Bennett of the Miami-Dade County Department of Corrections and Rehabilitation explained that under the standard operating procedures

governing intake at TGK, a disabled arrestee who is unable to communicate will be provided with appropriate auxiliary aids, such as a TDD phone. Miami-Dade submitted evidence that three TDD phones were delivered to TGK on December 29, 2000. Bircoll testified, however, that he was never offered a TDD phone.

Bircoll was placed in a cell alone and separate from the other inmates. Bircoll was released at 2:16 p.m. the same day.[FN8] Bircoll's DUI charge was later *nolle prossed*.

> FN8. In Florida, a person arrested for DUI may not be released from custody:
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> (a) Until the person is no longer under the influence of alcoholic beverages ... and affected to the extent that his or her normal faculties are impaired;
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> (b) Until the person's blood-alcohol level or breath-alcohol level is less than 0.05; or
>
> (c) Until 8 hours have elapsed from the time the person was arrested.
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> Fla. Stat. § 316.193(9).

II. PROCEDURAL HISTORY

On April 7, 2005, Bircoll filed this lawsuit alleging that: (1) Miami-Dade violated Title II of the ADA, 42 U.S.C. §§ 12131-12134, when it failed to provide him with an interpreter to assist him in communicating with police officers and denied him access to a TDD phone at the jail; and (2) Miami-Dade violated the Rehabilitation Act of 1973, 29 U.S.C. § 794, by discriminating against him when it denied him an interpreter, denied him a TDD phone, and placed him in solitary confinement.[FN9] Miami-Dade moved for summary judgment on these claims.[FN10]

> FN9. Bircoll's complaint also contained a 42 U.S.C. § 1983 claim, but the district court granted Miami-Dade judgment on this count, and it is not involved in this appeal.
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> FN10. Bircoll's complaint initially included the Miami-Dade County Police Department and the Miami-Dade County Department of Corrections and Rehabilitation as defendants. The complaint against the departments was dismissed because they are not legal entities subject to suit. The case proceeded against only Miami-Dade County.

As to the ADA claim, the district court noted that this Court has yet to address whether the ADA applies to a DUI arrest. *See* *Bircoll v. Miami-Dade County*, 410 F.Supp.2d 1280, 1283 (S.D.Fla.2006). The district court adopted the Fourth Circuit's approach in *Rosen v. Montgomery County*, 121 F.3d 154 (4th Cir.1997), and concluded that the ADA did not apply to police conduct during Bircoll's DUI arrest or at the station. *Bircoll*, 410 F.Supp.2d at 1283-84. The district court reasoned that the officers at the station "merely communicated the Breath Test consent form to Plaintiff and Plaintiff refused," and that "no 'police investigative activities' ever took place." *Id.* at 1284-85. As to the Rehabilitation Act claim, the district court determined that a plaintiff who proceeds under a theory of inequal treatment must prove intentional discrimination or bad faith. *Id.* at 1286. The district court also noted that this Court has not addressed whether intentional discrimination in Rehabilitation Act claims can be proven by "deliberate indifference," but found that in any event Defendant's actions did not rise to the ***1081** level of intentional discrimination or deliberate indifference. *Id.*[FN11]

> FN11. The district court also concluded that the police had probable cause to arrest Bircoll for DUI based on his erratic driving, red and watery eyes, and smell of alcohol; that the arrest was not based on Bircoll's disability; and that there was no causal connection between Bircoll's disability and the arrest made during the traffic stop. *Bircoll*, 410 F.Supp.2d at 1286.
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> In his brief on appeal, Bircoll does not advance a wrongful-arrest claim under the ADA but argues only a failure to accommodate his disability. At oral argument, Bircoll's lawyer acknowledged that Trask had probable cause to arrest Bircoll. Thus, we have no occasion to address whether a wrongful-arrest claim would be cognizable under the ADA.

[1] On appeal, Bircoll argues that the district court

erred in concluding that Title II of the ADA did not apply to law enforcement activity during his DUI arrest on the roadside, at the police station, and at the jail. We first review the statutory language of Title II and relevant case law.[FN12]

FN12. This Court reviews *de novo* the district court's grant of summary judgment, drawing all facts and inferences in the light most favorable to Bircoll. *See Giddens v. Equitable Life Assurance Soc'y of the U.S.*, 445 F.3d 1286, 1292 n. 4 (11th Cir.2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

III. TITLE II OF THE ADA

A. Statutory Language and Regulations

[2] Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA prohibits a "public entity" from discriminating against "a qualified individual with a disability" on account of the individual's disability, as follows:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications ... or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The Supreme Court has instructed that a disabled prisoner can state a Title II-ADA claim if he is denied participation in an activity provided in state prison by reason of his disability. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211, 118 S.Ct. 1952, 1955, 141 L.Ed.2d 215 (1998). The words "eligibility" and "participation" in the statutory definition of a qualified individual with a disability "do not connote voluntariness" and do not require voluntariness on the part of an applicant who seeks a benefit from the state. *Id.*

Title II of the ADA also provides that "the Attorney General shall promulgate regulations" that implement Title II, Part A. 42 U.S.C. § 12134(a). The Department of Justice ("DOJ") has promulgated regulations implementing Title II's prohibition against discrimination. The DOJ's regulations provide that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program,***1082** or activity." 28 C.F.R. § 35.130(b)(7).[FN13]

FN13. Title I, in its statutory text, notes that discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). Title III, in its statutory text, notes that discrimination includes "a failure to make reasonable modifications in policies, practices, or procedures." 42 U.S.C. § 12182(b)(2)(A)(ii). There is no similar statutory language in Title II.

> However, the DOJ regulations for Title II impose the requirement of "reasonable modifications" to procedures to avoid the discrimination prohibited by Title II. *Compare* 42 U.S.C. §§ 12111, 12112, *and* 42 U.S.C. § 12182, *with* 28 C.F.R. pt. 35. There is no claim in this case that the DOJ's Title II regulations go beyond the statutory authority of the ADA. In *Olmstead v. L.C. ex rel. Zimring*, the Supreme Court cited these same DOJ-Title II regulations, stating that "[w]e recite these regulations with the caveat that we do not here determine their validity." 527 U.S. 581, 592 119 S.Ct. 2176, 2183, 144 L.Ed.2d 540 (1999). The Supreme Court added, "we do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization." *Id.* Because Miami-Dade has not challenged the validity of the DOJ's regulations for Title II, we likewise interpret and apply the

> regulations but with the caveat that we do not here determine their validity.

These same DOJ regulations also contain Subpart E, entitled "Communications," which provides that "[a] public entity shall take appropriate steps to ensure that communications with ... members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a). These steps include furnishing "appropriate auxiliary aids and services" to afford a disabled individual equal opportunity to participate in an activity of the public entity, as follows:

> A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

28 C.F.R. § 35.160(b)(1). The ADA defines "auxiliary aids and services" to include "qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments." 42 U.S.C. § 12102(1)(A). The DOJ regulations provide that "auxiliary aids and services" include, among other things, "[q]ualified interpreters" and "telecommunications devices for deaf persons (TDD's)." 28 C.F.R. § 35.104(1). Further, the Appendix to DOJ Regulation § 35.160 states that "[t]he public entity shall honor the [disabled individual's] choice [of auxiliary aid] unless it can demonstrate another effective means of communication exists or that use of the means chosen would not be required under § 35.164." 28 C.F.R. pt. 35, app. A; *see also id.* § 35.160(b)(2) ("In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.").

[3] The ADA's "reasonable modification" principle, however, does not require a public entity to employ any and all means to make auxiliary aids and services accessible to persons with disabilities, but only to make "reasonable modifications" that would not fundamentally alter the nature of the service or activity of the public entity or impose an undue burden. *See Tennessee v. Lane*, 541 U.S. 509, 531-32, 124 S.Ct. 1978, 1993-94, 158 L.Ed.2d 820 (2004) ("Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities.... It requires only 'reasonable modifications' that would not fundamentally alter***1083** the nature of the service provided .... [or] impose an undue financial or administrative burden.").

B. Circuit Law on Arrestees under the ADA

[4] In order to state a Title II claim, a plaintiff generally must prove (1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability. *See Shotz v. Cates*, 256 F.3d 1077, 1079 (11th Cir.2001) (citing 42 U.S.C. § 12132).

The parties do not contest that Bircoll is a "qualified individual with a disability" under the first prong, or that Miami-Dade is a "public entity" under the second prong.[FN14] Rather, the dispute in this case is over whether Bircoll was excluded from participation in, or denied the benefit of, some "services, programs, or activities" of Miami-Dade by reason of his disability, *or* was "subjected to discrimination" by Miami-Dade by reason of his disability. 42 U.S.C. § 12132.

> FN14. *See Yeskey*, 524 U.S. at 209-10, 118 S.Ct. at 1954-55 (quoting § 12131(1)(B) and concluding that state prisons "fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government' ").

Relying heavily on the Fourth Circuit's decision in *Rosen*, in which a deaf person was arrested for DUI, Miami-Dade argues that arrests of deaf persons are not "services, programs, or activities" that fall within the parameters of the ADA. *See Rosen*, 121 F.3d at 157 ("[C]alling a drunk driving arrest a 'program or activity' of the County, the 'essential eligibility requirements' of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent."). In *Rosen*, the Fourth Circuit concluded that even "[i]f we assume, however, that the police were required [under the ADA] to provide auxiliary aids at some point in the process, that point certainly

cannot be placed before the arrival at the stationhouse. The police do not have to get an interpreter before they can stop and shackle a fleeing bank robber, and they do not have to do so to stop a suspected drunk driver, conduct a field sobriety test, and make an arrest." *Id.* at 158.

In reply, Bircoll emphasizes that *Rosen* was decided before the Supreme Court's *Yeskey* decision, which concluded that a state prisoner has a cognizable ADA claim if he is denied participation in a required activity in prison by reason of his disability. Additionally, Bircoll relies on three other circuits' decisions indicating that arrestees may state cognizable ADA claims under Title II. *See Hainze v. Richards*, 207 F.3d 795 (5th Cir.2000); *Gohier v. Enright*, 186 F.3d 1216 (10th Cir.1999); *Gorman v. Bartch*, 152 F.3d 907 (8th Cir.1998). However, none of these cases extends the ADA as far as Bircoll claims.

For example, in *Hainze*, the Fifth Circuit concluded that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents ... *prior to* the officer's securing the scene and ensuring that there is no threat to human life." 207 F.3d at 801 (emphasis added). The police officers responded to a request to take a mentally ill individual, Hainze, to a hospital. *Id.* at 797. When they arrived at the scene, Hainze, with a knife in his hand, began to walk toward one of the officers. *Id.* In concluding that the ADA did not govern ***1084** the police officers' actions, the Fifth Circuit pointed out that officers "already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations." *Id.* at 801. The Fifth Circuit reasoned that requiring police officers called to the scene of a reported disturbance "to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents." *Id.*

Nonetheless, the Fifth Circuit indicated that "[o]nce the area was secure and there was no threat to human safety ... deputies would have been under a duty to reasonably accommodate Hainze's disability in *handling and transporting him to a mental health facility*." *Id.* at 802 (emphasis added).[FN15]

FN15. Hainze was shot in the chest at the scene and transported by EMS, not the police. The Fifth Circuit's ultimate holding was that Hainze did not state a Title II claim against the police. *See Hainze*, 207 F.3d at 801.

Likewise, the Eighth Circuit concluded that the ADA applies to *police transportation of the arrestee* from the scene to the police station. *See Gorman*, 152 F.3d at 912-13. In that case, the Eighth Circuit reasoned that "[t]ransportation of an arrestee to the station house is ... a service of the police within the meaning of the ADA." *Id.* at 912. The Eighth Circuit decided that "the 'benefit' [arrestee] Gorman sought ... was to be handled and transported in a safe and appropriate manner consistent with his disability." *Id.* at 913 (citing 28 C.F.R. § 35.130(b)(1)). The Eighth Circuit ruled that "Gorman's allegations pass[ed] the threshold required to bring a case under the ADA and the Rehabilitation Act" and reversed the judgment for the defendants.[FN16] *Id.*

FN16. The Eighth Circuit remanded the case for development of the factual record, stating:

> It remains to be determined whether Gorman can prove he was discriminated against or denied a benefit or service because of his disability or whether the defendants can show they made reasonable accommodations of his disability or if further accommodation would have been an undue burden. 29 U.S.C. § 794a(a)(1); 42 U.S.C. § 12133.
>
> *Gorman*, 152 F.3d at 913.

The Tenth Circuit also recognized the possibility that arrestees may be able to state an ADA claim based on police conduct during an arrest. *Gohier*, 186 F.3d at 1220-21. However, the Tenth Circuit ultimately left the theory of such a claim "an open question" in the circuit because the facts did not show a wrongful arrest based on a disability and the plaintiff made no claim that the police had failed to accommodate his disability during the arrest. *Id.* at 1221.[FN17]

FN17. The Tenth Circuit described two potential theories of ADA-Title II liability: (1) "wrongful-arrest," where the police

> "wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity"; and (2) "reasonable-accommodation-during-arrest," where the police properly investigate and arrest a person with a disability for a crime unrelated to that disability, but fail "to reasonably accommodate the person's disability in the course of investigation or arrest." *Gohier*, 186 F.3d at 1220-21; *see supra* note 11.

[5] We need not enter the circuits' debate about whether police conduct during an arrest is a program, service, or activity covered by the ADA. This is because Bircoll, in any event, could still attempt to show an ADA claim under the final clause in the Title II statute: that he was "subjected to discrimination" by a public entity, the police, by reason of his disability. *See* 42 U.S.C. § 12132. Indeed, this Court ***1085** already has explained that the final clause of § 12132 "protects qualified individuals with a disability from being 'subjected to discrimination by any such entity,' and is not tied directly to the 'services, programs, or activities' of the public entity." *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 821-22 (11th Cir.1998) (quoting 42 U.S.C. § 12132). We said in *Bledsoe* that this final clause in Title II " 'is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.' " *Id.* at 822 (quoting *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir.1997), *overruled on other grounds by Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163 (2d Cir.2001)); *see also Gohier*, 186 F.3d at 1220 (noting that the magistrate judge "ignored the second basis for a Title II claim" and emphasizing the disjunctive language "*or* be subjected to discrimination" in the final clause of § 12132).

In this case, Bircoll identifies three separate points at which he contends Miami-Dade subjected him to discrimination by reason of his hearing disability: (1) the field sobriety tests on the roadside; (2) the consent warning and Intoxilyzer test at the police station; and (3) his incarceration at TGK. Specifically, Bircoll argues that he was entitled to effective communication with the police throughout his arrest; that he needed auxiliary aids, such as an oral interpreter, for effective communication during these tests; and that the police failed to make reasonable modifications to their procedures to ensure effective communication, thereby subjecting him to discrimination in violation of the ADA.

Bircoll claims that if he had been provided with auxiliary aids, he would have understood what the police were asking him to do, would have consented to and passed the Intoxilyzer test, and would not have lost his license or gone to jail. Even if he would have failed the Intoxilyzer test, Bircoll argues that he still was injured because with effective communication he would have consented to the Intoxilyzer test and would not have had his license automatically suspended. We examine each point at which Bircoll claims that he was denied effective communication and discriminated against because of his disability.

IV. FIELD SOBRIETY TESTS

We turn first to the field sobriety tests. As noted earlier, the Fifth Circuit in *Hainze* concluded that "Title II *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents ... *prior to* the officer's securing the scene and ensuring that there is no threat to human life." *Hainze*, 207 F.3d at 801 (emphasis added). In our view, the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of Bircoll's disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance.

[6] In other words, the question is whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer's safety. The reasonable-modification inquiry in Title II-ADA cases is "a highly fact-specific inquiry." *See Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1527 (11th Cir.1997) (stating, in a Title I-ADA reasonable accommodation case, that "what is reasonable for each individual employer is a highly fact-specific inquiry that will vary depending on the ***1086** circumstances and necessities of each employment situation"). We emphasize that terms like reasonable are relative to the particular circumstances of the case and the circumstances of a DUI arrest on the roadside are different from those of an office or

school or even a police station. What is reasonable must be decided case-by-case based on numerous factors.

[7] Here, Bircoll claims that he requested an interpreter, which Trask denies. Even assuming Bircoll asked for an oral interpreter,[FN18] we conclude that waiting for an oral interpreter before taking field sobriety tests is not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway, the on-the-spot judgment required of police, and the serious public safety concerns in DUI criminal activity. In DUI stops, as opposed to minor traffic offenses, the danger to human life is high. To protect public safety, Trask had to determine quickly, on the roadside at 3:00 a.m., whether Bircoll was sober enough to drive his car further or whether to impound his car and arrest him. DUI stops involve a situation where time is of the essence. Forestalling all police activity at a roadside DUI stop until an oral interpreter arrives is not only impractical but also would jeopardize the police's ability to act in time to obtain an accurate measure of the driver's inebriation. Moreover, field sobriety exercises are short tests that can be physically and visually demonstrated. DUI stops do not involve lengthy communications and the suspect is not asked to give a written statement. In sum, field sobriety tests in DUI arrests involve exigencies that necessitate prompt action for the protection of the public and make the provision of an oral interpreter to a driver who speaks English and can read lips per se not reasonable.

> FN18. Because Bircoll does not know sign language, we assume Bircoll wanted an oral interpreter trained to mouth words so that Bircoll could lip read accurately and to verbalize accurately Bircoll's messages based on his speech and mouth movements.

[8] We also reject Bircoll's alternative argument that once he told Trask of his deafness, Trask was required to accommodate his deafness by not asking him to perform any field sobriety tests and by immediately arresting him and taking him to the police station for the Intoxilyzer breath test. Bircoll's proposal, if anything, would force police to arrest deaf DUI suspects before even ascertaining if the suspect could communicate in some other way and understand the field sobriety tests. This would penalize deaf DUI suspects and not afford them the opportunity to perform the field tests and show their sobriety.

[9] In any event, the actual communication between Trask and Bircoll was not so ineffective that an oral interpreter was necessary to guarantee that Bircoll was on equal footing with hearing individuals. *See Kornblau v. Dade County*, 86 F.3d 193, 194 (11th Cir.1996) ("The purpose of the [ADA] is to place those with disabilities on an equal footing, not to give them an unfair advantage."). Bircoll admits that he reads lips and usually understands fifty percent of what is said. In addition to verbal instructions, Trask gave physical demonstrations. During the traffic stop, Bircoll was able to respond to Trask's directions about getting out of the car and providing his driver's license and insurance. While the communication may not have been perfect, Bircoll, by his own admission, understood that he was being asked to perform field sobriety tests. Bircoll also admits he actually tried to perform at least three of those tests. For all of the foregoing reasons, we conclude that ***1087** Bircoll has failed to state an ADA claim regarding the field sobriety tests during his DUI arrest.

V. POLICE STATION

[10] Once Bircoll was arrested and arrived at the police station at 4:10 a.m., the exigencies of the situation were greatly reduced. Nonetheless, time remained a factor in obtaining an Intoxilyzer test that accurately measured Bircoll's impairment, or lack thereof, while driving at 3:00 a.m. Townsend read the consent warning to Bircoll. Hearing individuals, even if impaired by alcohol, at least hear the consent warning, and Bircoll is entitled to be placed on equal footing with other arrestees at the police station. Thus, we conclude that at the police station, Townsend was required to take appropriate steps to ensure that his communication with Bircoll was as effective as with other individuals arrested for DUI.

[11][12] What steps are reasonably necessary to establish effective communication with a hearing-impaired person after a DUI arrest and at a police station will depend on all the factual circumstances of the case, including, but not limited to:

(1) the abilities of, and the usual and preferred method of communication used by, the hearing-impaired arrestee;

(2) the nature of the criminal activity involved

and the importance, complexity, context, and duration of the police communication at issue;

(3) the location of the communication and whether it is a one-on-one communication; and

(4) whether the arrestee's requested method of communication imposes an undue burden or fundamental change and whether another effective, but non-burdensome, method of communication exists.

In many circumstances, oral communication plus gestures and visual aids or note writing will achieve effective communication. In other circumstances, an interpreter will be needed. There is no bright-line rule, and the inquiry is highly fact-specific. Thus, we examine all factual circumstances to ascertain whether Townsend achieved effective communication with Bircoll.

[13] As to his abilities and usual communication mode, Bircoll has a twenty percent hearing capacity when using his hearing aid and relies on lipreading to communicate. Bircoll can understand about half of what is said when he is lipreading. He can also read, write, and speak in English.

The police communication at issue-the consent warning-although important, is short and not complex. Moreover, even before that night, Bircoll already had some knowledge of what Townsend sought to communicate to him. In a deposition, when questioned about the Intoxilyzer test, Bircoll testified that "I know that if you fail the sobriety test, you have to do the breathalyzer test, yes." Bircoll also already knew that if he refused the Intoxilyzer, he would lose his license for a year.[FN19]

FN19. In the malpractice deposition, Bircoll testified:

Q: You knew when you got a Florida driver's license, if you're stopped and suspected of drinking alcohol, that the officers will give you a breathalyzer test, and if you refuse it, you'll lose your license for a year?

A: I know that but, I don't take the test. I'll lose it.

Q: You were aware of that before you were stopped?

A: Yes.

***1088** The communication at issue was one-on-one, with Townsend sitting next to Bircoll on a bench. Townsend read the consent form aloud to Bircoll twice. Townsend spoke to Bircoll in lighted conditions. Moreover, an effective, non-burdensome method of communication existed as to this short implied consent warning. Bircoll can read English, and Townsend gave him a copy of the form to read. Townsend thus accommodated Bircoll by giving him written material. Bircoll's own failure to read what Townsend provided him does not constitute discrimination.

We recognize that there are factual issues about whether Bircoll requested an interpreter "many times" at the station and whether Townsend was facing, or turning away from, Bircoll. Nonetheless, Bircoll admits that Townsend read the form aloud twice and gave him a copy. Even assuming the facts most favorable to Bircoll, we conclude that, under all the circumstances here and especially given Bircoll's admitted prior knowledge, Townsend established effective communication with Bircoll regarding the consent warning and Intoxilyzer test. Accordingly, Miami-Dade did not violate the ADA at the police station.

VI. TGK DETENTION

[14] The corrections officers at TGK recognized Bircoll's hearing disability and affixed an ADA stamp to Bircoll's jail card. Miami-Dade does not deny that TGK has TDD phones available for disabled arrestees to use and that, under the ADA, it should accommodate Bircoll's hearing loss by making a TDD phone accessible at the jail. Instead, Miami-Dade asserts that even if Bircoll was denied access to a TDD phone, he cannot show he suffered any injury as a result.[FN20]

FN20. Bircoll's complaint also alleged a violation of the Rehabilitation Act for being placed in a cell alone and being held for "an inordinate and excessive amount of time." Miami-Dade responded that it provided preliminary protection to Bircoll by placing him in a cell separate from other inmates until it could be determined whether he could be

held in an appropriate classification of the inmate general population. Because Bircoll did not argue these claims on appeal, we do not address them. *See* *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir.2005); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 6 (11th Cir.1989).

At the police station, Townsend agreed to place a phone call on Bircoll's behalf to his girlfriend. Townsend essentially acted as a relay operator for Bircoll and conveyed to Bircoll's girlfriend that Bircoll had been arrested and needed to be picked up.

Once at TGK, Bircoll used the regular phones to place several calls to his own home-where his girlfriend lived-and leave messages on his answering machine. Bircoll used the regular phones at TGK in the same way he regularly uses his cell phone: by making a phone call and doing the talking in hopes that his message will be received. When Bircoll was discharged, he was picked up by his girlfriend and another friend. His girlfriend successfully received the message that Bircoll had been arrested and picked him up when he was released.

Moreover, Bircoll does not identify whom he would have called from a TDD phone. Bircoll cites no adverse effects associated with his having to rely on the police at the station to make a phone call for him, or his own use of a regular phone at the jail. Because Bircoll has shown no injury, we affirm the grant of summary judgment for Miami-Dade on Bircoll's TDD claim.[FN21]

FN21. This Court may affirm on any ground supported by the record. *See* *United States v. Mejia*, 82 F.3d 1032, 1035 (11th Cir.1996). For the same reasons we affirm the district court's grant of summary judgment to Miami-Dade on Bircoll's ADA claims, we also affirm the summary judgment granted to Miami-Dade on Bircoll's Rehabilitation Act claims. *See* *Cash v. Smith*, 231 F.3d 1301, 1305 & n. 2 (11th Cir.2000) (stating that "[d]iscrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases," and "[c]ases decided under the Rehabilitation Act are precedent for cases under the ADA, and vice-versa").

***1089** VII. CONCLUSION

For all of the foregoing reasons, we affirm the district court's order of January 17, 2006.

AFFIRMED.

C.A.11 (Fla.),2007.
Bircoll v. Miami-Dade County
480 F.3d 1072, 34 NDLR P 107, 20 Fla. L. Weekly Fed. C 371

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217 F.Supp.2d 938, 169 Ed. Law Rep. 247
(Cite as: 217 F.Supp.2d 938)

H

United States District Court,
E.D. Arkansas,
Western Division.
Cynthia BOONE, Individually and as Next Friend of Ashley Boone, Plaintiff,
v.
Fay BOOZMAN, Director of the Arkansas Department of Health, in his Official Capacity; John Doe 1 through John Doe 20, in their Official Capacities as Agents, Servants, Employees or Officials of the State of Arkansas, Department of Health; and Cabot School District, Defendants.

No. 4:01CV006585 SWW.
Aug. 12, 2002.

Parent brought § 1983 action, challenging constitutionality of Arkansas' student immunization statute. On cross-motions for summary judgment, the District Court, Susan Webber Wright, Chief Judge, held that: (1) statute's religious exemption provision, which only recognized objections based on tenets or practices of "recognized church or religious denomination," violated mother's Free Exercise and Establishment Clause rights, but (2) severed remainder of statute, requiring immunization without religious exemption, was constitutional.

Motions granted in part and denied in part.

West Headnotes

[1] Constitutional Law 92 1292

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1292 k. Beliefs Protected; Inquiry Into Beliefs. Most Cited Cases
(Formerly 92k84.2)

Belief must be rooted in religion to be protected by religion clauses of First Amendment. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 1292

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1292 k. Beliefs Protected; Inquiry Into Beliefs. Most Cited Cases
(Formerly 92k84.2)

Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 1356

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1341 Public Education
92k1356 k. Immunization Requirements. Most Cited Cases
(Formerly 92k84.5(3))

Schools 345 158(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k156 Health Regulations
345k158 Vaccination
345k158(1) k. In General. Most Cited Cases

Mother's belief concerning student immunization, as divined from her reading of bible and through God's revelations to her through angels, was rooted in religion and sincere, and thus entitled to First Amendment protection. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law 92 1295

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General

92k1294 Establishment of Religion
92k1295 k. In General. Most Cited Cases
(Formerly 92k84.1)

If statute which allegedly violates Establishment Clause discriminates among religious sects, court applies strict scrutiny review; if it does not so discriminate, court applies *Lemon* test, under which statute, to survive, must: (1) have secular legislative purpose; (2) have primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 1356

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1341 Public Education
92k1356 k. Immunization Requirements. Most Cited Cases
(Formerly 92k84.5(3))

Schools 345 158(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k156 Health Regulations
345k158 Vaccination
345k158(1) k. In General. Most Cited Cases

Provision of Arkansas student immunization statute, which limited religious exemption to objections based on tenets or practices of "recognized church or religious denomination," violated Establishment Clause rights of mother whose objection was based on personal religious beliefs; exemption was not religiously neutral, and fostered excessive government entanglement with religion. U.S.C.A. Const.Amend. 1; A.C.A. § 6–18–702(d)(2).

[6] Constitutional Law 92 1356

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1341 Public Education
92k1356 k. Immunization Requirements. Most Cited Cases
(Formerly 92k84.5(3))

Schools 345 158(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k156 Health Regulations
345k158 Vaccination
345k158(1) k. In General. Most Cited Cases

Provision of Arkansas student immunization statute, which limited religious exemption to objections based on tenets or practices of "recognized church or religious denomination," violated Free Exercise rights of mother whose objection was based on personal religious beliefs; state had no compelling interest in limiting religious exemption to some religious sects and individuals over others. U.S.C.A. Const.Amend. 1; A.C.A. § 6–18–702(d)(2).

[7] Statutes 361 64(2)

361 Statutes
361I Enactment, Requisites, and Validity in General
361k64 Effect of Partial Invalidity
361k64(2) k. Acts Relating to Particular Subjects in General. Most Cited Cases

Appropriate remedy, upon determining unconstitutionality of religious exemption provision in Arkansas student immunization statute, was to sever it from remainder of statute, which was complete in itself and capable of execution in accordance with apparent legislative intent. A.C.A. § 6–18–702.

[8] Constitutional Law 92 1291

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1291 k. Neutrality. Most Cited Cases
(Formerly 92k84.1)

Law that is neutral and of general applicability

need not be justified by compelling government interest even if law has incidental effect of burdening particular religious practice; law failing to satisfy neutrality and general applicability requirements, however, must be justified by compelling governmental interest and must be narrowly tailored to advance that interest. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law 92 1308

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1302 Free Exercise of Religion
92k1308 k. Strict Scrutiny; Compelling Interest. Most Cited Cases
(Formerly 92k84.1)

In "hybrid rights" case, where free exercise claim is conjoined with other constitutional protections such as freedom of speech and of press, or right of parents to direct education of their children, court may apply strict scrutiny to neutral law of general applicability. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law 92 1356

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1341 Public Education
92k1356 k. Immunization Requirements. Most Cited Cases
(Formerly 92k84.5(3))

Arkansas compulsory student immunization statute was neutral law of general applicability, and thus heightened scrutiny was not warranted in challenge by parent on ground statute violated her right to free exercise of religion. U.S.C.A. Const.Amend. 1; A.C.A. § 6–18–702.

[11] Constitutional Law 92 1356

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1341 Public Education
92k1356 k. Immunization Requirements. Most Cited Cases
(Formerly 92k84.5(3))

Constitutional Law 92 1363

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1362 Private Education
92k1363 k. In General. Most Cited Cases
(Formerly 92k84.5(4.1))

Schools 345 158(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k156 Health Regulations
345k158 Vaccination
345k158(1) k. In General. Most Cited Cases

Arkansas compulsory immunization statute, requiring all public or private school students to be immunized against Hepatitis B, was reasonable public health regulation which did not violate free exercise rights of objecting parent. U.S.C.A. Const.Amend. 1; A.C.A. § 6–18–702.

[12] Constitutional Law 92 4391

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4390 Parent and Child Relationship
92k4391 k. In General. Most Cited Cases
(Formerly 92k274(5))

Parent's constitutional right to direct education and upbringing of her child is grounded in Due Process Clause of Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

[13] Schools 345 158(1)

345 Schools
345II Public Schools

345II(L) Pupils
345k156 Health Regulations
345k158 Vaccination
345k158(1) k. In General. Most Cited Cases
(Formerly 92k82(12))

Arkansas compulsory immunization statute did not implicate parent's constitutional right to direct education of her child. U.S.C.A. Const. Amend. 14; A.C.A. § 6–18–702.

[14] Constitutional Law 92 4454

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)22 Privacy and Sexual Matters
92k4454 k. Refusal of Medical Treatment. Most Cited Cases
(Formerly 92k274(2))

Person's right to refuse medical treatment, which is part of liberty protected under Due Process Clause, is not absolute, and can be regulated by state. U.S.C.A. Const.Amend. 14.

[15] Constitutional Law 92 1053

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1053 k. Strict or Heightened Scrutiny; Compelling Interest. Most Cited Cases
(Formerly 92k82(1))

Constitutional Law 92 1054

92 Constitutional Law
92VII Constitutional Rights in General
92VII(A) In General
92k1054 k. Intermediate Scrutiny. Most Cited Cases
(Formerly 92k82(1))

Where state infringes on fundamental constitutional right, strict scrutiny applies; otherwise, state need only have legitimate purpose.

[16] Constitutional Law 92 3894

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3894 k. Rights and Interests Protected; Fundamental Rights. Most Cited Cases
(Formerly 92k252.5)

To properly determine whether asserted right is fundamental right subject to heightened protection under Due Process Clause, and to limit subjectivity inherent in analysis of substantive due process claim, court must: (1) consider whether asserted right is deeply rooted in nation's history and traditions, and implicit in concept of ordered liberty; and (2) require careful description of asserted fundamental right at stake. U.S.C.A. Const.Amend. 14.

[17] Constitutional Law 92 4205

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4204 Students
92k4205 k. In General. Most Cited Cases
(Formerly 92k278.5(5.1))

Special protection of the Due Process Clause does not include parent's right to refuse to have her child immunized before attending public or private school where immunization is precondition to attending school. U.S.C.A. Const.Amend. 14.

[18] Constitutional Law 92 4205

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4204 Students
92k4205 k. In General. Most Cited Cases

(Formerly 92k278.5(5.1))

Schools 345 158(1)

345 Schools
345II Public Schools
345II(L) Pupils
345k156 Health Regulations
345k158 Vaccination
345k158(1) k. In General. Most Cited Cases

Arkansas compulsory immunization statute, requiring all public or private school students to be immunized against Hepatitis B, was reasonable public health regulation which did not violate substantive due process rights of student or objecting parent. U.S.C.A. Const.Amend. 14; A.C.A. § 6–18–702.

[19] Constitutional Law 92 1075

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1074 Right to Education
92k1075 k. In General. Most Cited Cases
(Formerly 92k85)

Constitutional Law 92 1076

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1074 Right to Education
92k1076 k. Fundamental Nature of Right. Most Cited Cases
(Formerly 92k85)

Right to education is not provided explicit or implicit protection under Constitution and is not fundamental right or liberty.

West Codenotes
Held UnconstitutionalA.C.A. § 6–18–702(d)(2). ***941** Gregory T. Karber,Pryor, Robertson & Barry, PLLC, Fort Smith, AR, Robert T. Moxley, Gage & Moxley, Cheyenne, WY, for Plaintiff.

Robert Michael Brech, Arkansas Dept. of Health, Little Rock, AR, for Arkansas Dept. of Health and Fay Boozman.

William Clay Brazil, Brazil, Adlong & Winningham, Conway, AR, for Cabot School District.

MEMORANDUM OPINION AND ORDER

SUSAN WEBBER WRIGHT, Chief Judge.

Section 6–18–702 of the Arkansas Code Annotated requires that children be immunized from certain diseases before they may attend public or private school in the State of Arkansas. In enacting subsection (d) of that statute, the General Assembly conferred a religious exemption from the immunization requirements on individuals for whom "immunization conflicts with the religious tenets and practices of a recognized church or religious denomination of which [they are] an adherent or member." Plaintiff Cynthia Boone, on behalf of her daughter Ashley Boone, filed this 42 U.S.C. § 1983 action challenging the constitutionality of the immunization statute after her daughter was suspended from school because she had not received the required Hepatitis B immunization.[FN1]

FN1. Two other cases were filed in federal court challenging the constitutionality of the immunization statute: *Brock v. Boozman*, No. 4:01CV00760 SWW, 2002 WL 1972086, in the Eastern District of Arkansas, and *McCarthy v. Boozman*, 212 F.Supp.2d 945 (W.D.Ark.2002), in the Western District of Arkansas. On July 25, 2002, United States District Judge Robert T. Dawson of the Western District of Arkansas filed a Memorandum Opinion and Order in the *McCarthy* case declaring the religious exemption to the immunization statute unconstitutional. Although different facts and arguments presented in this case have dictated the analysis to be followed in this case, to the extent the legal analysis and conclusions present in Judge Dawson's Memorandum Opinion and Order are applicable to this case, the Court adopts them fully.

Now before the Court is separate defendant Fay Boozman's motion for summary judgment [docket no. 47], separate defendant Cabot School District's adoption of that motion [docket no. 50], and plaintiff's response in opposition [docket no. 51]. Also before the Court are plaintiff's motions for summary judgment

under the Fourteenth Amendment [docket no. 53] and First Amendment [docket no. 56] to the United States Constitution, separate defendant Fay Boozman's responses in opposition [docket nos. 59, 63], and separate defendant Cabot School District's response [docket no. 65]. After careful consideration, and for the reasons stated below, the Court determines that defendant's motion for summary judgment must be granted in part and denied in part, plaintiff's motion for summary judgment under the Fourteenth Amendment must be denied, and plaintiff's motion for summary judgment under the First Amendment must be granted in part and denied in part.

I. Background

Unless otherwise attributed, the following undisputed facts are taken directly ***942** from the parties' statements of undisputed facts [docket nos. 49, 55, 58, 61, 64].[FN2]

> FN2. Plaintiff did not file a separate statement of disputed facts in response to separate defendant Fay Boozman's statement of undisputed material facts [docket no. 49], and those facts are thus deemed admitted. *See* Local Rule 56.1(b) & (c). Additionally, in her brief in response [docket no. 52] to Boozman's motion for summary judgment [docket no. 48], plaintiff indicates agreement with the facts as stated by Boozman; the Court thus considers those facts undisputed and includes them in the above rendition.

Section 6–18–702(a) of the Arkansas Code Annotated provides that no child shall be admitted to school without proof of immunization from certain diseases.[FN3] The Arkansas Department of Health is charged by Arkansas statute and federal regulations with auditing the immunization status of Arkansas school children which includes notifying schools and/or citizens of any lack of "full immunization" status. Hepatitis B has been designated as one of those diseases from which school children must be immunized.[FN4] As a transfer student, Ashley Boone was required to submit proof that she had received the Hepatitis B vaccine. Cynthia Boone brought the present action after the Cabot School District, on or about October 1, 2001, informed her that her daughter, Ashley Boone, could no longer attend Cabot Senior High School because she did not have a Hepatitis B vaccination.[FN5]

FN3. The immunization statute states: "Except as otherwise provided by law, no infant or child shall be admitted to a public or private school or child care facility of this state who has not been age appropriately immunized from poliomyelitis, diphtheria, tetanus, pertussis, red (rubeola) measles, rubella, and other diseases as designated by the State Board of Health, as evidenced by a certificate of a licensed physician or a public health department acknowledging the immunization." ArkCode Ann. § 6–18–702(a) (Repl.1999).

FN4. Specifically, the Rules and Regulations promulgated July 27, 2000 by the Arkansas Department of Health pursuant to the immunization statute provide the following: "The requirements[ ] for entry into school, irrespective of grade, are at least three doses of Acellular Diphtheria/Tetanus/Pertussis (DtaP), Diptheria/Tetanus/Pertussis (DTP), Diphtheria/Tetanus (DT pediatric), or Tetanus/Diphtheria (Td Adult), at least three doses of polio vaccine; two doses of Rubeola (measles) vaccine, one dose of Rubella (German measles) vaccine and one dose of Mumps vaccine. Additionally, three doses of Hepatitis B vaccine and one dose of Varicella (chickenpox) vaccine are required before entering Kindergarten. Three doses of Hepatitis B are required for Transfer students (students not in your school district last school year) and students entering the seventh grade." *See* docket no. 56, health department exhibit 8.

FN5. On October 15, 2001, after holding a hearing on plaintiff's motion for preliminary injunction, the Court entered an Order [docket no. 13] enjoining defendants from preventing Ashley Boone from attending school because she had not received a Hepatitis B vaccination. The injunction was effective until the end of the school semester in December, 2001, and by Order entered December 14, 2001 [docket no. 30], was extended until the conclusion of the 2001–2002 school year.

Cynthia Boone sincerely objects to the administration of Hepatitis B vaccine to her daughter for religious reasons and on conscientious grounds which include traditional parenting concerns. The immunization statute does provide a religious exemption; however, the General Assembly limited the exemption as follows:

> The provisions of this section shall not apply if the parents or legal guardian of that child object thereto on the grounds that immunization conflicts with the religious tenets and practices of a *recognized church or religious denomination* of which the parent or guardian is an adherent or member.

Ark.Code Ann. § 6–18–702(d)(2) (Repl.1999) (emphasis supplied).[FN6]

> FN6. The immunization statute also provides for a medical exemption, for which Ashley Boone does not qualify. Ark.Code Ann. § 6–18–702(d)(1) & (3). Plaintiff does not argue that the medical exemption to the immunization requirement constitutes the type of secular "individualized exemption" which might trigger strict scrutiny of a refusal to make religious exemptions. *See, e.g.*, *Fraternal Order of Police v. Newark*, 170 F.3d 359, 364–66 (3rd Cir.1999) (Police department's decision to provide medical exemptions to its no-beard requirement, while refusing religious exemptions to the no-beard requirement, was subject to strict scrutiny and violated Free Exercise Clause.).

***943** The Department of Health employs persons who, pursuant to the immunization statute and under defendant Fay Boozman's direction, "screen" religious exemption applications to determine whether the applicants satisfy the "recognized religion" requirement, and if so, whether the "tenets and practices" of said religion "conflict" with the immunization program. Overall, the percentage of school age children in Arkansas whose parents seek religious exemption is only a small fraction of one percent of the total school age population. Although Cynthia Boone has never formally filed the application for a religious exemption, the Department of Health has evaluated Cynthia Boone's claim to exemption and determined that, because Cynthia Boone is not a member of a recognized religion with tenets against vaccination, she is not eligible for the religious exemption.[FN7]

> FN7. *See* docket no. 56, plaintiff exhibits C & D. Cynthia Boone claims no affiliation with any particular church, although she states she attends Methodist church or occasionally Lutheran church, and was baptized Lutheran. *See id.*, exhibit A (transcript), page 52. Cynthia Boone discussed her concerns about immunization with a Methodist minister who advised her that immunizations were not against the tenets of the Methodist faith. *See* docket no. 2, exhibit B. Cynthia Boone's religious convictions are further described in the "Discussion" section of this Order, *infra*.

Accordingly, the Cabot Schools, which Ashley attends, have been directed not to "admit" Ashley to school until she is "age appropriately immunized" with the recommended immunizations, including the Hepatitis B vaccination. [FN8] No evidence exists to show that Ashley Boone is at significant risk for contracting Hepatitis B, and Ashley Boone is of the age where, even if she were to contract Hepatitis B, she would have a 90% likelihood of full recovery. There is no evidence that even a single case of Hepatitis B is present in the schools of Cabot, Arkansas, and there is no declaration of public health emergency in Arkansas with regard to Hepatitis B.

> FN8. Separate defendant Fay Boozman both admits and denies this fact. *See* docket no. 55, paragraph 7; docket no. 64, paragraph 7; docket no. 58, paragraph 9; docket no. 61, paragraph 9. The necessity of the Court's injunction permitting Ashley Boone to attend school suggests that this fact is true.

Although there is no evidence that any prosecution has been threatened in this case, the Court notes that immunization statute carries with it a criminal penalty for non-compliance. Ark.Code Ann. § 6–18–702(e).

II. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

as a matter of law." Fed.R.Civ.P. 56(c). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party has properly supported its motion for summary judgment, the non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." ***944***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-moving party may not rest on mere allegations or denials of his pleading but must "come forward with 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 587, 106 S.Ct. 1348 (quoting Fed.R.Civ.P. 56(e)).

"[A] genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party." *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401 (8th Cir.1995). The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348 (citations omitted). Further, summary judgment is particularly appropriate where an unresolved issue is primarily legal, rather than factual. *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8th Cir.1995).

III. Discussion

Defendant Fay Boozman, joined by defendant Cabot School District, seeks summary judgment asserting: (1) compulsory immunization laws are constitutional; (2) Arkansas's statutory religious exemption is constitutional; and (3) Cynthia Boone, on behalf of Ashley Boone, is not entitled to a religious exemption from the immunization statute. Plaintiff Cynthia Boone, in turn, seeks summary judgment asserting the following arguments in various permutations: (1) the immunization statute lacks religious neutrality; (2) mandatory immunization would violate her religious beliefs, abridge her parental rights, and impinge upon her medical freedom and Ashley Boone's personal autonomy rights; (3) individuals with conscientious objection to immunization and who have not been prophylactically immunized may not be excluded from school in the absence of a clear and present danger to public health; and (4) the state's "police power" to immunize does not outweigh a parent's fundamental right to informed consent to medical procedures performed on a child. Because the parties' arguments overlap, the Court will address them by substantive category.

A. Sincerely Held Religious Beliefs

[1][2] A belief must be rooted in religion to be protected by the religion clauses of the First Amendment. *Thomas v. Review Board*, 450 U.S. 707, 713, 101 S.Ct. 1425, 1430, 67 L.Ed.2d 624 (1981). However, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714, 101 S.Ct. at 1430. The Court's review of Cynthia Boone's belief about immunization is therefore restricted to considering whether the belief is religious in nature and sincerely held.[FN9]

> FN9. Defendants do not directly challenge Cynthia Boone's particular religious beliefs, but they do not affirmatively acquiesce to their sincerity or basis in religion, either.

In an affidavit filed at the inception of this case, Cynthia Boone explained that although she was not a member of any church, she was a deeply religious person and felt strongly that Ashley Boone should not have to "defile" her body by injecting it with the Hepatitis B vaccine.[FN10] She stated that her beliefs came from revelations she received on a regular basis from God, and what she perceived to be her personal relationship with God.[FN11] In her testimony at the preliminary injunction hearing, Cynthia Boone indicated that her ***945** belief that immunization defiles the body was also based on her reading of the bible.[FN12] She explained that she prays to God, and that he speaks to her through angels.[FN13] An angel told her that she "needed to be very careful, as to what is going around in the world and to be very careful what [she does] to her children." [FN14] Because Cynthia Boone initially did not understand, and was afraid to accept, what her angel told her, her children were immunized earlier in their lives.[FN15] Cynthia Boone came to understand the angel's revelation about immunization over a period of years, and that revelation was cemented when Ashley Boone was faced with having to take the Hepatitis B vaccine.[FN16] Cynthia Boone further believes that vaccinations are "part of the devil's plan," and that vaccinating Ashley Boone against Hepatitis B, which can be transmitted by unprotected sex and intravenous

drug use, supports the devil in his effort to encourage Ashley Boone to engage in unprotected sex and intravenous drug use. [FN17]

FN10. *See* docket no. 2, exhibit B.

FN11. *See id.*

FN12. *See* docket no. 56, exhibit A (transcript), pages 51–52, 55–56, 60–61, 78.

FN13. *See id.*, pages 71–73.

FN14. *See id.*, page 73.

FN15. *See id.*, pages 73, 90–94. Cynthia Boone has four children total, who, at the time this lawsuit began, ranged in age from 12 to 23. *See id.*, page 49.

FN16. *See id.*, pages 74–75.

FN17. *See id.*, pages 97–98.

[3] The Court finds that Cynthia Boone's belief concerning immunization, as divined from her reading of the bible and through God's revelations to her through angels, is rooted in religion and sincere. Although she has at times doubted the revelations and had some difficulty articulating her beliefs at the hearing, such difficulties do not alter this Court's opinion. Accordingly, the Court proceeds with its First Amendment analysis.

B. Establishment Clause—Statutory Exemption

[4] The Establishment Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, *see Everson v. Board of Educ.*, 330 U.S. 1, 8, 67 S.Ct. 504, 508, 91 L.Ed. 711 (1947), provides that "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I. The standard by which a court reviews the constitutionality of a statute under the Establishment Clause depends upon whether that statute facially discriminates among religious sects. *Children's Healthcare Is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir.2000). If the statute discriminates among religious sects, the court applies strict scrutiny review as prescribed by *Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). *Id.* If the statute does not discriminate among religious sects, the court applies the less-stringent, familiar three-pronged test announced in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). *Id. See also Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339, 107 S.Ct. 2862, 2870, 97 L.Ed.2d 273 (1987) ("*Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws affording a uniform benefit to *all* religions should be analyzed under *Lemon*.") (emphasis in original; internal quotation omitted).

Despite the facial discrimination between religions evinced in the statute, *see infra*, the parties in this case have argued the immunization statute's constitutionality under the Establishment Clause using the *Lemon* test. [FN18] In any event, the Court's ***946** application of the *Lemon* test at the parties behest will not disadvantage plaintiff, as plaintiff prevails even when the constitutionality of the immunization statute is evaluated under the less-stringent *Lemon* test.

FN18. The *Larson* strict scrutiny standard is utilized when law facially differentiates among religious sects because "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244, 246, 102 S.Ct. at 1683, 1684. In *Larson*, plaintiffs brought a First Amendment challenge to a Minnesota statute which restricted exemptions from the registration and reporting requirements of the Minnesota Charitable Solicitation Act to "those religious organizations that received more than half of their total contributions from members or affiliated organizations." *Id.* at 231–32, 102 S.Ct. at 1677. Because the Minnesota statute advantaged well-established churches with correspondingly strong financial support from their members over newly-established churches with potentially greater dependence on the public for financial support, the Court utilized strict scrutiny review, ultimately invalidating the statute. *Id.* at 246 n. 23, 102 S.Ct. at 1684 n. 23.

To survive an Establishment Clause challenge under the *Lemon* test, a statute must: (1) have a secular

legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion. *See Lemon*, 403 U.S. at 612–13, 91 S.Ct. at 2111; *cf. Zelman v. Simmons–Harris*, —— U.S. ——, 122 S.Ct. 2460, 2465, 153 L.Ed.2d 604 (2002) (The Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."). A challenged statute is valid only if it satisfies all three parts of the *Lemon* test. *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987).

1. Secular Legislative Purpose

[5] Defendant asserts that the religious exemption provided for in the immunization statute satisfies the first prong of the *Lemon* test, a secular legislative purpose, because it constitutes a "permissive accommodation." *See Children's Healthcare*, 212 F.3d at 1093 ("[T]he alleviation of a special, government-created burden on religious belief and practice constitutes a valid secular purpose under *Lemon*."). The requirement that a law serve a secular legislative purpose does not mean that the law's purpose must be wholly unrelated to religion. *Amos*, 483 U.S. at 335, 107 S.Ct. at 2868. "Rather, *Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker ... from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters. Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.*

In *Children's Healthcare*, for example, the Eighth Circuit rejected an Establishment Clause challenge to a portion of the Medicare and Medicaid Acts drafted to permit individuals with religious objections to medical care to receive government assistance for care received at "religious nonmedical health care institutions." *Children's Healthcare*, 212 F.3d at 1089–91. The Eighth Circuit recognized that health care is a "widely available public benefit [ ] that [is] of great importance to personal well-being," and determined that the burden imposed by the Medicare and Medicaid Acts on those individuals who for religious reasons object to medical treatment was sufficient to warrant a permissive accommodation; Congress's effort at alleviating this burden reflected a valid secular purpose. 212 F.3d at 1094. The Eighth Circuit *also* found, however, that the exception at issue in *Children's Healthcare* was denominationally neutral. *Id.* at 1091. An individual could elect to receive Medicare- and Medicaid-funded services in a religious nonmedical health care institution ***947** "by simply stating that he or she is 'conscientiously opposed' to medical treatment and that such treatment is 'inconsistent with his or her religious beliefs.' " *Id.* (quoting 42 U.S.C. § 1395i–5(b)(2)(A)). In fact, the portion of the statute at issue in *Children's Healthcare* was drafted with the goal of sect-neutrality in mind after a federal district court declared a predecessor provision unconstitutional as facially discriminating among religious sects. *Id.* at 1088–89.

Defendant asserts that the religious exemption in this case reflects a valid secular purpose because it alleviates the pressure imposed upon individuals with religious objections to immunization to become immunized so that they may attend school. In principle, this theory is correct; however the "permissive accommodation" theory cannot carry defendant past the first part of the *Lemon* test because the immunization statute on its face speaks in terms of "the religious tenets and practices of a recognized church or religious denomination." Ark.Code Ann. § 6–18–702(d)(2).

The statute singles out "recognized churches" for preferential treatment. The fact that the statute does not single out particular churches or denominations *by name* is of no consequence here. The Eighth Circuit has recognized that a law need not expressly distinguish between religions by sect name; rather discrimination can be evinced by objective factors such as the law's legislative history and its practical effect while in operation. *Children's Healthcare*, 212 F.3d at 1090. Further, personal religious beliefs are not a basis for an exemption under the immunization statute. [FN19] Yet the First Amendment's protections are not limited to those who are responding to the commands of a particular religious organization. *See, e.g., Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 830–34, 109 S.Ct. 1514, 1516–18, 103 L.Ed.2d 914 (1989) (the denial of unemployment compensation benefits to an individual who "as a Christian ... could not work on the Lord's day" on the ground that his refusal to work was not based on the "tenet or dogma of an established religious sect" violates the Free Exercise Clause).

FN19. *See* docket no. 56, exhibit A (transcript), at page 34 (finding of the Court upon stipulation of the parties).

Under the statutory exemption and the Department of Health's corresponding review, it is not sufficient that an objection to immunization flows from an individual's interpretation of her church's tenets or her sincere, personal religious beliefs. The effect is to discriminate against a nondenominational, nonsectarian individual with a sincerely held individual religious belief, or churches and religious denominations that do not have explicit policies on immunization but may leave such matters to individual religious conscience. [FN20] Permissive accommodation, whatever its limits,***948** still requires neutrality among religions. *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 707, 114 S.Ct. 2481, 2493, 129 L.Ed.2d 546 (1994). *See also, e.g., Turner v. Liverpool Central Sch.*, 186 F.Supp.2d 187, 192 (N.D.N.Y.2002) (finding statutory exemption for those who "hold genuine and sincere religious beliefs" contrary to the practice of immunization sufficiently neutral to satisfy the secular purpose test).

FN20. For example, adherents of particular religions or denominations known by the Department of Health to categorically oppose the practice of immunization, such as the Christian Science religion, are granted exemptions, while adherents of other religions or denominations, such as the Catholic faith, are denied exemptions based on their unofficial, personal interpretation of what their religion or faith requires. *See id.* at pages 18–20. Plaintiff gives the example of the Catholic who, in keeping with the official dictates of the Catholic Church, opposes abortion, and takes that opposition a step beyond the official dictates of the Catholic Church, opposing the administration of a vaccine manufactured from a fetal cell line because of a belief that the acceptance of the vaccine would imply complicity with abortion. Likewise, plaintiff, who attends (but is not a member of) and adheres to some of the beliefs of the Methodist church, and who bases her objection to immunization on her personal reading of scripture and revelations from God, cannot obtain an exemption under the statute. *See id.*, plaintiff exhibits C & D.

2. Primary Effect

The second part of the *Lemon* test requires that the primary effect of the challenged portion of the statute be neither to advance nor inhibit religion. *See Lemon*, 403 U.S. at 612, 91 S.Ct. at 2111. Legislation does not violate the second part of the *Lemon* test simply because it provides special consideration to a religious group or better enables a religion to advance its cause. *Children's Healthcare*, 212 F.3d at 1095. Rather, "a religious accommodation impermissibly advances or inhibits religion only if it imposes a substantial burden on nonbeneficiaries, or provides a benefit to religious believers without providing a corresponding benefit to a large number of nonreligious groups or individuals." *Id.* (internal citations omitted).

Plaintiff's briefs do not directly address the burden/benefit aspect of the *Lemon* test, other than to state, in conclusory fashion, that the statutory exemption fails the second part of the *Lemon* test. Thus, this Court is left to its own devices to determine whether and how the statutory exemption imposes a substantial burden on those individuals who are *not* exempted from the immunization requirements as members or adherents of a recognized church or religious denomination with religious tenets and practices against vaccination, or confers a special benefit upon its beneficiaries—namely, members or adherents of a recognized church or religious denomination.

Defendant suggests that the only potential burden on non-beneficiaries is the increased health risk to those individuals who either have not been immunized due to medical contraindications or were immunized but did not gain the benefit of the vaccine, and that this burden is too minimal to violate the second part of the *Lemon* test. This may be true, where religious beliefs are excluded from consideration. It is possible, too, that nonbeneficiaries are "burdened" due to the State's expenditure of funds in maintaining the Religious Exemption Program. The Court finds troubling, however, that certain non-beneficiaries, namely individuals who oppose immunization on religious grounds but are not members of a religious organization that the State recognizes, are "burdened" by facing vaccination in contravention of their convictions, while other religious individuals belonging to certain churches recognized by the State are excused from vaccination and thus permitted to indulge their religious convictions.

In this sense, the "burden" derives from the statutory exemption's suggestion, whether facially or as applied, that the sovereign endorses or favors certain religious interpretations of a particular issue (here, the propriety of immunization) over others. *Cf.* *Clayton v. Place*, 884 F.2d 376 (8th Cir.1989) ("To the extent plaintiffs contend the rule impermissibly endorses or conveys a message of governmental preference for a particular religious viewpoint concerning social dancing, we find nothing in the rule ['School dances are not authorized and school premises shall not be used for purposes of conducting a dance'] to suggest the District has taken a position on questions of religious belief or made adherence to religion relevant in any way to a person's standing in the political community." (internal citation and quotation omitted)). In other words, the State ***949** is "sending a message of approval or disapproval of individual religious choices." *Stark v. Independent Sch. Dist.*, 123 F.3d 1068, 1074 (8th Cir.1997). The primary effect of the statutory exemption is that the State, by exempting some religious individuals and not others, acts to influence the public perception of different religions and religious beliefs disparately and without neutrality, as well as to inhibit the religious beliefs and practices of those individuals who oppose immunization but are not members of a religious organization the State recognizes. The Court notes, further, that simply because the State may permissibly burden a person's exercise of his or her religion does not mean that that burden is then *de minimis* —indeed, the General Assembly's provision of a religious exemption from immunization recognizes the burden immunization may place on the religiously-opposed individual.

The Court next considers whether the statutory exemption confers a benefit on religious believers without providing a corresponding benefit to a large number of nonreligious groups or individuals. Defendant defines the benefit in question broadly as the ability or opportunity to attend school. In this sense, the statute does not confer a benefit on non-immunized, exempted individuals that is not available to immunized individuals. A benefit *is* conferred, however, on those two groups over individuals who refuse immunization on religious grounds but are not members of a religious church or denomination which the State recognizes. This case is ill-suited for the "benefit" prong of the second part of the *Lemon* test, and more properly reviewed under the *Larson* standard, because this statute distinguishes between types of religious beliefs. Determining, for example, that the statute permits non-immunized Christian Scientist children to attend school, just as immunized children of any or no faith may attend school, does not assist in determining whether the Establishment Clause is violated by excluding someone like Ashley Boone from school.

3. Entanglement

The Court now turns to the third part of the *Lemon* test: that the law not foster excessive government entanglement with religion. *See* *Lemon*, 403 U.S. at 613, 91 S.Ct. at 2111. The Supreme Court has said that a law violates the Establishment Clause when it requires a "comprehensive, discriminating, and continuing state surveillance." *Lemon*, 403 U.S. at 619, 91 S.Ct. at 2114.

On the entanglement question, defendant points the Court to a non-First Amendment, tax case wherein the Eighth Circuit accepted fourteen factual criteria, provided by the IRS, as a guide in deciding what constitutes a church. *See* *Spiritual Outreach Soc. v. Commissioner of IRS*, 927 F.2d 335, 338 (8th Cir.1991). In *Spiritual Outreach*, a religious organization appealed the tax court's denial of its claim for status as a church under the tax code. The Eighth Circuit, determining the organization was not a church for tax purposes and thus not entitled to preferential tax treatment, focused on the core factual requirements of the fourteen criteria: the existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of doctrinal code. *Id.* at 339.

Defendant argues that the Department of Health's use of similar routine and factual criteria to determine what constitutes a "recognized church" likewise is permissible. The Arkansas Department of Health's Religious Exemption Application addresses the "Definition of a 'Recognized' Church" as follows:

> Parents or guardians, to claim a religious exemption, must demonstrate that ***950** the "religious tenets and practices" on which they base their objections to immunizations are those of a "recognized" religion. The Department will consider such evidence as a permanent address, number of members, times and places of regular meetings, existence of

written constitution or plan of organization, and a written theology or statement of beliefs, and copies of legal documents filed with any local, state or national governmental agency.[FN21]

FN21. *See* docket no. 56, plaintiff exhibit B.

The Application itself asks questions such as "How many members does your church have (worldwide) (Arkansas)?" and "Where are your meetings customarily held?" [FN22] A parent or guardian must also submit a notarized letter from an official of the church or denomination certifying that the parent or guardian "is currently a member in good standing of the church or denomination." [FN23] The parent or guardian must submit "an explicit and specific statement of the church's or denomination's condemnation or disapproval of immunizations, demonstrating why immunization is not allowed or approved." [FN24]

FN22. *See id.; see also id.*, exhibit A (transcript), at pages 43–45.

FN23. *See id.*, plaintiff exhibit B.

FN24. *See id.*

The entanglement question is a difficult and close one. Defendant states that the Department of Health is ill-equipped to understand or interpret church teachings and to surmise church doctrine, and that it merely accepts or denies the exemption based upon whether the requested information is provided. Yet requiring the Department to evaluate whether the church or denomination's statement against immunization, for example, (1) is sufficiently explicit and specific, or (2) sufficiently demonstrates why immunization is not allowed or approved, could invite excessive entanglement. The Court also notes that the Department is not simply charged with determining what constitutes a church; rather, the Department is required to determine what constitutes a "recognized" church. Regardless, in cases where courts have determined that religious exemptions do not beg excessive entanglement, an oft-mentioned factor is the exemption's neutrality. *See, e.g.*, *Children's Healthcare*, 212 F.3d at 1090–91 (noting exemption granted upon statement that individual is conscientiously opposed to medical treatment and that such treatment is inconsistent with individual's religious beliefs); *Stark*, 123 F.3d at 1075 (noting school district avoided considering parents' religious motivations for requesting exemptions from use of technology); *Turner*, 186 F.Supp.2d at 192–93 (noting immunization exemption extended to anyone with a genuine or sincere religious belief). *See also Texas Monthly v. Bullock*, 489 U.S. 1, 20 n. 9, 109 S.Ct. 890, 902 n. 9, 103 L.Ed.2d 1 (1989); *Good News/Good Sports Club v. City of Ladue*, 28 F.3d 1501, 1510 n. 19 (8th Cir.1994). Finally, the Court notes that, in practice, there is room in the Department of Health's inquiry for state officials' personal biases about what constitutes a religion.[FN25] On the balance, the Court must find that the statutory exemption fosters excessive government entanglement with religion.

FN25. *See id.*, exhibit A (transcript), at page 43–46 (indicating coordinator of religious exemption program's belief that regular meetings alone constitute a prerequisite to recognition of a religion, and that some doctrinal questions must be referred to legal staff).

In conclusion, the Court finds that the immunization statute's religious exemption provision, as written and as applied, fails the *Lemon* test, and thus violates the Establishment Clause.

***951 C. Free Exercise Clause—Statutory Exemption**

[6] The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.... "* U.S. Const. amend. I (emphasis supplied). Plaintiff argues that the that the limitation of the statutory exemption to a "recognized church or religious denomination" violates her rights under the Free Exercise Clause and is unconstitutional.

After *Larson*, a law that on its face grants a denominational preference may be upheld only if it is supported by a compelling state interest. *Larson*, 456 U.S. at 246–47, 102 S.Ct. at 1684–85; *Hernandez v. C.I.R.*, 490 U.S. 680, 695, 109 S.Ct. 2136, 2146, 104 L.Ed.2d 766 (1989). As the Supreme Court has explained:

The constitutional prohibition of denominational

> preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. Madison once noted [in The Federalist No. 51]: "Security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests and in the other in the multiplicity of sects." Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can be guaranteed only when legislators—and voters—are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.

Larson, 456 U.S. at 244–45, 102 S.Ct. at 1683–84.

It is difficult to imagine how the State would have a compelling interest in limiting the religious exemption to some religious sects and individuals over others, and in its briefs, the State advances none. No doubt it may be necessary to have quick means of identifying those children who have not been immunized against a disease in the event of an outbreak; [FN26] however, there is no reason the State would need to notify these children through their "recognized churches" rather than through their schools; indeed, the State can identify the non-immunized children through an already-existing database. [FN27] Where the State elects to accommodate religion on a particular issue like immunization, it is simply not constitutionally permissible for it to indulge the free exercise rights of some individuals and inhibit the free exercise rights of others on an arbitrary basis. *See Sherr v. Northport–East Northport Union Free Sch. Dist.*, 672 F.Supp. 81, 90–91 (E.D.N.Y.1987) ("While the state may be quite genuinely concerned with limiting the improper evasion of immunization, minimizing the total number of people exempt from the mandatory vaccination program, or devising a legally and logically coherent definition of religion, there surely exist less restrictive alternative means of achieving the state's aims than the blatantly discriminatory restriction of [the] religious exemption....").

FN26. *See* docket no. 56, exhibit A (transcript), pages 137–39.

FN27. *See id.*, pages 146–47.

D. Severability of Religious Exemption

[7] Having determined that the statutory exemption violates the First Amendment,***952** plaintiff asks this Court to re-write the statutory exemption to "effectuate the intent of the statute." [FN28] This Court does not lightly declare statutes unconstitutional, and seeks to preserve the constitutionality of the law whenever possible. While it was perhaps enlightened of the General Assembly to attempt to provide a religious exemption where one was not constitutionally required, this Court is disinclined to re-write the immunization statute to fashion a broader exemption that the General Assembly may not have contemplated or intended. Rather, under Arkansas law, the proper remedy is for this Court to "sever" the religious exemption from the remainder of the statute. Specifically, Arkansas Code Annotated § 1–2–117 provides:

FN28. In effect, plaintiff would have the Court edit the statute as follows: "The provisions of this section shall not apply if the parents or legal guardian of that child object thereto on the grounds that immunization conflicts with the religious tenets and practices of the parent or guardian."

> Except as otherwise specifically provided in this Code, in the event any title, subtitle, chapter, subchapter, section, subsection, subdivision, paragraph, item, sentence, clause, phrase, or word of this Code is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this Code which shall remain in full force and effect as if the portion so declared or adjudged invalid or unconstitutional was not originally a part of this Code.
> *See also Hutton v. Savage*, 298 Ark. 256, 769 S.W.2d 394, 399 (1989) ("[I]t is well settled that where a statute or code provision is unconstitutional in part, the valid portion of the act will be sustained if complete in itself and capable of execution in accordance with apparent legislative intent.").

In this case, that the statutory exemption has been declared unconstitutional does not dismantle the entire immunization statute. Rather, the statute's language indicates that the General Assembly sought to establish a comprehensive immunization program for

school children, and the statute is complete in itself and capable of execution in accordance with that intent without the provision providing for religious exemption. Subsection (d)(2) of Arkansas Code Annotated § 6–18–702 must be stricken as unconstitutional, but the remaining portions of the statute remain in full force and effect. In other words, there now exists no statutory religious exemption to immunization in the State of Arkansas.[FN29]

FN29. The Court recognizes that, beyond disappointing plaintiff, this conclusion may distress those individuals who previously benefitted from the religious exemption to the immunization statute; however, recourse lies in the political process. As Judge Dawson recognized, it is certainly within the General Assembly's province to enact a new religious exemption that comes within constitutional boundaries.

E. Free Exercise Clause—Compulsory Immunization

[8][9] Plaintiff challenges the constitutionality of compulsory immunization, as required by Arkansas Code Annotated § 6–18–702(a), under the Free Exercise Clause. The standard by which a court reviews a claim under the Free Exercise Clause depends upon the nature of the law or the precise characterization of the right at issue. "A law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice .... ***953** a law failing to satisfy [the neutrality and general applicability] requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 2226, 124 L.Ed.2d 472 (1993). In certain cases, however, which have come to be known as "hybrid rights" cases, the Court may apply strict scrutiny to neutral laws of general applicability because a Free Exercise claim is conjoined with other constitutional protections such as freedom of speech and of the press, or the right of parents to direct the education of their children. *See Employment Div. v. Smith*, 494 U.S. 872, 881–82, 110 S.Ct. 1595, 1601–02, 108 L.Ed.2d 876 (1990). The Supreme Court has frowned upon extending strict scrutiny to compulsory immunization laws, albeit in *dictum*. *Smith*, 494 U.S. at 888–89, 110 S.Ct. at 1605–06.

[10] Plaintiff asserts strict scrutiny of the immunization statute is required because, as demonstrated by the religious exemption, is not a neutral law of general applicability. Alternately, plaintiff argues that her Free Exercise and parental rights combine to make this a "hybrid rights" case in which strict scrutiny review should apply. At the outset, the Court finds that plaintiff's Free Exercise challenge to compulsory immunization is a challenge to a neutral law of general applicability. This Court has already determined that the statutory religious exemption of Arkansas Code Annotated § 6–18–702(d)(2) is unconstitutional, and severed it from the remainder of the immunization statute. Plaintiff cannot now rely on an invalidated statutory exemption to determine the standard of review for her general challenge to the power of the State under Arkansas Code Annotated § 6–18–702(a) to immunize religious individuals. Rather, plaintiff must direct her challenge at the remainder of the statute that is in effect.

Subsection (a) of the immunization statute does not target religious beliefs or seek to infringe upon or restrict certain practices because of their religious motivation, *see Lukumi*, 508 U.S. at 542, 113 S.Ct. at 2231; its "object" is to protect school children against the spread of disease through mandatory immunization.[FN30] It applies to all school children, save those for whom immunization would endanger their health.[FN31] *See* Ark.Code Ann. § 6–18–702(d)(1) & (3); *Jacobson v. Massachusetts*, 197 U.S. 11, 38–39, 25 S.Ct. 358, 366, 49 L.Ed. 643 (1905) ("[S]uppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the [vaccination] statute was intended to be applied to such a case...."). Because the immunization statute is a neutral law of general applicability, heightened scrutiny is not required even though compulsory immunization may burden plaintiff's right to free exercise.

FN30. The Court notes that the portion of the immunization statute challenged in this section was enacted wholly apart from the religious exemption, which was added sixteen years later. *See* 1983 Ark.Acts 150 ("An Act to Amend Section 3 of Act 244 of 1967 to Exempt from the Mandatory Pertussis Im-

munization Requirements for School Children, with Siblings, Either Whole Blood or Half Blood, Who Have Had Serious Adverse Reactions to Such Immunizations Which Reaction Resulted in a Total Permanent Disability; and for Other Purposes.")

FN31. For example, individuals who have had a life-threatening allergic reaction to baker's yeast or to a previous dose of the Hepatitis B vaccine (it is administered in three doses) are advised not to take the Hepatitis B vaccine. *See* docket no. 56, health department exhibit 5.

***954** [11] It is well established that the State may enact reasonable regulations to protect the public health and the public safety, and it cannot be questioned that compulsory immunization is a permissible exercise of the State's police power. *See Zucht v. King*, 260 U.S. 174, 176, 43 S.Ct. 24, 25, 67 L.Ed. 194 (1922); *Jacobson*, 197 U.S. at 24–25, 25 S.Ct. at 360–61. The Supreme Court has long recognized that a state may require public and private school children to be immunized. *See id.* The constitutionally-protected free exercise of religion does not excuse an individual from compulsory immunization; in this instance, the right to free exercise of religion and parental rights are subordinated to society's interest in protecting against the spread of disease. *See Prince v. Massachusetts*, 321 U.S. 158, 166–67, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) (The state's authority "is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion...."); *Wright v. DeWitt Sch. Dist.*, 238 Ark. 906, 385 S.W.2d 644, 647–48 (1965); *Cude v. Arkansas*, 237 Ark. 927, 377 S.W.2d 816, 819–20 (1964).

Plaintiff seeks to distinguish her case from what she refers to as "this draconian vaccine jurisprudence" by asserting that those cases were decided on the basis of a declared health emergency involving smallpox, while in this case Hepatitis B presents no "clear and present danger." The Court is not persuaded by this argument. The Supreme Court did not limit its holding in *Jacobson* to diseases presenting a clear and present danger.[FN32] Even if such a distinction could be made, the Court cannot say that Hepatitis B presents no such clear and present danger. Hepatitis B may not be airborne like smallpox; however, this is not the only factor by which a disease could be judged dangerous. Hepatitis B is spread by bodily fluids; the virus is "fairly hearty and can survive on surfaces, door knobs, et cetera, for up to a month." [FN33] Hepatitis B can lead to sclerosis, scarring and fibrosis of the liver, or liver cancer after chronic infection. [FN34] Globally, Hepatitis B is second only to tobacco as a leading cause of cancer.[FN35] Approximately 1.25 million people in the United States have chronic Hepatitis B infection; each year it is estimated that 80,000 people, mostly young adults, become infected with the Hepatitis B virus.[FN36]

FN32. *See also* the Court's discussion of plaintiff's separate due process claim, *infra* Section III.F.

FN33. *See* docket no. 56, exhibit A (transcript), pages 133–34.

FN34. *See id.*, pages 134–35.

FN35. *See id.*, page 136.

FN36. *See id.*, health department exhibit 5.

Because the groups at highest risk for Hepatitis B are unlikely to self-identify and pursue the vaccine, immunizing those individuals as children is the recommended strategy to stern the spread of Hepatitis B.[FN37] Immunization of school children against Hepatitis B has a real and substantial relation to the protection of the public health and the public safety. The Court therefore finds that requiring schoolchildren to be immunized against Hepatitis B is a reasonable exercise of the State's police power and is constitutionally permissible even though it affects plaintiff's religious practice.

FN37. *See id.*, page 136–37.

[12][13] The Court now turns to plaintiff's argument that this is a hybrid rights case requiring strict scrutiny review.[FN38] In ***955** addition to her Free Exercise right, plaintiff invokes her constitutional right to direct the education of her child. A parent's constitutional right to direct the education and upbringing of her child is grounded in the Due Process Clause of the Fourteenth Amendment. *See Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772 (1997). Courts have indicated that this parental right is limited in scope, however, determin-

ing, for example, that a parent has no right to: (1) exempt her child from certain reading programs the parent finds objectionable; (2) exempt her child from a school's community-service requirement; (3) exempt her child from an assembly program that included sexually explicit topics; (4) refuse standardized testing used to determine the quality of education her home-schooled child is receiving; and (5) send her child to public school on a part-time basis in order to pick and choose which courses her child will take from the public school. *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 698 (10th Cir.1998) (collecting cases). In contrast, a parent does have the right to: (1) send her child to private school, whether that school is religious or secular; (2) have her child attend school in a state where the teaching of foreign languages is not prohibited; and (3) withdraw her child from public education where her religion requires it as part of a way of life. *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). The key characteristic of these cases is that they relate to educational instruction. Plaintiff's desire that her daughter not be immunized has no relation to her directing her daughter's education, other than it may limit where and how she receives that education. A parent's constitutional right to direct the education of her child is not implicated under the facts of this case, and thus plaintiff cannot proceed under a "hybrid rights" theory.

> FN38. Although it is not dispositive, the Court notes that the Supreme Court in *Smith* included compulsory vaccination laws in its "parade of horribles" to which the compelling interest test should probably not be applied. *See Smith*, 494 U.S. at 888–89, 110 S.Ct. at 1605–06 (citing an Arkansas Supreme Court case which upheld the State's power to require compulsory immunization of school children over religious objections, *see Cude*, 377 S.W.2d at 818–820).

In keeping with longstanding Supreme Court precedent, the Court finds that, as it relates to compulsory immunization of school children, the statutory religious exemption having previously been stricken, Arkansas's immunization law does not violate plaintiff's Free Exercise rights and is constitutional.

F. Substantive Due Process

[14][15] Although some aspects of plaintiff's due process argument are implicated in her First Amendment arguments, as discussed above, plaintiff has separately filed a motion for summary judgment under the Fourteenth Amendment. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. As plaintiff points out, the right to refuse medical treatment is assumed to be a part of liberty protected under the Due Process Clause.[FN39] *See Cruzan v. Director*, 497 U.S. 261, 278–79, 110 S.Ct. 2841, 2851–52, 111 L.Ed.2d 224 (1990). This right is not absolute, however, and can be regulated by the State. *See, e.g.*, *Jacobson*, 197 U.S. at 24–30, 25 S.Ct. at 360–61. "[D]etermining that a person has a 'liberty interest' under ***956** the Due Process Clause does not end the inquiry; whether [an individual's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Cruzan*, 497 U.S. at 279, 110 S.Ct. at 2851–52 (internal quotation omitted). Where the State infringes on a *fundamental* constitutional right, strict scrutiny applies; otherwise, the state need only have a legitimate purpose. *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S.Ct. 2258, 2271, 138 L.Ed.2d 772 (1997). *Cruzan* does not make clear whether the right to refuse medical treatment is a fundamental right requiring proof that the state's infringement is necessary and compelling, but the Supreme Court has recently indicated that there is no fundamental right to assisted suicide. *Id.*

> FN39. "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Cruzan*, 497 U.S. at 279 n. 7, 110 S.Ct. at 2851 n. 7.

Plaintiff complains that "*Jacobson* and *Zucht* are utterly archaic in 14th Amendment substantive due process terms, and worthless as precedent in light of the extensive jurisprudence of the 20th Century." [FN40] It is the responsibility of this Court, however, until the Supreme Court says otherwise, to give effect to immunization cases like *Jacobson* and *Zucht*. *See Agostini v. Felton*, 521 U.S. 203, 207, 117 S.Ct. 1997,

2002, 138 L.Ed.2d 391 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Even if this Court were to review plaintiff's argument against immunization in light of the Court's most recent substantive due process cases, plaintiff would not prevail.

FN40. *See* docket no. 54, page 10, footnote 17.

[16][17][18] To properly determine whether an asserted right is a fundamental right subject to heightened protection under the Due Process Clause, and to limit the subjectivity inherent in the analysis of a substantive due process claim, a court must: (1) consider whether the asserted right is deeply rooted in the nation's history and traditions, and implicit in the concept of ordered liberty; and (2) require a careful description of the asserted fundamental right at stake. *Glucksberg*, 521 U.S. at 720–21, 117 S.Ct. at 2267–68. The question presented in this case is not, as plaintiff suggests, simply whether a parent has a fundamental right to decide whether her child should undergo a medical procedure such as immunization. Carefully formulated, the question presented by the facts of this case is whether the special protection of the Due Process Clause includes a parent's right to refuse to have her child immunized before attending public or private school where immunization is a precondition to attending school.[FN41] The Nation's history, legal traditions, and practices answer with a resounding "no."

FN41. The Court notes that plaintiff's argument against subjecting her daughter to a medical procedure is not based on any concern that the vaccine is specifically medically contra-indicated for Ashley Boone; this would be an entirely different matter.

[19] Since the early twentieth century the Supreme Court has acknowledged that a state may require school children to be immunized. *See Zucht*, 260 U.S. at 176, 43 S.Ct. at 25; *see also Jacobson* and *Prince*, *supra*. Compulsory immunization has long been practiced in Arkansas and other states. *See, e.g.*, *Wright*, 385 S.W.2d at 647–48; *Cude*, 377 S.W.2d at 819–20 (cited in *Smith*, 494 U.S. at 888–89, 110 S.Ct. at 1605–06); *Board of Educ. v. Maas*, 56 N.J.Super. 245, 152 A.2d 394 (App.Div.1959); ***957***Ohio ex rel Dunham v. Board of Educ.*, 154 Ohio St. 469, 96 N.E.2d 413 (1951); *Mosier v. Barren County Board of Health*, 308 Ky. 829, 215 S.W.2d 967 (1948); *City of New Braunfels v. Waldschmidt*, 109 Tex. 302, 207 S.W. 303 (1918). What is "implicit in the concept of ordered liberty" is an understanding that:

> [T]he liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members.

Jacobson, 197 U.S. at 26, 25 S.Ct. at 361. It is apparent from these cases, and from a century of the nation's experience, that requiring school children to be immunized rationally furthers the public health and safety. Finally, to the extent plaintiff asserts that Ashley Boone has a fundamental constitutional right to a free and appropriate public education which outweighs the State's interest in immunizing school children, plaintiff is incorrect. While the Court does not minimize the importance of education, it is firmly established that the right to an education is not provided explicit or implicit protection under the Constitution and is not a fundamental right or liberty. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 1297, 36 L.Ed.2d 16 (1973).

Plaintiff also raises the issue of informed consent. The State apparently provides informed consent forms to parents and guardians before a child is immunized;[FN42] plaintiff makes no allegation that she did not give, or was not provided information sufficient for, informed consent. "Informed consent" is not implicated by the facts in this case; this case is about "no consent." Plaintiff's informed consent argument is unavailing.

FN42. *See* docket no. 56, exhibit A (transcript), pages 149–50.

IV. Conclusion

THEREFORE, plaintiff's motion for summary judgment under the Fourteenth Amendment [docket

no. 53] is hereby DENIED; plaintiff's motion for summary judgment under the First Amendment [docket no. 56] is hereby GRANTED to the extent that Subsection 6–18–702(d)(2) of the Arkansas Code Annotated is stricken as violating the Establishment Clause and Free Exercise Clause of the First Amendment, and DENIED as to all other grounds.[FN43]

> FN43. In Count IV of her second amended complaint [docket no. 44], plaintiff asserts that her right to equal protection has been violated. Plaintiff does not make this a focus of her motions for summary judgment, but states in a footnote: "Clearly, a law which exempts the adherents of 'recognized' religions, yet denies exemption on the basis of personal, sincere religious belief, is predisposed to deny Equal Protection of law, as well." *See* docket no. 57, page 19, footnote 26. The Court agrees.

FURTHER, separate defendant Fay Boozman's motion for summary judgment [docket no. 47], in which separate defendant Cabot School District joins [docket no. 50], is hereby DENIED to the extent subsection (d)(2) is declared unconstitutional, but GRANTED to the extent that the remaining portions of the statute are found to be constitutional and valid.

FURTHER, because the preliminary injunction entered by the Court expired at the conclusion of the 2001–2002 school year, there is no need to dissolve that injunction.

Judgment shall be entered accordingly.[FN44]

> FN44. On the issue of attorney's fees and costs, the parties are referred to Local Rule 54.1.

***958 JUDGMENT**

In accordance with the Memorandum Opinion and Order entered this date, this case is hereby dismissed; all relief requested by plaintiff is denied with one exception: subsection (d)(2) of Arkansas Code Annotated § 6–18–702 is stricken as unconstitutional.

E.D.Ark.,2002.
Boone v. Boozman
217 F.Supp.2d 938, 169 Ed. Law Rep. 247

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Supreme Court of the United States
COUNTY OF SACRAMENTO, et al., Petitioners,
v.
Teri LEWIS and Thomas Lewis, personal representative of the Estate of Philip Lewis, Deceased.

No. 96–1337.
Argued Dec. 9, 1997.
Decided May 26, 1998.

Parents of motorcycle passenger killed in high-speed police chase of motorcyclist brought § 1983 claim against county, sheriff's department, and deputy, alleging deprivation of passenger's substantive due process right to life. The United States District Court for the Eastern District of California, Garland E. Burrell, Jr., J., granted summary judgment for defendants, and the Court of Appeals, Pregerson, J., 98 F.3d 434, reversed as to deputy. On writ of certiorari, the Supreme Court, Justice Souter, held that: (1) Fourth Amendment reasonableness standard did not apply; (2) high-speed police chases with no intent to harm suspects physically do not give rise to liability under Fourteenth Amendment; and (3) allegation that pursuit was undertaken with deliberate indifference to passenger's survival was insufficient to state substantive due process claim.

Judgment of Court of Appeals reversed.

Chief Justice Rehnquist, filed a concurring opinion.

Justice Kennedy, filed a concurring opinion in which Justice O'Connor, joined.

Justice Breyer, filed a concurring opinion.

Justice Stevens, filed an opinion concurring in the judgment.

Justice Scalia, filed an opinion concurring in the judgment in which Justice Thomas, joined.

West Headnotes

[1] Civil Rights 78 1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(2) k. Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general. Most Cited Cases
(Formerly 78k214(2))

Better approach to resolving cases in which defense of qualified immunity is raised is to determine first whether plaintiff has alleged deprivation of constitutional right at all; normally, it is only then that court should ask whether right allegedly implicated was clearly established at time of events in question.

[2] Civil Rights 78 1088(4)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1088 Police, Investigative, or Law Enforcement Activities
78k1088(4) k. Arrest and detention. Most Cited Cases
(Formerly 78k132.1)

Fourth Amendment reasonableness standard did not apply to § 1983 claim against sheriff's deputy arising out of high-speed chase that resulted in death of motorcycle passenger, as police pursuit was not a "seizure"; abrogating *Mays v. East St. Louis*, 123 F.3d 999 (C.A.7 1997). U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983.

[3] Arrest 35 57.1

35 Arrest
35II On Criminal Charges
35k57.1 k. In general. Most Cited Cases
(Formerly 35k68(1))

Attempted but failed seizures of a person are beyond scope of Fourth Amendment. U.S.C.A. Const.Amend. 4.

[4] Constitutional Law 92 3893

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3893 k. In general. Most Cited Cases
(Formerly 92k251.3)

While due process protection in substantive sense limits what government may do in both its legislative and its executive capacities, criteria to identify what is fatally arbitrary differ depending on whether it is legislation or specific act of governmental officer that is at issue. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 3896

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3892 Substantive Due Process in General
92k3896 k. Egregiousness; "shock the conscience" test. Most Cited Cases
(Formerly 92k253(1))

In due process challenge to executive action, threshold question is whether behavior of governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience; that judgment may be informed by history of liberty protection, but it necessarily reflects understanding of traditional executive behavior, of contemporary practice, and of standards of blame generally applied to them. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 3911

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3908 Mental State
92k3911 k. Negligence, recklessness, or indifference. Most Cited Cases
(Formerly 92k253(1))

Liability for negligently inflicted harm is categorically beneath threshold of constitutional due process. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 92 3911

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3908 Mental State
92k3911 k. Negligence, recklessness, or indifference. Most Cited Cases
(Formerly 92k253(1))

Deliberate indifference that shocks in one environment may not be so patently egregious in another, and concern with preserving constitutional proportions of substantive due process demands exact analysis of circumstances before any abuse of power is condemned as conscience-shocking. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 92 4541

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)3 Law Enforcement
92k4540 Vehicle Pursuits
92k4541 k. In general. Most Cited Cases
(Formerly 92k253(1))

High-speed police chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under Fourteenth Amendment for deprivation of substantive due process, redressable by action under § 1983. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

[9] Automobiles 48A 175(1)

48A Automobiles

48AV Injuries from Operation, or Use of Highway
48AV(A) Nature and Grounds of Liability
48Ak175 Vehicles Used in Saving Life or Property, or Enforcing Law
48Ak175(1) k. In general. Most Cited Cases

Constitutional Law 92 4542

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)3 Law Enforcement
92k4540 Vehicle Pursuits
92k4542 k. Rights of third parties; bystanders. Most Cited Cases
(Formerly 92k253(1))

Allegation that high-speed pursuit of motorcyclist by sheriff's deputy, which resulted in death of motorcycle passenger, was undertaken with deliberate indifference to passenger's survival did not meet shocks-the-conscience test and thus was insufficient to state substantive due process claim under § 1983; while prudence would have suppressed deputy's reaction to motorcyclist's behavior, deputy's instinct was to do his job as law enforcement officer, not to induce motorcyclist's lawlessness, or to terrorize, cause harm, or kill. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

*****1710 *833** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

After petitioner James Smith, a county sheriff's deputy, responded to a call along with another officer, Murray Stapp, the latter returned to his patrol car and saw a motorcycle approaching at high speed, driven by Brian Willard, and carrying Philip Lewis, respondents' decedent, as a passenger. Stapp turned on his rotating lights, yelled for the cycle to stop, and pulled his car closer to Smith's in an attempt to pen the cycle in, but Willard maneuvered between the two cars and sped off. Smith immediately switched on his own emergency lights and siren and began high-speed pursuit. The chase ended after the cycle tipped over. Smith slammed on his brakes, but his car skidded into Lewis, causing massive injuries and death. Respondents brought this action under 42 U.S.C. § 1983, alleging a deprivation of Lewis's Fourteenth Amendment substantive due process right to life. The District Court granted summary judgment for Smith, but the Ninth Circuit reversed, holding, *inter alia*, that the appropriate degree of fault for substantive due process liability for high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security.

Held: A police officer does not violate substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. Pp. 1713–1721.

(a) The "more-specific-provision" rule of *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443, does not bar respondents' suit. *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision, not under substantive due process. *E.g.*, *Lanier v. United States*, 520 U.S. 259, 272, n. 7, 117 S.Ct. 1219, 1228, n. 7, 137 L.Ed.2d 432 (1997). Substantive due process analysis is therefore inappropriate here only if, as *amici* argue, respondents' claim is "covered by" the Fourth Amendment. It is not. That Amendment covers only "searches and seizures," neither of which took place here. No one suggests that there was a search, and this Court's cases foreclose finding a seizure, since Smith did not terminate Lewis's freedom ***834** of movement through means intentionally applied. *E.g.*, *Brower v. County of Inyo*, 489 U.S. 593, 597, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628. Pp. 1714–1716.

(b) Respondents' allegations are insufficient to state a substantive due process violation. Protection against governmental arbitrariness is the core of due process, *e.g.*, *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 116–117, 28 L.Ed. 232, including substantive due process, see, *e.g.*, *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, but only the most egregious executive action can be said to be "arbitrary" in the constitutional sense, *e.g.*, *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071, 117 L.Ed.2d 261; the cogniza-

ble level of executive abuse of power is that which shocks the conscience, *e.g.*, *id.*, at 128, 112 S.Ct., at 1070; *Rochin v. California*, 342 U.S. 165, 172–173, 72 S.Ct. 205, 209–210, 96 L.Ed. 183. The conscience-shocking concept points clearly away from liability, or clearly toward it, only at the ends of the tort law's culpability spectrum: Liability for negligently inflicted harm is categorically beneath the ****1711** constitutional due process threshold, see, *e.g.*, *Daniels v. Williams*, 474 U.S., at 328, 106 S.Ct., at 663, while conduct deliberately intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level, see *id.*, at 331, 106 S.Ct., at 665. Whether that level is reached when culpability falls between negligence and intentional conduct is a matter for closer calls. The Court has recognized that deliberate indifference is egregious enough to state a substantive due process claim in one context, that of deliberate indifference to the medical needs of pretrial detainees, see *City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605; cf. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251, but rules of due process are not subject to mechanical application in unfamiliar territory, and the need to preserve the constitutional proportions of substantive due process demands an exact analysis of context and circumstances before deliberate indifference is condemned as conscience shocking, cf. *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595. Attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one context is less egregious in the other. In the circumstances of a high-speed chase aimed at apprehending a suspected offender, where unforeseen circumstances demand an instant judgment on the part of an officer who feels the pulls of competing obligations, only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the shocks-the-conscience test. Such chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to substantive due process liability. Cf. *Whitley v. Albers*, 475 U.S. 312, 320–321, 106 S.Ct. 1078, 1084–1085, 89 L.Ed.2d 251. The fault claimed on Smith's part fails to meet this test. Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood police ***835** authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, Smith's instinct was to do his job, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive. Pp. 1716–1721.

98 F.3d 434, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 1721. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 1721. BREYER, J., filed a concurring opinion, *post*, p. 1722. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 1723. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 1723.

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Paul J. Hedlund, Los Angeles, CA, for respondents.

For U.S. Supreme Court briefs, see:1997 WL 453655 (Pet.Brief)1997 WL 615765 (Resp.Brief)1997 WL 695462 (Reply.Brief)

***836** Justice SOUTER delivered the opinion of the Court.

The issue in this case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. We answer no, and hold that in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary ****1712** conduct shocking to the conscience, necessary for a due process violation.

I

On May 22, 1990, at approximately 8:30 p.m., petitioner James Everett Smith, a Sacramento County sheriff's deputy, along with another officer, Murray

Stapp, responded to a call to break up a fight. Upon returning to his patrol car, Stapp saw a motorcycle approaching at high speed. It was operated by 18-year-old Brian Willard and carried Philip Lewis, respondents' 16-year-old decedent, as a passenger. Neither boy had anything to do with the fight that prompted the call to the police.

Stapp turned on his overhead rotating lights, yelled to the boys to stop, and pulled his patrol car closer to Smith's, attempting to pen the motorcycle in. Instead of pulling over in response to Stapp's warning lights and commands, Willard ***837** slowly maneuvered the motorcycle between the two police cars and sped off. Smith immediately switched on his own emergency lights and siren, made a quick turn, and began pursuit at high speed. For 75 seconds over a course of 1.3 miles in a residential neighborhood, the motorcycle wove in and out of oncoming traffic, forcing two cars and a bicycle to swerve off the road. The motorcycle and patrol car reached speeds up to 100 miles an hour, with Smith following at a distance as short as 100 feet; at that speed, his car would have required 650 feet to stop.

The chase ended after the motorcycle tipped over as Willard tried a sharp left turn. By the time Smith slammed on his brakes, Willard was out of the way, but Lewis was not. The patrol car skidded into him at 40 miles an hour, propelling him some 70 feet down the road and inflicting massive injuries. Lewis was pronounced dead at the scene.

Respondents, Philip Lewis's parents and the representatives of his estate, brought this action under Rev. Stat. § 1979, 42 U.S.C. § 1983, against petitioners Sacramento County, the Sacramento County Sheriff's Department, and Deputy Smith, alleging a deprivation of Philip Lewis's Fourteenth Amendment substantive due process right to life.[FN1] The District Court granted summary judgment for Smith, reasoning that even if he violated the Constitution, he was entitled to qualified immunity, because respondents could point to no "state or federal opinion published before May, 1990, when the alleged misconduct took place, that supports ***838** [their] view that [the decedent had] a Fourteenth Amendment substantive due process right in the context of high speed police pursuits." App. to Pet. for Cert. 52.[FN2]

FN1. Respondents also brought claims under state law. The District Court found that Smith was immune from state tort liability by operation of California Vehicle Code § 17004, which provides that "[a] public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle ... when in the immediate pursuit of an actual or suspected violator of the law." Cal. Veh.Code Ann. § 17004 (West 1971). The court declined to rule on the potential liability of the county under state law, instead dismissing the tort claims against the county without prejudice to refiling in state court.

FN2. The District Court also granted summary judgment in favor of the county and the Sheriff's Department on the § 1983 claim, concluding that municipal liability would not lie under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), after finding no genuine factual dispute as to whether the county adequately trains its officers in the conduct of vehicular pursuits or whether the pursuit policy of the Sheriff's Department evinces deliberate indifference to the constitutional rights of the public. The Ninth Circuit affirmed the District Court on these points, 98 F.3d 434, 446–447 (1996), and the issue of municipal liability is not before us.

The Court of Appeals for the Ninth Circuit reversed, holding that "the appropriate degree of fault to be applied to high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security," 98 F.3d 434, 441 (1996), and concluding that "the law regarding police liability for death or injury caused by an officer during the course of a high-speed chase was clearly established" at the time of Philip Lewis's death, *id.*, at 445. Since Smith apparently disregarded the Sacramento County Sheriff's Department's General Order on police pursuits, the Ninth Circuit****1713** found a genuine issue of material fact that might be resolved by a finding that Smith's conduct amounted to deliberate indifference:

"The General Order requires an officer to com-

municate his intention to pursue a vehicle to the sheriff's department dispatch center. But defendants concede that Smith did not contact the dispatch center. The General Order requires an officer to consider whether the seriousness of the offense warrants a chase at speeds in excess of the posted limit. But here, the only apparent 'offense' was the boys' refusal to stop when another officer told them to do so. The General Order requires an officer to consider whether the need for apprehension***839** justifies the pursuit under existing conditions. Yet Smith apparently only 'needed' to apprehend the boys because they refused to stop. The General Order requires an officer to consider whether the pursuit presents unreasonable hazards to life and property. But taking the facts here in the light most favorable to plaintiffs, there existed an unreasonable hazard to Lewis's and Willard's lives. The General Order also directs an officer to discontinue a pursuit when the hazards of continuing outweigh the benefits of immediate apprehension. But here, there was no apparent danger involved in permitting the boys to escape. There certainly was risk of harm to others in continuing the pursuit." *Id.*, at 442.

Accordingly, the Court of Appeals reversed the summary judgment in favor of Smith and remanded for trial.

We granted certiorari, 520 U.S. 1250, 117 S.Ct. 2406, 138 L.Ed.2d 173 (1997), to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case. Compare 98 F.3d, at 441 ("deliberate indifference" or "reckless disregard"),[FN3] with *Evans v. Avery*, 100 F.3d 1033, 1038 (C.A.1 1996) ("shocks the conscience"), cert. denied, 520 U.S. 1210, 117 S.Ct. 1693, 137 L.Ed.2d 820 (1997); *Williams* v. *Denver City*, 99 F.3d 1009, 1014–1015 (C.A.10 1996) (same); *Fagan v. Vineland*, 22 F.3d 1296, 1306–1307 (C.A.3 1994) (en banc) (same); ***840***Temkin v. Frederick County Commissioners*, 945 F.2d 716, 720 (C.A.4 1991) (same), cert. denied, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992); and *Checki v. Webb*, 785 F.2d 534, 538 (C.A.5 1986) (same). We now reverse.

FN3. In *Jones v. Sherrill*, 827 F.2d 1102, 1106 (1987), the Sixth Circuit adopted a "gross negligence" standard for imposing liability for harm caused by police pursuit. Subsequently, in *Foy v. Berea*, 58 F.3d 227, 230 (1995), the Sixth Circuit, without specifically mentioning *Jones*, disavowed the notion that "gross negligence is sufficient to support a substantive due process claim." Although *Foy* involved police inaction, rather than police pursuit, it seems likely that the Sixth Circuit would now apply the "deliberate indifference" standard utilized in that case, see 58 F.3d, at 232–233, rather than the "gross negligence" standard adopted in *Jones*, in a police pursuit situation.

II

Our prior cases have held the provision that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law," U.S. Const., Amdt. 14, § 1, to "guarante[e] more than fair process," *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772 (1997), and to cover a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them," *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct., at 665 (1986); see also *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990) (noting that substantive due process violations are actionable under § 1983). The allegation here that Lewis was deprived of his right to life in violation of substantive due process amounts to such a claim, that under the circumstances described earlier, Smith's actions in causing Lewis's death were an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment. Cf. *Collins v. Harker Heights*, 503 U.S. 115, 126, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992) (noting that the Due Process Clause was intended to prevent government officials " ' "from abusing [their] power, or employing it as an instrument of oppression"****1714** ' ") (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989), in turn quoting *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 670–671, 88 L.Ed.2d 677 (1986)).[FN4]

FN4. Respondents do not argue that they were denied due process of law by virtue of the fact that California's postdeprivation procedures and rules of immunity have effectively denied them an adequate opportunity to seek compensation for the

state-occasioned deprivation of their son's life. We express no opinion here on the merits of such a claim, cf. *Albright v. Oliver*, 510 U.S. 266, 281–286, 114 S.Ct. 807, 816–820, 127 L.Ed.2d 114 (1994) (KENNEDY, J., concurring in judgment); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), or on the adequacy of California's postdeprivation compensation scheme.

[1] ***841** Leaving aside the question of qualified immunity, which formed the basis for the District Court's dismissal of their case,[FN5] respondents face two principal objections to their ***842** claim. The first is that its subject is necessarily governed by a more definite provision of the Constitution (to the exclusion of any possible application of substantive due process); the second, that in any event the allegations are insufficient to state a substantive due process violation through executive abuse of power. Respondents can meet the first objection, but not the second.

FN5. As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. See *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870–1871, 104 L.Ed.2d 443 (1989). The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question. See *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991) ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all," and courts should not "assum[e], without deciding, this preliminary issue").

Justice STEVENS suggests that the rule of *Siegert* should not apply where, as here, the constitutional question presented "is both difficult and unresolved." *Post*, at 1723. But the generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted. What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. See Shapiro, Public Officials' Qualified Immunity in Section 1983 Actions Under *Harlow v. Fitzgerald* and its Progeny, 22 U. Mich. J.L. Ref. 249, 265, n. 109 (1989). But these avenues would not necessarily be open, and therefore the better approach is to determine the right before determining whether it was previously established with clarity.

A

[2] Because we have "always been reluctant to expand the concept of substantive due process," *Collins v. Harker Heights*, *supra*, at 125, 112 S.Ct., at 1068, we held in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), that "[w]here a particular Amendment provides an explicit textual

source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273, 114 S.Ct. 807, 813, 127 L.Ed.2d 114 (1994) (plurality opinion of REHNQUIST, C.J.) (quoting *Graham v. Connor, supra*, at 395, 109 S.Ct., at 1871) (internal quotation marks omitted). Given the rule in *Graham*, we were presented at oral argument with the threshold issue raised ****1715** in several *amicus* briefs,[FN6] whether facts involving a police chase aimed at apprehending suspects can ever support a due process claim. The argument runs that in chasing the motorcycle, Smith was attempting to make a seizure within the meaning of the Fourth Amendment, and, perhaps, even that he succeeded when Lewis was stopped by the fatal collision. Hence, any liability must turn on an application of the reasonableness standard***843** governing searches and seizures, not the due process standard of liability for constitutionally arbitrary executive action. See *Graham v. Connor, supra*, at 395, 109 S.Ct., at 1871 ("*All* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach" (emphases in original)). *Albright v. Oliver*, 510 U.S., at 276, 114 S.Ct., at 814 (GINSBURG, J., concurring); *id.*, at 288, n. 2, 114 S.Ct., at 820 (SOUTER, J., concurring in judgment). One Court of Appeals has indeed applied the rule of *Graham* to preclude the application of principles of generalized substantive due process to a motor vehicle passenger's claims for injury resulting from reckless police pursuit. See *Mays v. East St. Louis*, 123 F.3d 999, 1002–1003 (C.A.7 1997).

> FN6. See Brief for National Association of Counties et al. as *Amici Curiae* 8–13; Brief for Grand Lodge of the Fraternal Order of Police as *Amicus Curiae* 4–9; Brief for City and County of Denver, Colorado, as *Amici Curiae* 2–7; Brief for County of Riverside et al. as *Amici Curiae* 6–18; Brief for Gabriel Torres et al. as *Amici Curiae* 3–11.

The argument is unsound. Just last Term, we explained that *Graham*

> "does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272, n. 7, 117 S.Ct. 1219, 1228, n. 7, 137 L.Ed.2d 432 (1997).

Substantive due process analysis is therefore inappropriate in this case only if respondents' claim is "covered by" the Fourth Amendment. It is not.

[3] The Fourth Amendment covers only "searches and seizures," neither of which took place here. No one suggests that there was a search, and our cases foreclose finding a seizure. We held in ***844***California v. Hodari D.*, 499 U.S. 621, 626, 111 S.Ct. 1547, 1550–1551, 113 L.Ed.2d 690 (1991), that a police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. And in *Brower v. County of Inyo*, 489 U.S. 593, 596–597, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989), we explained that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*." We illustrated the point by saying that no Fourth Amendment seizure would take place where a "pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit," but accidentally stopped the suspect by crashing into him. *Id.*, at 597, 109 S.Ct., at 1381–1382. That is exactly this case. See, *e.g.*, *Campbell v. White*, 916 F.2d 421, 423 (C.A.7 1990) (following *Brower* and finding no seizure where a police officer accidentally struck and killed a fleeing motorcyclist during a high-speed pursuit), cert. denied, 499 U.S. 922, 111 S.Ct. 1314, 113 L.Ed.2d 248 (1991). *Graham* 's more-specific-provision rule is therefore no bar to respondents' suit. See, *e.g.*, *Frye v. Akron*, 759 F.Supp. 1320, 1324 (N.D.Ind.1991) (parents of a motorcyclist who was struck and killed by a

police car during a high-speed pursuit could sue under substantive due process because no Fourth ****1716** Amendment seizure took place); *Evans v. Avery*, 100 F.3d, at 1036 (noting that "outside the context of a seizure, ... a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983"); *Pleasant v. Zamieski*, 895 F.2d 272, 276, n. 2(CA6) (noting that *Graham* "preserve[s] fourteenth amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investigatory***845** stop or other seizure"), cert. denied, 498 U.S. 851, 111 S.Ct. 144, 112 L.Ed.2d 110 (1990).[FN7]

FN7. Several *amici* suggest that, for the purposes of *Graham*, the Fourth Amendment should cover not only seizures, but also failed attempts to make a seizure. See, *e.g.*, Brief for National Association of Counties et al. as *Amici Curiae* 10–11. This argument is foreclosed by *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), in which we explained that "neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions." *Id.*, at 626, n. 2, 111 S.Ct., at 1550, n. 2. Attempted seizures of a person are beyond the scope of the Fourth Amendment. See *id.*, at 646, 111 S.Ct., at 1561 (STEVENS, J., dissenting) (disagreeing with the Court's position that "an attempt to make [a] ... seizure is beyond the coverage of the Fourth Amendment").

B

[4] Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action:

> "The principal and true meaning of the phrase has never been more tersely or accurately stated than by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 17 U.S. 235, 4 Wheat. 235–244, 4 L.Ed. 559 [(1819)]: 'As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.' " *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct., at 117 (1884).

We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974), whether the fault lies in a denial of fundamental***846** procedural fairness, see, *e.g.*, *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S.Ct. 1983, 1995, 32 L.Ed.2d 556 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, *e.g.*, *Daniels v. Williams*, 474 U.S., at 331, 106 S.Ct., at 664 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and its executive capacities, see, *e.g.*, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.

Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense," *Collins v. Harker Heights*, 503 U.S., at 129, 112 S.Ct., at 1071, thereby recognizing the point made in different circumstances by Chief Justice Marshall, " 'that it is *a constitution* we are expounding,' " *Daniels v. Williams*, *supra*, at 332, 106 S.Ct., at 665 (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 407, 4 L.Ed. 579 (1819)) (emphasis in original)). Thus, in *Collins v. Harker Heights*, for example, we said that the Due Process Clause was intended to prevent government officials " ' "from abusing [their] power, or employing it as an instrument of oppression." ' " 503 U.S., at 126, 112 S.Ct., at 1069 (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S., at 196, 109

S.Ct., at 1003 (in turn ****1717** quoting *Davidson v. Cannon*, 474 U.S., at 348, 106 S.Ct., at 670–671).

[5] To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. We first put the test this way in *Rochin v. California*, *supra*, at 172–173, 72 S.Ct., at 209–210, where we found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." In the intervening ***847** years we have repeatedly adhered to *Rochin 's* benchmark. See, *e.g.*, *Breithaupt v. Abram*, 352 U.S. 432, 435, 77 S.Ct. 408, 410, 1 L.Ed.2d 448 (1957) (reiterating that conduct that " 'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process); *Whitley v. Albers*, 475 U.S. 312, 327, 106 S.Ct. 1078, 1088, 89 L.Ed.2d 251 (1986) (same); *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' ... or interferes with rights 'implicit in the concept of ordered liberty' ") (quoting *Rochin v. California*, *supra*, at 172, 72 S.Ct., at 209–210, and *Palko v. Connecticut*, 302 U.S. 319, 325–326, 58 S.Ct. 149, 151–152, 82 L.Ed. 288 (1937)). Most recently, in *Collins v. Harker Heights*, *supra*, at 128, 112 S.Ct., at 1070, we said again that the substantive component of the Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, "poin[t] the way." *Johnson v. Glick*, 481 F.2d 1028, 1033 (C.A.2), cert. denied, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973).[FN8]

FN8. As Justice SCALIA has explained before, he fails to see "the usefulness of 'conscience shocking' as a legal test," *Herrera v. Collins*, 506 U.S. 390, 428, 113 S.Ct. 853, 875, 122 L.Ed.2d 203 (1993), and his independent analysis of this case is therefore understandable. He is, however, simply mistaken in seeing our insistence on the shocks-the-conscience standard as an atavistic return to a scheme of due process analysis rejected by the Court in *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

Glucksberg presented a disagreement about the significance of historical examples of protected liberty in determining whether a given statute could be judged to contravene the Fourteenth Amendment. The differences of opinion turned on the issues of how much history indicating recognition of the asserted right, viewed at what level of specificity, is necessary to support the finding of a substantive due process right entitled to prevail over state legislation.

As we explain in the text, a case challenging executive action on substantive due process grounds, like this one, presents an issue antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed. For executive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them. Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways. In none of our prior cases have we considered the necessity for such examples, and no such question is raised in this case.

In sum, the difference of opinion in

Glucksberg was about the need for historical examples of recognition of the claimed liberty protection at some appropriate level of specificity. In an executive action case, no such issue can arise if the conduct does not reach the degree of the egregious.

[6] ***848** It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In ****1718***Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160–1161, 47 L.Ed.2d 405 (1976), for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels v. Williams*, 474 U.S., at 332, 106 S.Ct., at 665, we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." We have accordingly rejected the lowest common denominator of customary tort liability***849** as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. See *id.*, at 328, 106 S.Ct., at 663; see also *Davidson v. Cannon*, 474 U.S., at 348, 106 S.Ct., at 670–671 (clarifying that *Daniels* applies to substantive, as well as procedural, due process). It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level. See *Daniels v. Williams*, 474 U.S., at 331, 106 S.Ct., at 665 ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original)).

Whether the point of the conscience shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence but "less than intentional conduct, such as recklessness or 'gross negligence,' " *id.*, at 334, n. 3, 106 S.Ct., at 666, n. 3, is a matter for closer calls.[FN9] To be sure, we have expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment, *ibid.*, and our cases have compelled recognition that such conduct is egregious enough to state a substantive due process claim in at least one instance. We held in *City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983), that "the due process rights of a [pretrial detainee] are at least as great as the ***850** Eighth Amendment protections available to a convicted prisoner." *Id.*, at 244, 103 S.Ct., at 2983 (citing *Bell v. Wolfish*, 441 U.S. 520, 535, n. 16, 545, 99 S.Ct. 1861, 1872, n. 16, 60 L.Ed.2d 447 (1979)). Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners, see *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976), it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial, see, *e.g.*, *Barrie v. Grand County, Utah*, 119 F.3d 862, 867 (C.A.10 1997); *Weyant v. Okst*, 101 F.3d 845, 856 (C.A.2 1996).[FN10]

FN9. In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), the case in which we formulated and first applied the shocks-the-conscience test, it was not the ultimate purpose of the government actors to harm the plaintiff, but they apparently acted with full appreciation of what the Court described as the brutality of their acts. *Rochin*, of course, was decided long before *Graham v. Connor* (and *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)), and today would be treated under the Fourth Amendment, albeit with the same result.

FN10. We have also employed deliberate indifference as a standard of culpability sufficient to identify a dereliction as reflective of municipal policy and to sustain a claim of municipal liability for failure to train an employee who causes harm by unconstitutional

conduct for which he would be individually liable. See *Canton v. Harris*, 489 U.S. 378, 388–389, 109 S.Ct. 1197, 1204–1205, 103 L.Ed.2d 412 (1989).

[7] Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience ****1719** shocking. What we have said of due process in the procedural sense is just as true here:

> "The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Betts v. Brady*, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595 (1942).

***851** Thus, attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indifference as deliberate in the case of sudden pursuit). As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical, see *Whitley v. Albers*, 475 U.S., at 320, 106 S.Ct., at 1084–1085,[FN11] and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

> FN11. By "actual deliberation," we do not mean "deliberation" in the narrow, technical sense in which it has sometimes been used in traditional homicide law. See, *e.g.*, *Caldwell v. State*, 203 Ala. 412, 84 So. 272, 276 (1919) (noting that " 'deliberation here does not mean that the man slayer must ponder over the killing for a long time' "; rather, "it may exist and may be entertained while the man slayer is pressing the trigger of the pistol that fired the fatal shot[,] even if it be only for a moment or instant of time").

"[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the ... Due Process Clause." *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S., at 199–200, 109 S.Ct., at 1005 (citation and footnote omitted).

Nor does any substantial countervailing interest excuse the State from making provision for the decent care and protection of those it locks up; "the State's responsibility to attend ***852** to the medical needs of prisoners [or detainees] does not ordinarily clash with other equally important governmental responsibilities." *Whitley v. Albers*, *supra*, at 320, 106 S.Ct., at 1084.[FN12]

> FN12. *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), can be categorized on much the same terms. There, we held that a severely retarded person could state a claim under § 1983 for a violation of substantive due process if the personnel at the mental institution where he was confined failed to exercise professional judgment when denying him training and habilitation. *Id.*, at 319–325, 102 S.Ct., at 2459–2463. The combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient's welfare.

But just as the description of the custodial prison situation shows how deliberate indifference can rise to a constitutionally shocking level, so too does it suggest why indifference may well not be enough for

liability in the different circumstances of a case like this one. We have, indeed, found that deliberate indifference does not suffice for constitutional liability (albeit under the Eighth Amendment) even in prison circumstances when a prisoner's claim arises not from normal custody but from response to a violent disturbance. Our analysis is instructive here:

> "[I]n making and carrying out decisions involving the use of force to restore order in the face of a prison disturbance, prison officials undoubtedly must take into account the very real threats the unrest ****1720** presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used.... In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Whitley v. Albers*, 475 U.S., at 320, 106 S.Ct., at 1084.

We accordingly held that a much higher standard of fault than deliberate indifference has to be shown for officer liability***853** in a prison riot. In those circumstances, liability should turn on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.*, at 320–321, 106 S.Ct., at 1085 (internal quotation marks omitted). The analogy to sudden police chases (under the Due Process Clause) would be hard to avoid.

[8] Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance." *Id.*, at 320, 106 S.Ct., at 1084; cf. *Graham v. Connor*, 490 U.S., at 397, 109 S.Ct., at 1872 ("[P]olice officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"). A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to all those within stopping range, be they suspects, their passengers, other drivers, or bystanders.

To recognize a substantive due process violation in these circumstances when only midlevel fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." *Daniels v. Williams*, 474 U.S., at 332, 106 S.Ct., at 665. ***854** Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.[FN13]

> FN13. Cf. *Checki v. Webb*, 785 F.2d 534, 538 (C.A.5 1986) ("Where a citizen suffers physical injury due to a police officer's *negligent use* of his vehicle, no section 1983 claim is stated. It is a different story when a citizen suffers or is seriously threatened with physical injury due to a police officer's *intentional misuse* of his vehicle" (citation omitted)).

[9] The fault claimed on Smith's part in this case accordingly fails to meet the shocks-the-conscience test. In the count charging him with liability under § 1983, respondents' complaint alleges a variety of culpable states of mind: "negligently responsible in some manner," App. 11, Count one, ¶ 8, "reckless and careless,' *id.*, at 12, ¶ 15, "recklessness, gross negligence and conscious disregard for [Lewis's] safety,' *id.*, at 13, ¶ 18, and "oppression, fraud and malice,' *ibid.* The subsequent summary judgment proceedings revealed that the height of the fault actually claimed was "conscious disregard," the malice allegation having been made in aid of a request for punitive

damages, but unsupported either in allegations of specific conduct or in any affidavit of fact offered on the motions for summary judgment. The Court of Appeals understood the claim to be one of ****1721** deliberate indifference to Lewis's survival, which it treated as equivalent to one of reckless disregard for life. We agree with this reading of respondents' allegations, but consequently part company from the Court of Appeals, which found them sufficient to state a substantive due process claim, and from the District Court, which made the same assumption *arguendo*.[FN14]

FN14. To say that due process is not offended by the police conduct described here is not, of course, to imply anything about its appropriate treatment under state law. See *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1070, 117 L.Ed.2d 261 (1992) (decisions about civil liability standards that "involve a host of policy choices ... must be made by locally elected representatives [or by courts enforcing the common law of torts], rather than by federal judges interpreting the basic charter of Government for the entire country"). Cf. *Thomas v. City of Richmond*, 9 Cal.4th 1154, 40 Cal.Rptr.2d 442, 892 P.2d 1185 (1995) (en banc) (discussing municipal liability under California law for injuries caused by police pursuits).

***855** Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.

Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983. The judgment below is accordingly reversed.

It is so ordered.

Chief Justice REHNQUIST, concurring.

I join the opinion of the Court in this case. The first question presented in the county's petition for certiorari is:

> "Whether, in a police pursuit case, the legal standard of conduct necessary to establish a violation of substantive***856** due process under the Fourteenth Amendment is 'shocks the conscience'... or is 'deliberate indifference' or 'reckless disregard.' " Pet. for Cert. i.

The county's petition assumed that the constitutional question was one of substantive due process, and the parties briefed the question on that assumption. The assumption was surely not without foundation in our case law, as the Court makes clear. *Ante*, at 1717. The Court is correct in concluding that "shocks the conscience" is the right choice among the alternatives posed in the question presented, and correct in concluding that this demanding standard has not been met here.

Justice KENNEDY, with whom Justice O'CONNOR joins, concurring.

I join the opinion of the Court, and write this explanation of the objective character of our substantive due process analysis.

The Court is correct, of course, in repeating that the prohibition against deprivations of life, liberty, or property contained in the Due Process Clause of the Fourteenth Amendment extends beyond the command of fair procedures. It can no longer be controverted that due process has a substantive component as well. See, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Collins v. Harker Heights*, 503 U.S. 115, 125–128, 112 S.Ct. 1061, 1068–1070, 117 L.Ed.2d 261 (1992); *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). As a consequence, certain actions are prohibited no matter what procedures attend them.

In the case before us, there can be no question****1722** that an interest protected by the text of the Constitution is implicated: The actions of the State were part of a causal chain resulting in the undoubted loss of life. We have no definitional problem, then, in determining whether there is an interest sufficient to invoke due process. Cf. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S.Ct. 1244, 140 L.Ed.2d 387 (1998).

***857** What we do confront is the question of the standard of conduct the Constitution requires the State, in this case the local police, to follow to protect against the unintentional taking of life in the circumstances of a police pursuit. Unlike the separate question whether or not, given the fact of a constitutional violation, the state entity is liable for damages, see *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 694–695, 98 S.Ct. 2018, 2037–2038, 56 L.Ed.2d 611 (1978); *Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), which is a matter of statutory interpretation or elaboration, the question here is the distinct, anterior issue whether or not a constitutional violation occurred at all. See *Collins v. Harker Heights*, *supra*, at 120, 124, 112 S.Ct., at 1065–1066, 1068.

The Court decides this case by applying the "shocks the conscience" test first recognized in *Rochin v. California*, 342 U.S. 165, 172–173, 72 S.Ct. 205, 209–210, 96 L.Ed. 183 (1952), and reiterated in subsequent decisions. The phrase has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with considerable skepticism. As our opinion in *Collins v. Harker Heights* illustrates, however, the test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning. 503 U.S., at 126–128, 112 S.Ct., at 1069–1070. As Justice SCALIA is correct to point out, we so interpreted the test in *Glucksberg*. *Post*, at 1723–1724 (opinion concurring in judgment). In the instant case, the authorities cited by Justice SCALIA are persuasive, indicating that we would contradict our traditions were we to sustain the claims of the respondents.

That said, it must be added that history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry. There is room as well for an objective assessment of the necessities of law enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment,***858** is bound to respect. I agree with the Court's assessment of the State's interests in this regard. Absent intent to injure, the police, in circumstances such as these, may conduct a dangerous chase of a suspect who disobeys a lawful command to stop when they determine it is appropriate to do so. There is a real danger in announcing a rule, or suggesting a principle, that in some cases a suspect is free to ignore a lawful police command to stop. No matter how narrow its formulation, any suggestion that suspects may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause suspects to flee more often, increasing accidents of the kind which occurred here.

Though I share Justice SCALIA's concerns about using the phrase "shocks the conscience" in a manner suggesting that it is a self-defining test, the reasons the Court gives in support of its judgment go far toward establishing that objective considerations, including history and precedent, are the controlling principle, regardless of whether the State's action is legislative or executive in character. To decide this case, we need not attempt a comprehensive definition of the level of causal participation which renders a State or its officers liable for violating the substantive commands of the Fourteenth Amendment. It suffices to conclude that neither our legal traditions nor the present needs of law enforcement justify finding a due process violation when unintended injuries occur after the police pursue a suspect who disobeys their lawful order to stop.

Justice BREYER, concurring.

I join the Court's judgment and opinion. I write separately only to point out my agreement with Justice STEVENS, *post*, at 1723, that ****1723***Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), should not be read to deny lower courts the flexibility, in appropriate cases, to decide 42 U.S.C. § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with ***859** constitutional issues that are either difficult or poorly presented. See *Siegert*, *supra*, at 235, 111 S.Ct., at 1794–1795 (KENNEDY, J., concurring) (Lower court "adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by

the parties").

Justice STEVENS, concurring in the judgment.

When defendants in a 42 U.S.C. § 1983 action argue in the alternative (a) that they did not violate the Constitution, and (b) that in any event they are entitled to qualified immunity because the constitutional right was not clearly established, the opinion in *Siegert v. Gilley*, 500 U.S. 226, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991), tells us that we should address the constitutional question at the outset. That is sound advice when the answer to the constitutional question is clear. When, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions. Because I consider this such a case, I would reinstate the judgment of the District Court on the ground that the relevant law was not clearly defined in 1990.

The Court expresses concern that deciding the immunity issue without resolving the underlying constitutional question would perpetuate a state of uncertainty in the law. *Ante*, at 1714, n. 5. Yet the Court acknowledges, as it must, that a qualified immunity defense is unavailable in an action against the municipality itself. *Id.* Sound reasons exist for encouraging the development of new constitutional doctrines in adversarial suits against municipalities, which have a substantial stake in the outcome and a risk of exposure to damages liability even when individual officers are plainly protected by qualified immunity.

In sum, I would hold that Officer Smith is entitled to qualified immunity. Accordingly, I concur in the Court's judgment, but I do not join its opinion.

***860** Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

Today's opinion gives the lie to those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership. It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, "That was then, this is now."

Just last Term, in *Washington v. Glucksberg*, 521 U.S. 702, 720–722, 117 S.Ct. 2258, 2267–2269, 138 L.Ed.2d 772 (1997), the Court specifically rejected the method of substantive-due-process analysis employed by Justice SOUTER in his concurrence in that case, which is the very same method employed by Justice SOUTER in his opinion for the Court today. To quote the opinion in *Glucksberg:*

> "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'... and 'implicit in the concept of ordered liberty'.... Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest.... Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decision-making,'... that direct and restrain our exposition of the Due Process Clause....
>
> "Justice SOUTER ... would largely abandon this restrained methodology, and instead ask 'whether [Washington's] statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause ...' [citations and footnote omitted]. In our view, however, the development of this Court's substantive-due-process jurisprudence ... has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth****1724** Amendment ... have at ***861** least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due process judicial review." *Id.*, at 720–722, 117 S.Ct., at 2268.

Today, so to speak, the stone that the builders had rejected has become the foundation stone of our substantive-due-process jurisprudence. The atavistic methodology that Justice SOUTER announces for the Court is the very same methodology that the Court called atavistic when it was proffered by Justice SOUTER in *Glucksberg.* In fact, if anything, today's opinion is even more of a throw back to highly subjective substantive-due-process methodologies than the concurrence in *Glucksberg* was. Whereas the latter said merely that substantive due process prevents "arbitrary impositions" and "purposeless restraints" (without any objective criterion as to what is arbitrary or purposeless), today's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma

Gandhi, the Cellophane [FN1] of subjectivity, th' ol' "shocks-the-conscience" test. According to today's opinion, this is the *measure* of arbitrariness when what is at issue is executive, rather than legislative, action. *Ante*, at 1717.[FN2] ***862** *Glucksberg*, of course, rejected "shocks-the-conscience," just as it rejected the less subjective "arbitrary action" test. A 1992 executive-action case, *Collins v. Harker Heights*, 503 U.S. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261, which had paid lipservice to "shocks-the-conscience," see *id.*, at 128, 112 S.Ct., at 1070, was cited in *Glucksberg* for the proposition that "[o]ur Nation's history, legal traditions, and practices ... provide the crucial 'guideposts for responsible decisionmaking.' " 521 U.S., at 721, 117 S.Ct., at 2268, quoting *Collins*, *supra*, at 125, 112 S.Ct., at 1068. In fact, even before *Glucksberg* we had characterized the last "shocks-the-conscience" claim to come before us as "nothing more than [a] bald assertio[n]," and had rejected it on the objective ground that the petitioner "failed to proffer any historical, textual, or controlling precedential support for [his alleged due process right], and we decline to fashion a new due process right out of thin air." *Carlisle v. United States*, 517 U.S. 416, 429, 116 S.Ct. 1460, 1468, 134 L.Ed.2d 613 (1996).

FN1. For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter's "You're the Top," copyright 1934.

FN2. The proposition that "shocks-the-conscience" is a test applicable only to executive action is original with today's opinion. That has never been suggested in any of our cases, and in fact "shocks-the-conscience" was recited in at least one opinion involving legislative action. See *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (in considering whether the Bail Reform Act of 1984 violated the Due Process Clause, we said that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience' "). I am of course happy to accept whatever limitations the Court today is willing to impose upon the "shocks-the-conscience" test, though it is a puzzlement why substantive due process protects some liberties against executive officers but not against legislatures.

Adhering to our decision in *Glucksberg*, rather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert. The first step of our analysis, of course, must be a "careful description" of the right asserted, *Glucksberg*, *supra*, at 721, 117 S.Ct., at 2268. Here the complaint alleges that the police officer deprived Lewis "of his Fourteenth Amendment right to life, liberty and property without due process of law when he operated his vehicle with recklessness, gross negligence and conscious disregard for his safety." App. 13. I agree with the Court's conclusion that this asserts a substantive right to be free from "deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Ante*, at 1711; see also *ante*, at 1720.

Respondents provide no textual or historical support for this alleged due process right, and, as in *Carlisle*, I would "decline to fashion a new due process right out of thin air." 517 U.S., at 429, 116 S.Ct., at 1468. Nor have respondents identified any precedential support. Indeed, precedent is to the contrary:****1725 *863** "Historically, th[e] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 664–665, 88 L.Ed.2d 662 (1986) (citations omitted); *Collins*, *supra*, at 127, n. 10, 112 S.Ct., at 1069, n. 10 (same). Though it is true, as the Court explains, that "deliberate indifference" to the medical needs of pretrial detainees, *City of Revere v. Massachusetts Gen. Hospital*, 463 U.S. 239, 244–245, 103 S.Ct. 2979, 2983–2984, 77 L.Ed.2d 605 (1983), or of involuntarily committed mental patients, *Youngberg v. Romeo*, 457 U.S. 307, 314–325, 102 S.Ct. 2452, 2457–2463, 73 L.Ed.2d 28 (1982), may violate substantive due process, it is not the deliberate indifference alone that is the "deprivation." Rather, it is that combined with "the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty," *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200, 109 S.Ct. 998, 1006, 103 L.Ed.2d 249 (1989). "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it

renders him unable to care for himself, and *at the same time* fails to provide for his basic human needs[,] ... it transgresses the substantive limits on state action set by the ... Due Process Clause." *Ibid.* (emphasis added). We have expressly left open whether, in a context in which the individual has *not* been deprived of the ability to care for himself in the relevant respect, "something less than intentional conduct, such as recklessness or 'gross negligence,' " can ever constitute a "deprivation" under the Due Process Clause. *Daniels*, 474 U.S., at 334, n. 3, 106 S.Ct., at 666, n. 3. Needless to say, if it is an open question whether recklessness can *ever* trigger due process protections, there is no precedential support for a substantive-due-process right to be free from reckless police conduct during a car chase.

To hold, as respondents urge, that all government conduct deliberately indifferent to life, liberty, or property violates the Due Process Clause would make " 'the Fourteenth Amendment a font of tort law to be superimposed upon whatever ***864** systems may already be administered by the States.' " *Id.*, at 332, 106 S.Ct., at 665, quoting *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976) (other citation omitted). Here, for instance, it is not fair to say that it was the police officer alone who "deprived" Lewis of his life. Though the police car did run Lewis over, it was the driver of the motorcycle, Willard, who dumped Lewis in the car's path by recklessly making a sharp left turn at high speed. (Willard had the option of rolling to a gentle stop and showing the officer his license and registration.) Surely Willard "deprived" Lewis of his life in every sense that the police officer did. And if Lewis encouraged Willard to make the reckless turn, Lewis himself would be responsible, at least in part, for his own death. Was there contributory fault on the part of Willard or Lewis? Did the police officer have the "last clear chance" to avoid the accident? Did Willard and Lewis, by fleeing from the police, "assume the risk" of the accident? These are interesting questions of tort law, not of constitutional governance. "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels, supra*, at 332, 106 S.Ct., at 665. As we have said many times, "the Due Process Clause of the Fourteenth Amendment ... does not transform every tort committed by a state actor into a constitutional violation." *DeShaney, supra*, at 202, 109 S.Ct., at 1006 (citations omitted).

If the people of the State of California would prefer a system that renders police officers liable for reckless driving during high-speed pursuits, "[t]hey may create such a system ... by changing the tort law of the State in accordance with the regular lawmaking process." 489 U.S., at 203, 109 S.Ct., at 1007. For now, they prefer not to hold public employees "liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an ****1726** authorized emergency vehicle ... when in the immediate pursuit of an actual or suspected violator***865** of the law." Cal. Veh.Code Ann. § 17004 (West 1971). It is the prerogative of a self-governing people to make that legislative choice. "Political society," as the Seventh Circuit has observed, "must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee—and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders." *Mays v. City of East St. Louis*, 123 F.3d 999, 1003 (C.A.7 1997). In allocating such risks, the people of California and their elected representatives may vote their consciences. But for judges to overrule that democratically adopted policy judgment on the ground that it shocks *their* consciences is not judicial review but judicial governance.

I would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right. Accordingly, I concur in the judgment of the Court.

U.S.Cal.,1998.
County of Sacramento v. Lewis
523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043, 66 USLW 4407, 98 Cal. Daily Op. Serv. 3918, 98 Daily Journal D.A.R. 5389, 98 CJ C.A.R. 2577, 11 Fla. L. Weekly Fed. S 555

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419 F.2d 617, 136 U.S.App.D.C. 35
(Cite as: 419 F.2d 617, 136 U.S.App.D.C. 35)

United States Court of Appeals District of Columbia Circuit.
James COVINGTON, Appellant,
v.
David W. HARRIS, Appellee.

No. 21935.
Argued Dec. 5, 1968.
Decided March 14, 1969.

Habeas corpus petition by person civilly committed to Saint Elizabeths Hospital in District of Columbia, seeking transfer from the John Howard (maximum security) Pavilion to some less restricted ward. The United States District Court for the District of Columbia, George L. Hart, Jr., J., dismissed the petition, and petitioner appealed. The Court of Appeals, Bazelon, Chief Judge, held that where record did not indicate that decision of Saint Elizabeths Hospital that petitioner be confined in John Howard (maximum security) Pavilion was made in view of the relevant information, case was remanded to district court for further proceedings to expand the record and to make findings of fact.

Remanded.

West Headnotes

[1] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically Dependent Persons
197k537.1 k. In general. Most Cited Cases
(Formerly 197k537, 197k17)

Habeas corpus challenges the place as well as the fact of confinement, even if the challenged place is a particular hospital ward, and specifically if the particular ward is the John Howard Pavilion, which is the maximum security ward in Saint Elizabeths Hospital in District of Columbia.

[2] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically Dependent Persons
197k537.1 k. In general. Most Cited Cases
(Formerly 197k537, 197k100)

On review by way of habeas corpus of decision of Saint Elizabeths Hospital that petitioner be confined in John Howard (maximum security) Pavilion, the question was not whether hospital had made the best decision but only whether it had made a permissible and reasonable decision in review of the relevant information and within a broad range of discretion.

[3] Habeas Corpus 197 863

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)3 Determination and Disposition
197k862 Remand
197k863 k. Particular issues and problems. Most Cited Cases
(Formerly 197k113(14), 197k113(13))

Where record in habeas corpus case did not indicate that decision of Saint Elizabeths Hospital that petitioner be confined in John Howard (maximum security) Pavilion was made in view of the relevant information, case was remanded to district court for further proceedings to expand the record and to make findings of fact.

[4] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically Dependent Persons
197k537.1 k. In general. Most Cited Cases

(Formerly 197k537, 197k100)

The principal purpose of limited judicial review by way of habeas corpus of administrative action of Saint Elizabeths Hospital confining petitioner in John Howard (maximum security) Pavilion is to insure that the decision makers have (1) reached a reasoned and not unreasonable discretion, (2) by employing proper criteria, and (3) without overlooking anything of substantial relevance.

[5] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically Dependent Persons
197k537.1 k. In general. Most Cited Cases
(Formerly 197k537, 197k100)

The limited scope of judicial review by way of habeas corpus of hospital decisions assumes good faith and professional expertise of hospital staff.

[6] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically Dependent Persons
197k537.1 k. In general. Most Cited Cases
(Formerly 197k537, 197k17)

A mere request for change of dormitories or for transfer between substantially similar wards of Saint Elizabeths Hospital could not support a petition for habeas corpus; a patient seeking review of his placement within hospital must show at least that there are substantial differences in the conditions of confinement between where he is and where he wants to be.

[7] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically Dependent Persons
197k537.1 k. In general. Most Cited Cases
(Formerly 197k537, 197k100)

A court is better equipped to review by habeas corpus a hospital decision that exceptional restrictions on liberty are justified if it knows with reasonable precision what those restrictions are.

[8] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically Dependent Persons
197k537.1 k. In general. Most Cited Cases
(Formerly 197k537, 197k100)

Habeas Corpus 197 863

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)3 Determination and Disposition
197k862 Remand
197k863 k. Particular issues and problems. Most Cited Cases
(Formerly 197k113(14), 197k113(13))

The facts about John Howard (maximum security) Pavilion in Saint Elizabeths Hospital were not peculiarly within knowledge of hospital, and were properly part of case of one who had been civilly committed to hospital and whowas seeking by way of habeas corpus transfer from the pavilion to some less restricted ward; on remand the petitioner could develop those facts, and hospital should canvass less restrictive alternatives and, finding none, should consider effect of such extreme deprivations on petitioner's treatment.

[9] Habeas Corpus 197 537.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k537 Mentally Disordered and Chemically

Dependent Persons
197k537.1 k. In general. Most Cited Cases
(Formerly 197k537, 197k100)

In reviewing on habeas corpus a civilly committed patient's confinement in a mental hospital, the court should satisfy itself that no less onerous disposition would serve purpose of commitment. D.C.C.E. §§ 21-501 to 21-591, 21-544, 21-545(b).

[10] Mental Health 257A 51.10

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.10 k. Nature or extent of restraint. Most Cited Cases
(Formerly 257Ak51)

The principle of the least restrictive alternative consistent with legitimate purposes of commitment to hospital inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty justifiable only when the respondent is mentally ill to the extent that he is likely to injure himself or other persons if allowed to remain at liberty. D.C.C.E. § 21-544.

[11] Mental Health 257A 32

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak32 k. Constitutional and statutory provisions. Most Cited Cases

Statute sanctioning commitment of mentally ill person must be narrowly construed in order to avoid deprivations of liberty without due process of law. D.C.C.E. §§ 21-501 to 21-591.

[12] Constitutional Law 92 1079

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1079 k. Personal liberty. Most Cited Cases
(Formerly 92k83(1))

Even though governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when end can be more narrowly achieved; the breadth of legislative abridgement must be viewed in light of less drastic means for achieving same basic purpose.

[13] Mental Health 257A 51.10

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.10 k. Nature or extent of restraint. Most Cited Cases
(Formerly 257Ak51)

The principle of the least restrictive alternative is equally applicable to alternative dispositions within a mental hospital. D.C.C.E. §§ 21-501 to 21-591.

[14] Mental Health 257A 51.10

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.10 k. Nature or extent of restraint. Most Cited Cases
(Formerly 257Ak51)

Efficient hospital administration requires courts to accord administrators much broader discretion in determining appropriateness of an inter-hospital disposition of mentally ill person than in assaying the need for hospitalization ab initio; however, additional restrictions beyond those necessarily entailed by hospitalization are as much in need of justification as any other deprivations of liberty; judicial review of internal decisions is not precluded. D.C.C.E. §§ 21-501 to 21-591.

[15] Mental Health 257A 51.10

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure

257Ak51 Restraint or Treatment
257Ak51.10 k. Nature or extent of restraint. Most Cited Cases
(Formerly 257Ak51)

Before a court can determine that hospital's decision to confine patient in maximum security ward is, within its broad discretion, permissible and reasonable in view of the relevant information, it must be able to conclude that hospital has considered and found inadequate all relevant alternative dispositions within hospital. D.C.C.E. §§ 21-501 to 21-591.

[16] Mental Health 257A 51.5

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.5 k. Treatment or medication; training or habilitation. Most Cited Cases
(Formerly 257Ak51)

Under District of Columbia statute providing that a person hospitalized in public hospital for a mental illness shall be entitled to medical and psychiatric care and treatment, the hospital may be required to show that it is making a bona fide effort to cure or improve the patient and that the treatment provided is suited to his particular needs. D.C.C.E. § 21-562.

[17] Mental Health 257A 51.10

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.10 k. Nature or extent of restraint. Most Cited Cases
(Formerly 257Ak51)

Since treatment of mentally ill person is an essential justifying purpose of civil commitment, a permissible decision to confine patient under maximal restrictions cannot be made without consideration of its therapeutic consequences.

[18] Mental Health 257A 21

257A Mental Health
257AI In General
257Ak21 k. Records and confidential communications. Most Cited Cases

That hospital to which mentally ill person has been civilly committed may not disclose hospital records to outside parties without patient's consent does not imply that it is forbidden to introduce them in court where they are relevant to patient's contentions on habeas corpus. D.C.C.E. § 21-562.

[19] Habeas Corpus 197 841

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k841 k. In general. Most Cited Cases
(Formerly 197k113(12))

Orderly judicial procedure normally precludes raising on appeal issues not reasonably within scope of question presented by petition for habeas corpus.

***619 **37** Mr. Thomas C. Green, Asst. U.S. Atty., with whom Messrs. David G. Bress, U.S. Atty., and Frank Q. Nebeker, Asst. U.S. Atty., were on the motion, for appellee.

Mr. Charles R. Halpern, with whom Mr. Stephen B. Rosenberg was on the opposition to the motion, for appellant.

Before BAZELON, Chief Judge, FAHY, Senior Circuit Judge, and McGOWAN, Circuit Judge.[FNa1]

FNa1. Circuit Judge McGowan did not participate in the decision to remand this case.

BAZELON, Chief Judge:

The District Court heard and dismissed appellant's habeas corpus petition seeking transfer from the maximum security pavilion of Saint Elizabeths Hospital to some less restrictive ward. On this appeal appellant not only contests this order, but also asserts that he is entitled to be released from Saint Elizabeths altogether because of numerous alleged defects in the proceedings leading to his civil commitment. Appellee promptly moved for summary affirmance on the grounds that the record adequately

supports the order denying transfer and that none of the other issues appellant now raises was presented below. Thereupon, appellant requested summary reversal on the transfer issue and further argument on the others. Because of deficiencies in the record, we think a remand, rather than any final disposition, would best serve the interests of justice.

I

Appellant was convicted of second degree murder in 1942 and served a 14-year prison sentence. In 1957, soon after his release, he was again charged with murder. This time he was found incompetent to stand trial because of 'mental deficiency (38 I.Q.) with psychotic reaction,' and was confined in Saint Elizabeths. In 1964, he was civilly committed to the hospital, and the pending murder charge was dismissed. Ever since his original confinement he has been continuously lodged in the John Howard (maximum security) Pavilion. Though his I.Q. has risen to 52, the hospital says he is still suffering from the same syndrome.

Generally, during his ten years in John Howard, appellant has by all accounts been a model patient, cooperating with the staff and staying out of trouble. Under the influence of medication he has shown no overt signs of violence. In December, 1966, while under an experimentally reduced dosage of medication, he confessed to having 'murderous thoughts' towards some of his fellow patients, but these thoughts were stilled by restoring his full dosage. Considering this record and the improvement he had shown during confinement, his supervising physician, Dr. Weickhardt, recommended in September, 1967, that he be transferred out of the maximum security division. The recommendation was disapproved by Acting Superintendent Harris, whereupon appellant brought this habeas corpus action in the District Court pro se, explaining that he 'would like to get out on the grounds where I have ground privileges and catch a little fresh air.'

In a hearing before Judge Sirica, Dr. Weickhardt stood by his recommendation, stating that while appellant would never achieve normal intelligence,

> as long as he takes medicine such as he is getting now- a tranquilizer- and as long as he refrains from the use of alcohol, I think that he can get along well under supervision.

The doctor had been unable, however, to convince the Superintendent that appellant, if permitted more freedom, might not begin to use alcohol, with 'unpredictable consequences.' The hospital thought it more prudent to wait a full year after the 'murderous thoughts' episode before risking a less restrictive regime. Judge Sirica complained that he ***620 **38** couldn't see 'why the Superintendent doesn't accept the advice of the doctor that sees this man all the time,' but decided to continue the case until the hospital had reconsidered the transfer recommendation in December as scheduled, at the end of the year of 'murderous thoughts.'

The hospital did not reconsider its decision; indeed, it may not have even formally reconsidered appellant's request.[FN1] Accordingly, appellant was back in court in February, 1968, before Judge Hart. But Dr. Weickhardt now reversed his field and refused to recommend a transfer. In the unkindest cut of all, the doctor said the reason for his change of heart was an incident in which appellant reported that another patient had stolen money from him. The authorities searched the accused patient and found five dollars and some contraband drugs, including pills and a pink liquid. This discovery set in motion a train of inferences which, according to Dr. Weickhardt, were cumulatively fatal to appellant's hopes. Appellant's medication was a pink liquid. And though other medicinal liquids administered in the pavilion were also pink, though no analysis was performed on the confiscated drug to determine if it could have been appellant's, though appellant testified that he was never given any pills and that he was always obliged to swallow his pink liquid in the presence of an attendant- nonetheless Dr. Weickhardt concluded from the discovery of pills and pink liquid on the thief that 'there was reason to think there had been some dealings between (appellant) * * * and the other patient about money and drugs.' Moreover, it appears that, while not uncommon, money itself is formally contraband in John Howard Pavilion. Appellant said he had found the money in the courtyard where others had been gambling, but that he had inadvertently neglected to turn it in, though he knew he should have done so. Despite the fact that, if he had willfully violated the rules, he was of course only incriminating himself by reporting the theft, Dr. Weickhardt concluded that

> FN1. Appellant's hospital records, lodged with this court on appeal (but not presented to the District Court) make no mention of appellant's request for transfer after the September 1967 decision to wait until December. It may be, however, that the records are not a complete set since, though they were not filed until December 4,

1968, the last entry is dated December 31, 1967.

if Mr. Covington cannot follow the regulations about contraband in the Maximum Security Building * * *, he would be even less inclined to follow them where there is less supervision.

Finally, the doctor noted that appellant had in 1942 committed murder after an altercation over a small sum of money. He conceded that appellant's behavior in calmly reporting the instant money incident was, in contrast, 'much to his credit,' but he surmised that the Superintendent 'felt there might be a possibility that things like this would happen again between him and another patient. * * *'

On this evidence, the court dismissed the petition, relying on the Superintendent's initial decision to deny transfer, a decision now unopposed by any medical authority.

II

[1] On its motion for summary affirmance, appellee does not deny that appellant may seek transfer out of John Howard Pavilion via habeas corpus. It is well settled that habeas corpus challenges the place as well as the fact of confinement,[FN2] even if the challenged place is a particular hospital ward, [FN3] and ***621 **39** specifically if the particular ward is the John Howard Pavilion.[FN4]

FN2. In re Bonner, 151 U.S. 242, 14 S.Ct. 323, 38 L.Ed. 149 (1894); Lake v. Cameron, 124 U.S.App.D.C. 264, 364 F.2d 657 (1966) (en banc), cert. denied, 382 U.S. 863, 86 S.Ct. 126, 15 L.Ed.2d 100; Miller v. Overholser, 92 U.S.App.D.C. 110, 206 F.2d 415 (1953).

FN3. Miller v. Overholser, supra note 2.

FN4. Stultz v. Cameron, 127 U.S.App.D.C. 324, 383 F.2d 519, 520-521 (1967) (en banc).

[2] Rather, appellee says that under the standard governing judicial review of hospital decisions concerning internal administration articulated in Tribby v. Cameron,[FN5] the question is not whether the hospital has made the best decision, but only whether

FN5. 126 U.S.App.D.C. 327, 379 F.2d 104 (1967).

it has made a permissible and reasonable decision in view of the relevant information and within a broad range of discretion.[FN6]

FN6. Id. at 328, 379 F.2d at 105.

Appellee submits that since the District Court implicitly found the hospital's decision 'permissible and reasonable,' and since this finding is not 'clearly erroneous,' there is no substantial issue for appellate determination. Appellant, on the other hand, asserts that the hospital manifestly failed to carry its burden of proof and that he is therefore entitled to summary reversal.

[3] We agree with appellee that Tribby states the applicable standard of judicial review. But the predicate for the hospital's 'wide range of discretion' under Tribby is a record which gives assurance that its decision has been made 'in view of the relevant information.' We cannot tell from the present record whether such information was considered or not. Accordingly, since neither of the parties objects to clarification of the record,[FN7] we remand to the District Court for further proceedings to expand the record and to make findings of fact. The scope of the proceedings on remand required by this opinion are accurately delineated by Judge Fahy at page 630.[FN8]

FN7. In the alternative, appellant urges us to remand for a supplemental record on the transfer question, and during oral argument the Government stated that it 'would have no objection if the court felt that a remand would be in order to take more evidence on this issue.'

FN8. Cf. Stultz v. Cameron, supra note 4; Rouse v. Cameron, 125 U.S.App.D.C. 366, 374, 373 F.2d 451, 458 (1966); Miller v. Overholser, supra note 2. In Miller, we remanded a similar assertion of a right to transfer within Saint Elizabeths

with instructions that it make a finding as to the conditions of appellant's confinement, receiving, if necessary, additional pleadings and evidence in that regard * * *. Id. at 116, 206 F.2d at 420.

III

[4] A 'permissible * * * decision' under Tribby v.

Cameron[FN9] is one which demonstrably takes account of 'the relevant information.' The principal purpose of limited judicial review of administrative action is to insure that the decision-makers have (1) reached a reasoned and not unreasonable decision, (2) by employing the proper criteria, and (3) without overlooking anything of substantial relevance. More than this the courts do not pretend to do, and probably are not competent to do. To do less would abandon the interests affected to the absolute power of administrative officials.

FN9. Supra note 5.

[5] Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power, be they Presidents, legislators, administrators, judges, or doctors. It is not doctors' nature, but human nature, which benefits from the prospect and the fact of supervision. Indeed, the limited scope of judicial review of hospital decisions necessarily assumes the good faith and professional expertise of the hospital staff. Judicial review is only a safety catch against the fallibility of the best of men; and not the least of ***622 **40** its services is to spur them to double-check their own performance and provide them with a checklist by which they may readily do so.

The hearing below dealt almost exclusively with the single issue of appellant's potential dangerousness to others. The question, however, was not whether appellant was dangerous enough to require continued confinement, but whether he could properly be confined under conditions of maximum security detention. That question appears to involve other considerations besides his abstract potential dangerousness.

A. Consequences of Confinement in John Howard Pavilion.

[6] A mere request for a change of dormitories or for transfer between substantially similar wards could not support a petition for habeas corpus. A patient seeking review of his placement within the hospital must show at least that there are substantial differences in the conditions of confinement between where he is and where he wants to be. We need not decide whether or when such a showing could be made on a request for transfer from a service other than John Howard. Appellant's petition alleges in substance only that he has a right to be kept anywhere but in John Howard, and the necessary premise of such a petition is that John Howard is a unique service at Saint Elizabeths.

It appears that John Howard houses principally the so-called 'criminally insane.'[FN10] Such facilities have, in the past, notoriously rivalled maximum security prisons in the pervasiveness of their restraint upon liberty and the totality of their impositions upon dignity. The predecessor to John Howard Pavilion at Saint Elizabeths was described to this court as

> FN10. This designation refers to persons who have not been civilly committed but are rather confined as a result of criminal proceedings, either because they are incompetent to stand trial for pending charges or because they have been found not guilty by reason of insanity of a criminal offense. In 1963, John Howard's population was comprised of 'essentially all prisoner patients.' Hearings on the Administration and Operation of Saint Elizabeths Hospital before a Subcommittee of the House Committee on Education and Labor, (hereinafter '1964 Hearings') 88th Cong., 1st Sess. 65 (1964) (testimony of Dr. Dale C. Cameron, Superintendent of Saint Elizabeths Hospital). Of the 380 patients then in John Howard, only thirty were 'civil' patients (of which the hospital then housed some 6000), and those few were there because they were 'difficult and assaultive.' Id., 48.
>
> A more recent description of John Howard, with recommendations for its improvement, is contained in the report of an ad hoc committee of the National Institute of Mental Health ('The Evaluation of Security Programs and Facilities at Saint Elizabeths Hospital,' November 1968), portions of which are attached as an Appendix to this opinion.

a place for the confinement of the violent, criminal, hopeless insane, instead of * * * a place designed and operated for the treatment of the mentally ill. * * *[FN11]

> FN11. Miller v. Overholser, supra note 2, 92 U.S.App.D.C. at 116, 206 F.2d at 419. In Baxstrom v. Herold, 383 U.S. 107, 113, 86 S.Ct. 760, 15 L.Ed.2d 620 (1964), the Supreme Court took note of the 'striking' dissimilarities between Dannemora- the New York hospital for the 'cri-

minally insane'- and New York's 'civil' hospitals.

Of the present John Howard, appellant says in his brief:

John Howard is physically a prison. Its inmates are locked in; they have no ground privileges, their outdoor activities are conducted in a walled-in yard identical to a prison yard; their visitors may be received only for a few minutes, and then in a prison-like visiting room; and they are denied access to many of the recreational and educational facilities available to other patients at the hospital.

Thus, there is reason to believe that confinement in John Howard is not normally contemplated for civilly committed patients***623 **41** and entails extraordinary deprivations of liberty and dignity which make it, in effect, more penitentiary than mental hospital, even if it also provides some treatment.

[7] In entertaining appellant's petition, the District Court evidently proceeded on the reasonable assumption that, as the designation 'maximum security service' implies, confinement in John Howard does in fact impose substantially greater deprivations than confinement anywhere else in the hospital. However, appellant made no record on this matter except to note that he was denied ground privileges. We do not dispute the District Court's assumption concerning the nature of John Howard. Indeed, our further observations concerning the inadequacy of the record rest on the same assumption. However, since Congress and the courts are only beginning to examine the operations of Saint Elizabeths,[FN12] it is desirable that the courts be fully informed by the parties. A court is better equipped to review a hospital decision that exceptional restrictions on liberty are justified if it knows with reasonable precision what those restrictions are.

FN12. See, e.g., Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on a Bill to Protect the Constitutional Rights of the Mentally Ill, 88th Cong., 1st Sess. 12 (1963); 1964 Hearings, supra note 10.

[8] The facts about the nature of John Howard Pavilion are not peculiarly within the knowledge of the hospital, and were properly part of appellant's case below. On remand, he may now develop those facts for the record. If they are as he now says, then before denying appellant's request for transfer the hospital was obliged both to canvass less restrictive alternatives and, finding none, to consider the effect of such extreme deprivations on his treatment.

B. The Availability of Less Restrictive Alternatives.

[9][10][11][12] In Lake v. Cameron,[FN13] we held that in reviewing on habeas corpus a civilly committed patient's confinement in a mental hospital, the court should satisfy itself that no less onerous disposition would serve the purpose of the commitment. We thought this principle was implicit in the provisions of the District of Columbia Hospitalization of the Mentally Ill Act[FN14] authorizing the committing court to consider alternatives to hospitalization[FN15] and evincing a profound congressional concern for the liberties of the mentally ill. The new legislation apart, however, the principle of the least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment, which entails an extraordinary deprivation of liberty justifiable only when the respondent is 'mentally ill to the extent that he is likely to injure himself or other persons if allowed to remain at liberty.'[FN16] A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.[FN17]

FN13. 124 U.S.App.D.C. 264, 364 F.2d 657 (1966).

FN14. D.C.Code §§ 21-501 to 21-591 (1967).

FN15. D.C.Code § 21-545(b)(1967).

FN16. D.C.Code § 21-544 (1967).

FN17. Cf. Aptheker v. Secretary of State, 378 U.S. 500, 514, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). It is an axiom of due process that

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct.

247, 252, 5 L.Ed.2d 231 (1960).

[13] The principle of the least restrictive alternative is equally applicable to alternate dispositions within a mental hospital. It makes little sense to guard ***624 **42** zealously against the possibility of unwarranted deprivations prior to hospitalization, only to abandon the watch once the patient disappears behind hospital doors. The range of possible dispositions of a mentally ill person within a hospital, from maximum security to outpatient status, is almost as wide as that of dispositions without. The commitment statute no more authorizes unnecessary restrictions within the former range than it does within the latter.

[14] The only distinctive feature of intra-hospital dispositions suggesting that they might be subject to a different rule is the fact that they involve considerations of hospital administration which are entrusted, in the first instance, to hospital authorities. Efficient hospital administration does require the courts to accord the administrators much broader discretion in determining the appropriateness of an intra-hospital disposition than in assaying the need for hospitalization ab initio. But this recognition of the hospital's primary responsibility, reflected in the narrow scope of judicial review under Tribby v. Cameron,[FN18] does not detract from the principle that additional restrictions beyond those necessarily entailed by hospitalization are as much in need of justification as any other deprivations of liberty; nor does it preclude all judicial review of internal decisions.

FN18. Supra note 5.

In the 1964 Act,[FN19] Congress scotched any notion that a public mental hospital is a temple into which mere mortals are not allowed to gaze. It marched rudely into the very sanctum sanctorum, where purely medical decisions are made, and established a judicially cognizable right to treatment. [FN20] It instructed the hospital to keep detailed records of all treatment administered, and to make them available to the patient's personal physician or attorney upon his request.[FN21] It provided for periodic reconsideration-by the hospital, by outside physicians, and by the courts- of the need for hospitalization itself.[FN22] It even prescribed in detail when and how the hospital might control incoming mail and other communications to a patient,[FN23] and it felt compelled to affirm expressly that the hospital still retains the right to make 'reasonable rules regarding visitation hours and the use of telephone and telegraph facilities.'[FN24] These pervasive limitations on the hospital's discretion to run its own shop negate any intent to repeal in the same statutory breath the ordinary presumption in favor of liberty or to insulate the hospital from all accountability for its protection of that right.

FN19. Supra note 14.

FN20. D.C.Code § 21-562 (1967); Rouse v. Cameron, supra note 8.

FN21. Id.

FN22. D.C.Code §§ 21-546, 21-547, 21-548 (1967).

FN23. D.C.Code § 21-561(a) and (b) (1967).

FN24. D.C.Code § 21-561(c) (1967).

[15] Thus, before a court can determine that the hospital's decision to confine a patient in a maximum security ward is, within its broad discretion, 'permissible and reasonable * * * in view of the relevant information,' [FN25] it must be able to conclude that the hospital has considered and found inadequate all relevant alternative dispositions within the hospital. Moreover, as we noted in Lake v. Cameron, the state has the obligation

FN25. Tribby v. Cameron, supra note 6.

to bear the burden of exploration of possible alternatives an indigent cannot bear * * *. Appellant may not be required to carry the burden of showing the availability of alternatives. Proceedings involving the care and treatment of the mentally ill are not strictly adversary proceedings. Moreover, appellant plainly does not know and lacks the means to ascertain what alternatives, if any, are available, but the government knows or has the means of knowing and ***625 **43** should therefore assist the court in acquiring such information. [FN26]

FN26. Supra, note 13, 124 U.S.App.D.C. at 267-268, 364 F.2d at 660-661.

The duty to explore intra-hospital alternatives to maximum security confinement can hardly be assailed as an intolerable burden on the administrators. Professionally, a doctor owes even a voluntary patient a careful canvass of alternatives to drastic treatment. He owes at least as much to a patient confined for treatment against his will.

The instant record is devoid of evidence that an evaluation of alternatives was made. At most it shows that the hospital thought appellant should be closely supervised for the protection of others. In ten years, he has never been violent or unruly.[FN27] Under full medication, he has not even expressed 'murderous thoughts,' and medication may of course be administered outside a maximum security ward. Appellant asserts that the hospital has other security wards, not imposing the extreme deprivations of the John Howard Pavilion, in which supervision can be provided. These wards may not be suitable for appellant, but the record does not disclose a reasoned hospital conclusion that they are not. On remand, the hospital will have an opportunity to show that it has considered alternative security accommodations for appellant and to explain why it finds them inadequate.

FN27. Indeed, appellant's hospital records show that he has regularly been permitted to work with large knives and other sharp instruments in the hospital broom shop.

C. Relation of Confinement to Treatment.

[16] Under present law, the principal justification for involuntary hospitalization is the prospect of treatment, and a failure to provide treatment would present 'serious constitutional questions.'[FN28] Accordingly, Congress has provided that

FN28. Rouse v. Cameron, 125 U.S.App.D.C. 366, 370, 373 F.2d 451, 455 (1967).

A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment. [FN29]

FN29. D.C.Code § 21-562 (1967).

Under that provision, the hospital may be required to show that it is making 'a bona fide effort' to cure or improve the patient, and that the treatment provided 'is suited to his particular needs.'[FN30]

FN30. Rouse v. Cameron, supra note 28, 125 U.S.App.D.C. at 371, 373 F.2d at 456.

[17] Appellant does not contend that he has been denied his statutory right to treatment. But since treatment is an essential justifying purpose of any civil commitment, a 'permissible * * * decision' to confine a patient under maximal restrictions cannot be made without consideration of its therapeutic consequences. That the conditions of confinement may significantly enhance or retard a given patient's recovery is not open to doubt.

The milieu of the hospital, if properly structured, is * * * a constructive force for getting well; if improperly constructed it is a force for remaining sick.[FN31]

FN31. 1964 Hearings, supra note 10, 23-24 (Testimony of Superintendent Dr. Dale C. Cameron).

It may not 'be assumed that confinement in a hospital (or in its maximum security ward) is beneficial 'environmental therapy' for all.'[FN32] Even if in some cases maximum security confinement is positively therapeutic, such cases may be exceptional. Whatever the method of treatment applied, the ultimate goal of therapy for persons involuntarily hospitalized must be to shore up their capacity to function satisfactorily in the unrestricted environment of the outside world. It appears that this goal is unlikely to be achieved if the patient has little or no opportunity for controlled ***626 **44** experiments with freedom. Accordingly, civilly committed patients are rarely sent to John Howard Pavilion at all,[FN33] and the typical treatment program at Saint Elizabeths for those few who are housed there envisages transfer into a progressively less restrictive regime. [FN34]

FN32. Rouse v. Cameron, supra note 28, 125 U.S.App.D.C. at 371, 373 F.2d at 456.

FN33. See note 10, supra.

FN34. 1964 Hearings, supra note 10, 22, 49 (Testimony of Superintendent Dr. Dale C. Cameron).

It may be that appellant benefits therapeutically from maximum security confinement, or that in his case such confinement is therapeutically neutral, or that, though an obstacle to the most rapid progress, its detrimental effects on his treatment are outweighed by the need to protect other patients or to prevent his escape. Any of these possibilities could adequately explain the hospital's decision, but the record contains no hint as to which one, if any, explains it in fact. For all that appears, the hospital may

have considered only appellant's dangerousness and ignored his treatment needs. Such a one-sided balance would inevitably resolve all doubts against greater freedom. Moreover, since a proper balance often involves comparative evaluation of unquantifiable variables, intelligent judicial review requires at least a reasoned hospital analysis of any conflict among them. Because the record contains no such analysis, it provides no assurance that the hospital considered 'the relevant information.'

For the same reasons that he cannot be required to establish the availability of less restrictive alternatives, appellant cannot reasonably be obliged to bear the burden of attacking the hospital decision on medical grounds in vacuo. On remand, the hospital should explain either why maximum security confinement does not impair appellant's prospects for the promptest rehabilitation, or that he is so dangerous as to require such impairment.

D. Appellant's Hospital Records.

Appellant has sought leave to file his hospital records with this court. In D.C.Code § 21-562, Congress expressly provided that

The administrator of each public hospital shall keep records detailing all medical and psychiatric care and treatment received by a person hospitalized for a mental illness and the records shall be made available, upon that person's written authorization, to his attorney or personal physician. The records shall be preserved by the administrator until the person has been discharged from the hospital.

Plainly, appellant's attorney could have introduced these records into evidence. His failure to do so might not be cause for a remand if the record were otherwise adequate, but the fact that the District Court had to conduct its review without benefit of them is an additional reason for requiring further consideration.

[18] Even if appellant had deliberately chosen not to introduce his records, however, the hospital could have used them to explain its decision. That it may not disclose them to outside parties without the patient's consent does not imply that it is forbidden to introduce them in court where they are relevant to the patient's contentions on habeas corpus. One plain purpose of the statutory records requirement is to facilitate judicial review of the care and treatment accorded the patient.[FN35] A petitioner may not use the confidentiality of his records as a sword to deprive the court of the enlightenment the records requirement was designed to give it. The records submitted on this appeal are not notably informative, but there may well be other records, and even the limited material now available throws some light on the hospital's thinking.

FN35. See Rouse v. Cameron, supra note 28, 125 U.S.App.D.C. at 370-371, 373 F.2d at 455-456.

In view of its prerogative to introduce such records, the hospital's obligation to show that a challenged decision ***627 **45** reflects a reasoned consideration of the relevant information should not ordinarily be burdensome for either the hospital or the courts. Even if the records are inadequate in the present case, full records kept in the spirit of the statutory requirement would usually be sufficient in themselves to fulfill the hospital's evidentiary obligation. By articulating a plan of treatment and by explaining the basis for important decisions affecting the patient, they would fully inform the court at a glance. Incidentally, they would also enhance the integrity, reliability, and thoroughness of the hospital's own decision-making procedures. The bothersome incidental paperwork is a small price to pay for so many blessings. Besides, such paperwork is often bothersome precisely because the process of formal articulation forces busy administrators to confront problems and considerations their intuitive reactions might have overlooked.

As we suggested in Rouse v. Cameron,[FN36] if the hospital established internal procedures for reviewing its own decisions and redressing grievances it could largely eliminate any occasion for judicial challenges, and any residual litigation could be readily disposed of on summary judgment. Expert administrative agencies of the federal government which deal primarily with property, not with lives and liberties, follow such procedures as a matter of course, in order to maintain consistent policies and to correct their own errors. Largely because they do so, the courts rarely disturb their decisions for other than procedural infirmities.

FN36. Id. at 371 n. 22, 373 F.2d at 456 n. 22.

IV

In these respects, then, the record is inadequate to show whether the hospital made a 'permissible decision' to keep appellant in John Howard Pavilion 'in view of the relevant information.'[FN37] Accordingly, we do not consider whether that decision is, on the present record, 'reasonable

* * * within a broad range of discretion.' However, it may be useful to the parties and the court on remand to flag several troublesome issues raised by the record and by appellant's hospital dossier, which was not introduced below.

FN37. Tribby v. Cameron, supra note 6.

First, the considerations passed by in silence at the hearing below are all possible counterweights to the consideration of appellant's potential dangerousness. The danger feared in this case is not one lightly to be dismissed, and we do not suggest that it could never outweigh all other considerations. But as we recently made clear in Millard v. Harris,[FN38] 'dangerousness' is a many splendored thing. Unless muzzled by discriminating analysis, it is likely to weigh against nominally competing considerations the way a wolf weighs against a sheep in the same scales: even if the sheep is heavier when weighed separately, somehow the wolf always prevails when the two are weighed together. Keeping dangerousness on a taut leash is especially difficult where there is danger of murder, since the danger is admittedly grave and since its improbability, which theoretically discounts its gravity, is exceedingly difficult to quantify.

FN38. 132 U.S.App.D.C. 146, pp. 151-153, 406 F.2d 964, 969, 971 (1968).

Moreover, once a man has shown himself to be dangerous, it is all but impossible for him to prove the negative that he is no longer a menace. The specters of the murder appellant committed 35 years ago (expiated by a long jail sentence) and the murder he may have committed more than 10 years ago obviously haunt the hospital at the very thought of granting him the least measure of freedom within Saint Elizabeths. He asks for ground privileges after ten docile years under a regime consisting, according to the hospital files, of maximum security confinement, pink liquids, and a dozen brief psychiatric interviews; and the hospital worries about those ***628 **46** murders and the 'unpredictable consequences' which would ensue if he should ever have access to alcohol. Their concern is understandable and may well be fully justified. But for all that appears, the murders and the unpredictable consequences will still be there after twenty years or after fifty. Appellant was not convicted of the second murder, and his hospitalization is not to be tacitly converted into a life sentence to John Howard.

In these circumstances it is fair to ask the hospital how appellant can ever demonstrate his readiness for a less pervasive confinement: What evidence of improvement are they looking for? What is the prospect that they will ever find it? If, as may be, the hospital administrators think he will likely never be sufficiently purged of his dangerousness, then the reviewing court should at least have an opportunity to scrutinize the basis for such a counsel of despair. For the very reason that he is unlikely soon, if ever, to be released from the hospital, it is crucial to provide some check against his becoming a non-person, deprived of any rights to minimally rational treatment within the hospital because he murdered once and may have murdered again.

Second, there is some indication that the hospital denied transfer for reasons other than simple dangerousness. The hospital records suggest that appellant's request may have been initially deferred, not because he was inherently a bad risk, but because no space was available in other wards where he could be adequately supervised.[FN39] The hospital cannot, of course, create space it does not have, but if appellant is in John Howard merely faute de mieux, serious questions arise as to hospital priorities and constitutional and statutory rights.[FN40] Moreover, the hospital may have seized upon Dr. Weickhardt's change of heart as a sufficient reason not even to reconsider its postponed decision.[FN41] If so, Dr. Weickhardt's analysis of the episode involving the theft of appellant's money assumes disturbing importance. His explanation does not convincingly lay to rest the possibility either that appellant's request for transfer was denied as a disciplinary measure to enforce minor hospital rules, or else that the money episode served as a pretext under which other undisclosed interests could be served. The public, the court, the hospital, and not least the appellant, would profit greatly from a thorough ventilation of these matters and a careful attention to the legitimacy of the considerations which prove to have been crucial.

FN39. In deferring action on the original recommendation that appellant should be transferred, Acting Superintendent Harris wrote:

> All agree that his initial supervision (outside John Howard) must be very dependable for the first few months of his security reduction. At this moment there is no service available for his placement that can provide the needed close attention.

No mention of this consideration was made at

either of the court hearings, however.

FN40. See Rouse v. Cameron, supra note 28, 125 U.S.App.D.C. at 372-373, 373 F.2d at 457-458; Sas v. Maryland, 334 F.2d 506, 517 (4 Cir. 1964).

FN41. See note 1, supra.

V

Quite apart from the transfer issue, appellant now contends for the first time that his civil commitment in 1964 was fatally defective in numerous respects. He says he was denied his statutory right to an independent judicial evaluation of his mental condition and need for commitment, since the committing court had before it no information on which to predicate such an evaluation. He also says this defect amounts to a denial of due process. Furthermore, he alleges deprivations of the statutory right to a jury trial, the alleged right to a transcript of his pre-commitment hearing before the Mental Health Commission, and the constitutional right to effective representation of counsel.

***629 **47** [19] On their face, these contentions appear neither remote nor insubstantial. But at least some of them may turn on questions of fact which cannot be resolved in an appellate court. Moreover, orderly judicial procedure normally precludes raising on appeal issues not reasonably within the scope of the question presented by a petition for habeas corpus. There is no reason to consider an exception to this rule in the instant case.

The usual procedure would be simply to dismiss this aspect of the appeal, leaving appellant free to bring a new habeas corpus petition if he wishes. However, petitioner is an indigent with an I.Q. of 52. To place upon him the burden of preparing a new petition and obtaining appointment of a new attorney by the District Court seems an unwarranted hardship which would serve no ascertainable interest of judicial administration.[FN42] At oral argument in this court, it clearly appeared that the attorneys appointed for him on this appeal would be willing to continue to represent him on any remand. Accordingly, since there is to be a remand in any event, I would direct the District Court to consider these issues on an amended petition, as well as the transfer question.[FN43] But see Judge Fahy's position as to this in his opinion concurring specially.

FN42. Cf. Caplan v. Cameron, 125 U.S.App.D.C. 150, 369 F.2d 195 (1966); Dobson v. Cameron and Stultz v. Cameron, 127 U.S.App.D.C. 324, 383 F.2d 519 (1967).

FN43. If appellant decides to pursue these matters below, I think the District Court may permit him to amend his petition. If it declines to do so, he will of course be free to raise them by a new petition.

Remanded.

FAHY, Senior Circuit Judge (concurring specially):

I agree with Judge Bazelon that the case should be remanded for a fuller hearing, but I wish to state as now set forth my approach to the problem, albeit on the background of the more detailed discussion in the opinion of Judge Bazelon.

Deprivation of liberty by the government is authorized when consonant with due process of law and applicable statutory provisions; and when ordered the deprivation is subject to examination as to its validity by proceedings other than those by which the deprivation initially occurred. Usually this is by appeal from the judgment or order requiring the deprivation; but judicial inquiry in many instances is available also by habeas corpus proceedings. This is so where there has been a previous civil commitment to St. Elizabeths, as here. The validity of continued confinement of the committed person in the maximum security ward there, rather than in a less restrictive facility, may be questioned and decided. Miller v. Overholser, 92 U.S.App.D.C. 110, 115, 206 F.2d 415, 419; and see Lake v. Cameron, 124 U.S.App.D.C. 264, 364 F.2d 657 (en banc). When, however, the deprivation of liberty is based on the person's dangerousness to himself or others due to his mental condition, the degree of deprivation is not for the judiciary to pass upon except under a restraint consistent with the deep involvement of the medical discipline, that is, the discipline of those charged under the law with the administration of the institution. While the individual may bring the matter to court as a case or controversy under the Constitution, the court, in passing upon the validity of the deprivation of liberty, a judicial function, recognizes the responsibility the law places also upon those in charge of the institution. Thus, in Tribby v. Cameron, 126 U.S.App.D.C. 327, 379 F.2d 104, as pointed out by Judge Bazelon, the question was stated to be whether the administrator,

has made a permissible and reasonable decision in

view of the relevant information and within a broad range of discretion.

It was appropriate, therefore, on the pleadings in this case, appellant having been confined in the maximum security ***630 **48** ward for ten years, for the District Court to inquire whether appellant was being excessively deprived of liberty. The government does not contest this, as I understand, taking the position that the record supports appellant's continued detention in John Howard Pavilion or, if not, that a fuller hearing would so disclose. Our question, then, is whether the hearing in the District Court did explore the problem fully enough to enable the court to decide, not whether appellant's detention at St. Elizabeths is valid, which was not questioned in the District Court, but whether it should continue as at present in the John Howard Pavilion. As to this I agree to a remand for a fuller hearing, particularly with respect to possible alternative facilities with less restrictive deprivation of liberty. The hearing on the remand I think should bring the following into the record:

1. The reports regarding appellant required by law to be kept by the hospital;

2. The history of appellant and of his illness, including his present condition, the treatment he is receiving at the hospital, and the efficacy of the treatment;

3. A comparison of the John Howard Pavilion and the treatment there available with possible alternative facilities at St. Elizabeths and the treatment there available,[FN1] with an exploration of the differences in supervision and restrictions and the comparative therapeutic results likely to ensue;

> FN1. Though appellant makes no issue as to his treatment, intertwined with the evaluation of his present confinement is the consideration of appellant's general right to treatment. See Rouse v. Cameron, 125 U.S.App.D.C. 366, 373 F.2d 451; Ragsdale v. Overholser, 108 U.S.App.D.C. 308, 315, 281 F.2d 943, 950 (concurring opinion).

4. The conclusion or conclusions of the hospital authorities as to the nature of the confinement appellant should have, with the reasons therefor, reached in recognition that no greater deprivation of liberty should be had than is reasonably required for his safety and the safety of others, in determining which consideration should be given to the desirability of seeking improvement in appellant's condition.

The foregoing should not be considered as limiting the scope of the hearing if the parties or the court advance other data which the court in the exercise of a sound discretion deems admissible.[FN2]

> FN2. I hope the hospital itself will find itself able to establish internal procedures such as suggested in Rouse v. Cameron, supra note 1, repeated in Judge Bazelon's present opinion.

As to the burden of proof, my view is that when the appropriateness of a particular deprivation of liberty has been drawn in question by supporting evidence, its continued validity depends upon a showing, in the circumstances of appellant's confinement,[FN3] that within a broad range of discretion of the hospital authorities, exercised upon the basis of the relevant information, the deprivation is supported by substantial evidence and is reasonable.

> FN3. Compare Ragsdale v. Overholser, supra note 1 (concurring opinion).

As to the validity of appellant's original commitment, questioned for the first time on the appeal in this court, it is possible that on further consideration neither appellant nor counsel would desire to pursue this. I think our court should refrain from seeming to encourage its pursuit. It is a matter which I think should be left for the parties and the District Court in the light of such circumstances as might develop.

***631 **49** APPENDIX

Excerpts from

“THE EVALUATION OF SECURITY PROGRAMS AND FACILITIES AT SAINT ELIZABETHS HOSPITAL”

419 F.2d 617, 136 U.S.App.D.C. 35
(Cite as: 419 F.2d 617, 136 U.S.App.D.C. 35)

Report

by

AD HOC COMMITTEE FOR THE EVALUATION OF SECURITY PROGRAMS AND FACILITIES AT SAINT ELIZABETHS HOSPITAL

Committee Members:

Hege, John H., Sr., M.D., Chairman
Kenefick, Donald P., M.D.
McGarry, A. Louis, M.D.
Settle, Russell O., Sr., M.D.
Smith, Harvey L., PH.D.
Watson, Andrew S., M.D.
Weihofen, Henry, J.S.D.
Zubowicz, George, M.D.

Louis Jacobs, M.D.
Executive Secretary

National Institute of Mental Health
Chevy Chase, Maryland

November 1, 1968

(Emphasis in original.)

RECOMMENDATIONS AND FINDINGS

A. Recommendations

1. The practical aspects of the treatment of the so-called security patients in separate facilities and the need for it. * * * Few professionals count these people in their problems or among their concerns. Efforts should be made to bring all patients requiring security services under an administrative officer who shall have four assistants responsible for recruitment and training, research, treatment services and legal matters.

2. Modification of John Howard Pavilion. The Committee study would indicate that approximately one-half of the patients confined in the JHP could be adequately cared for in the less secure units within the Security section or in other parts of Saint Elizabeths Hospital.

5. Decentralization of Security Decisions. The Committee views the decision-making of the Security section, particularly as it relates to security issues, to be too centralized. Security (degree of restrictions) is an integral part of the treatment process. Therefore, it is recommended that these decisions be made as closely as possible to the area (wards) where the treatment process takes place, by the personnel responsible for the care of the patient.

6. Reduction of Inpatient Pretrial Examinations. Much staff time and bed space seems to be utilized unnecessarily in the performance of psychiatric examinations for the courts. To greatly reduce the number of patients admitted to the Security section for psychiatric examination the Committee recommends that:

a. A service be developed to conduct screening examinations on an outpatient***632 **50** basis by the comprehensive community mental health centers.

b. Admission to the Security service of Saint Elizabeths Hospital of only those patients requiring more comprehensive psychiatric evaluations or who are actually psychotic.

c. Place those admitted to the Hospital in the appropriate custody level of housing.

d. Develop a jail-located psychiatric service to screen misdemeanants (optional for civil commitment whenever possible).

7. Improved Aftercare Service. * * * The Committee recommends that an effective aftercare service be developed through clinics and mental health services, and social workers on the staff of the Hospital itself.

10. Use of All Hospital Services. Integration of clinical services should be accomplished to the end that all treatment modalities within Saint Elizabeths Hospital will be available for the patients requiring security services.

11. Program Goal. The Committee recommends that the long range goal should be the transition of patients committed upon acquittal of criminal charges by reason of insanity to the same status and treatment as other patients in the general hospital wards. So far as possible the same should be true of persons committed because they are mentally incompetent to stand trial.

B. Findings of the Committee

The National Institute of Mental Health is responsible for the implementation of the treatment program at Saint Elizabeths Hospital. This is a 7,000 bed federal mental hospital of which 700 beds are currently designated as a Security section. The study of this Committee concerns evaluation and programming as these relate to this section of the Hospital.

1. Security Facilities. The section designated for Security currently consists of three divisions: the John Howard Division, in a maximum security building with 395 beds; the West Side Division (in the Center Building), with 422 beds; and the Cruvant Division with 123 beds.

a. John Howard Division is occupied by criminal proceedings patients which include those committed for pretrial examinations, not guilty by reason of insanity, prisoners from the D. C. Department of Corrections and the Federal Bureau of Prisons, those found to be incompetent to stand trial and those committed under the sexual psychopath laws. As a general practice those male criminal proceedings patients involved in felonies are treated in the John Howard Division. There are a number of potentially dangerous civil patients treated here also.

b. Of the 422 patients of the West Side Division approximately 150 are civil commitments transferred from other sections of Saint Elizabeths Hospital to this area because of peculiar management problems and the need for more security. The remaining 275 patients in this building are misdemeanant criminal proceedings patients committed for pretrial examination, not guilty by reason of insanity, incompetent to stand trial and sexual ‘psychopaths.’ * * *

c. The Cruvant Division is composed of four wards, three of which are occupied almost exclusively by female criminal proceedings patients. * * * and there are some sexual psychopaths as well as potentially dangerous civil patients. One ward is occupied by a small group of male patients who have been transferred from John Howard Division into the terminal phases of treatment involving minimal security prior to release into the community.

2. Major Issues for Staff. * * * The values of the court-prison system and those of the Hospital conflict in an uneasy balance. There is a confused definition of the patients as either ‘prisoners' or ‘patients.’ The contingencies of each value system trammel up the tasks of the others. The Hospital staff does not seem to have optimal communication with the courts it serves or a sufficiently***633 **51** knowledgeable and critical understanding of the legal principles it helps to administer. * *

A second major concern of the staff is the lack of space and facilities to implement treatment involving the concept of the therapeutic milieu or therapeutic community at a satisfactory level. The Committee saw evidence which validated this opinion; for example, the space in John Howard Division is largely occupied by patients, leaving inadequate space for adjunctive therapy.

A third major concern of the staff is an insufficient number of hospital personnel in all categories. For example, as related to professional personnel, the Security sec-

tion finds it most difficult to have psychiatric residents from the training program of Saint Elizabeths Hospital rotated through the Security sections.

3. Semiautonomy of Security Section. The security facilities seem to be islands of autonomy, hardly linked to each other and markedly shielded from the rest of the Hospital. They hardly share each other's resources and seem deprived from sharing those from the Hospital at large. * * * A semiautonomous status of security services would facilitate implementation of those matters largely peculiar to the section, e.g., relationships to law enforcement agencies and the courts. Integration of clinical services should be accomplished to the end that all treatment modalities within Saint Elizabeths Hospital will likewise be available for the security patients.

The Committee believes that the criminal behavior of the mentally ill is simply another form (out of many forms) of deviant behavior characteristic of severe mental illness.

As certain forms of mental illness can best be treated in the hospital setting the Committee recommends that the long range direction of the Saint Elizabeths Hospital program should be towards development of a modern psychiatric hospital program in which all patients can freely participate regardless of the type of deviant behavior they have manifested.

In other words, the separation of so-called ‘criminally insane,’ in a special unit separate and apart from the rest of the patient population at Saint Elizabeths Hospital, should be considered as a temporary and transitional measure which eventually will lead towards complete integration of both groups of patients within a uniform and therapeutic hospital program.

4. Staff Organization. A more integrated continuum of care and record keeping is necessary for the security units. It is recommended that all Security services be placed under a chief administrative officer charged with the responsibility of coordinating administrative and clinical functions within the section. He should have at least four professional assistants, one devoted to recruitment and training, one to research, one an attorney devoted to relationships with the courts and consultation for the professional staff of the three units, and one concerned with treatment services.

5. Legal Rights of Patients. A special assistant to the chief administrative officer should be a legal officer who would have the function of protecting the legal rights of patients, informing them what their legal rights are, and checking as to whether these rights are being observed; and to act as their spokesman in making complaints. To carry out these functions without constraint, this legal officer should not be a part of the Hospital staff but should be autonomous. These services could be obtained by contract with private law firms or with the law departments of the academic community.

6. Treatment. The present treatment program in the Security sections is better than the treatment provided in many such institutions. This is due to the dedication of a limited number of professional***634 **52** staff laboring under many disadvantageous circumstances. The John Howard Pavilion needs to make its environment more ‘livable’ and less prison-like. There is too much ‘sitting around’ on the wards at the present time. Adjunctive therapy should be greatly expanded including academic education, vocational training and rehabilitation, religious instruction, recreation, arts, music, etc. All adjunctive treatment must be related to therapeutic goals and not be merely time fillers. While it is amply clear that individuals in the maximum Security unit now suffer from massive social deprivations of all sorts, merely supplying them with socializing experience is no substitute for interpreted experience which will modify personality operations. Extensive development of these resources should only be carried out in the context of their explicit utilization for treatment.

Too often, the law and the legal professional seem to focus their concern on the number of escapes, the quality and quantity of controls, sufficient length of confinement, etc., to the exclusion of therapeutic considerations.

Recent opinions from the Court of Appeals have explicitly stated that a person committed for treatment must receive treatment or be discharged. Medically adequate treatment is that which at least does not worsen the condition and which either limits the extension of the disease process, or, ideally, eliminates the pathologicial situation. It is carried out with skill and competency commensurate with the standards of the community, and in concurrence with the implied or explicit contractual agreement between the parties. * * * The balance between dangerousness and treatability is now demanded by the law of the District of Columbia. It is a dynamic type of question and it may not be met by any absolute and categorical criteria. To make the balanced judgments regarding these two questions which have both medical and legal implications, is a task

for persons highly trained in both the medical and legal issues involved.

The Committee is not cognizant of the data which would establish the minimal number of clinical and other personnel which would qualify as adequate at the security facilities at Saint Elizabeths Hospital. We would stress that quality is a more important consideration than quantity with respect to the adequacy of treatment. We would observe, however, that in comparison to similar institutions the number of personnel attached to the Security division, particularly in the social work and attendant categories, ranks low.

Medically adequate treatment itself is probably going to have to be reassessed in the mental hospital. Programming should proceed on the assumption that the institution will be a hospital and will treat mentally ill persons. It is true that criminally committed patients are more likely to be dangerous than most of those civilly committed; and special precautions and procedures will continue to be required for patients who are dangerous to others or to themselves. Suffice it to say that in addition to the modalities used in the care of the mentally ill in general psychiatric hospitals, there are available special methods and techniques which have proved effective in security settings. There should be combined the best features of a quality ‘corrections' approach and mental hospital program.

7. Individual Treatment Plan. While we have not presumed to establish generalized clinical positions which might or might not be appropriate for a particular patient, we would affirm that:

a. There should be a recorded assessment of the pathology and assets of the individual.

b. There should be a recorded treatment plan.

c. The treatment plan should be implemented in good faith within the limits of available resources.

***635 **53** d. There should be a periodic recorded assessment of treatment progress or the lack of it.

e. Significant modifications to the treatment plan and their rationale should be recorded.

f. Where available resources fall below the standards acceptable to the individual clinician, he should communicate the realistic needs of the situation to proper authorities.

8. Degrees of Security. As has been observed in other mental hospitals, in the practice concerning the housing of patients committed by the criminal courts, it seems to be assumed that a court order committing a person for criminal purposes (pretrial examination, hospitalization of those found incompetent to stand trial, and of those found not guilty by reason of insanity) necessarily means that such patients be kept under maximum security. The court order does not in fact say this. It merely orders the person ‘* * * committed to * * * the mental hospital designated by the court * * *’ nor is there any reason to read a special security requirement into the order. Patients so committed are as fully subject to the Hospital's administrative discretion as to where to house them as are civilly committed persons. As with the civilly committed, the Hospital has the duty of determining whether the individual person is in fact dangerous and in need of greater restraint than others, but there is no reason for the assumption that, merely because the patient comes to the Hospital by way of commitment from the criminal courts, as distinguished from the civil, he must ipso facto be placed in maximum security, without the diagnosis or prognosis of actual dangerousness. At the present time it is primarily the Registrar who makes the decision that a person should go to maximum security. The determination is in fact a mechanical one: new admissions from the U.S. District Court are assigned to the John Howard Division; misdemeanants from the Court of General Sessions are committed to the West Side Division. The clinical directors, however, of these two divisions may, and do, exchange patients, if after a period of observation these are determined to be in need of either greater or lesser security.

It appears that security is both overused and underused at the Hospital. It is estimated that one half of the men at JHP do not require maximum security. On the other hand, the escapes from Cruvant Division and the West Side Division are astonishingly high (President's Commission on Crime in the District of Columbia). It seems clear that there is excessive security at one end of the spectrum and little or no security elsewhere- an all or none situation. It would seem clear that medium security facilities are called for- an intermediate and graduated step system. * * *

Reevaluation of the current ‘patient load’ in the Howard unit would permit a sizable number of these people to be treated in a less secure or even in an open

setting. The security of those remaining should be transferred from the inside to the periphery. With few exceptions, whatever controls are needed on the inside should be incorporated in therapeutic measures inherent in the total treatment program.

Any rational approach to the problem must pay cognizance to the history of this institution and its current physical plant. The JHP, built to provide security which could not be surpassed even by most prisons, automatically forces upon the staff a form of treatment that is less than desirable. However, it represents such a large number of beds it will probably have to be used in the immediate future. Extensive modification of the physical structure will be required to make it optimally effective within its current character.

10. Decisions Decentralized. At the present time the decision-making, particularly as it relates to security issues (transfers, releases, ground privileges, etc.), is too centralized. In a mental ***636 **54** hospital, security (degree of restrictions) is an integral part of the treatment process. Therefore, decisions about restrictions should be made by the personnel who regulate the area (wards) where treatment processes (milieu therapy) take place. Milieu therapy should provide the opportunity of training the emotionally disturbed through planned management of the structure and processes of the situation in which they live.

11. Care for Conditionally Released. A certain number of the criminally committed patients is conditionally released. There is no very effective follow-up or aftercare, either of the conditionally released or of those finally discharged. * * * The effective way is to bring the aftercare service into the neighborhood through the clinics and mental health services, or through social workers on the staff of the Hospital itself who can go to the patient's home and into the neighborhood. This means an extensive development and enlargement of social services.

15. Hospital-Court Relationships. * * * As legal personnel begin to learn about mental health concepts, they can build more effective legal procedures to cope with obedience, prevent the preventable, and at least carry out their activities with people in more effective ways. Similarly, the ‘legal education’ of Hospital personnel should be developed so that they know exactly what social values are built into legal concepts with which they deal. Such relevant roles as ‘expert witness' should be clearly understandable by mental health persons. Psychiatrists and other behavioral staff should be able to go into court understanding completely what their function is to be so that they may carry it out without inappropriate anxieties and with a sense of appropriate participation.

18. Community Tolerance. Every mental hospital, but particularly one with a security unit, must be aware of and sensitive to the community level of tolerance for its programs and patients. As the community's tolerance greatly influences formulation of treatment programs, the Hospital, through a public education program, must endeavor to improve the degree of its acceptance by the community. Development of as many as possible hospital-community contacts will help not only the intramural programs but also open doors to a much more extensive and effective posthospitalization program for discharged patients.

C.A.D.C. 1969.
Covington v. Harris
419 F.2d 617, 136 U.S.App.D.C. 35

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Supreme Court of the United States
Charles DEMORE, District Director, San Francisco District of Immigration and Naturalization Service, et al., Petitioners,
v.
Hyung Joon KIM.

No. 01-1491.
Argued Jan. 15, 2003.
Decided April 29, 2003.

Lawful permanent resident alien filed habeas petition challenging no-bail provision of Immigration and Nationality Act (INA), pursuant to which he had been held for six months during pendency of removal proceedings against him. The United States District Court for the Northern District of California, Susan Y. Illston, J., entered order holding statute unconstitutional on its face and directing the Immigration and Naturalization Service (INS) to hold bail hearing. Government appealed. The United States Court of Appeals for the Ninth Circuit, 276 F.3d 523, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) provision of INA limiting judicial review of Attorney General's discretionary judgments regarding detention or release of any alien did not deprive Supreme Court of jurisdiction to grant habeas relief to alien, and (2) Congress, justifiably concerned that deportable criminal aliens who were not detained would continue to engage in crime and would fail to appear for their removal hearings in large numbers, could require that such aliens be detained for brief period necessary for their removal proceedings, without providing individualized determination as to whether aliens presented flight risks, and thus detention of alien, pursuant to no-bail provision of INA, did not violate his due process rights under the Fifth Amendment; abrogating *Patel v. Zemski*, 275 F.3d 299, *Welch v. Ashcroft*, 293 F.3d 213, *Hoang v. Comfort*, 282 F.3d 1247.

Reversed.

Justice Kennedy filed concurring opinion.

Justice O'Connor filed opinion concurring in part, and concurring in judgment, in which Justice Scalia and Justice Thomas joined.

Justice Souter filed opinion concurring in part, and dissenting in part, in which Justice Stevens and Justice Ginsburg joined.

Justice Breyer filed opinion concurring in part, and dissenting in part.

West Headnotes

[1] Habeas Corpus 197 521

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(C) Relief Affecting Particular Persons or Proceedings
197k521 k. Aliens. Most Cited Cases

Provision of Immigration and Nationality Act (INA) limiting judicial review of Attorney General's discretionary judgments regarding detention or release of any alien did not deprive Supreme Court of jurisdiction to grant habeas relief to alien challenging his detention under no-bail provision of INA; alien was not challenging discretionary judgment or decision by Attorney General, but rather was challenging constitutionality, under Due Process Clause of the Fifth Amendment, of statutory framework that permitted his detention without bail, and provision did not explicitly bar habeas review. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 236(c, e), 8 U.S.C.A. § 1226(c, e).

[2] Constitutional Law 92 961

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)1 In General
92k960 Judicial Authority and Duty in General
92k961 k. In General. Most Cited Cases

(Formerly 92k45)

Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.

[3] Habeas Corpus 197 ⚿205

197 Habeas Corpus
197I In General
197I(A) In General
197I(A)1 Nature of Remedy in General
197k205 k. Constitutional and Statutory Provisions. Most Cited Cases

Where provision precluding judicial review is claimed to bar habeas review, Supreme Court requires particularly clear statement that such is Congress' intent.

[4] Aliens, Immigration, and Citizenship 24 ⚿465

24 Aliens, Immigration, and Citizenship
24VI Arrest, Detention, Supervision, and Parole
24VI(D) Detention, Supervision, and Parole
24k464 Detention Pending Removal Proceeding
24k465 k. In General. Most Cited Cases
(Formerly 24k53.9)

Constitutional Law 92 ⚿4439

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)20 Aliens, Immigration, and Citizenship
92k4439 k. Arrest, Detention, Supervision, and Parole. Most Cited Cases
(Formerly 92k274.3)

Congress, justifiably concerned that deportable criminal aliens who were not detained would continue to engage in crime and would fail to appear for their removal hearings in large numbers, could require that such aliens be detained for brief period necessary for their removal proceedings, without providing for individualized determinations as to whether aliens presented flight risk, and thus such detention of lawful permanent resident alien, pursuant to no-bail provision of Immigration and Nationality Act (INA), did not violate his due process rights under the Fifth Amendment; abrogating *Patel v. Zemski*, 275 F.3d 299, *Welch v. Ashcroft*, 293 F.3d 213, *Hoang v. Comfort*, 282 F.3d 1247. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 236(c), 8 U.S.C.A. § 1226(c).

[5] Aliens, Immigration, and Citizenship 24 ⚿116

24 Aliens, Immigration, and Citizenship
24II Status, Rights, Privileges, Duties, and Disabilities
24k116 k. Status and Classification of Aliens in General. Most Cited Cases
(Formerly 24k39)

Aliens, Immigration, and Citizenship 24 ⚿690

24 Aliens, Immigration, and Citizenship
24VIII Citizenship and Naturalization
24VIII(B) Naturalization
24k690 k. Power to Naturalize. Most Cited Cases
(Formerly 24k60)

In exercise of its broad power over naturalization and immigration, Congress may make rules as to aliens that would be unacceptable if applied to citizens.

[6] Aliens, Immigration, and Citizenship 24 ⚿465

24 Aliens, Immigration, and Citizenship
24VI Arrest, Detention, Supervision, and Parole
24VI(D) Detention, Supervision, and Parole
24k464 Detention Pending Removal Proceeding
24k465 k. In General. Most Cited Cases
(Formerly 24k53.9)

Alien, by conceding that he was deportable and hence subject to mandatory detention, pursuant to provision of Immigration and Nationality Act (INA) governing apprehension and detention of criminal aliens, did not concede that he would ultimately be

deported. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 236(c), 8 U.S.C.A. § 1226(c).

[7] Constitutional Law 92 4438

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)20 Aliens, Immigration, and Citizenship
92k4438 k. Admission and Exclusion. Most Cited Cases
(Formerly 92k274.3)

Constitutional Law 92 4439

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)20 Aliens, Immigration, and Citizenship
92k4439 k. Arrest, Detention, Supervision, and Parole. Most Cited Cases
(Formerly 92k274.3)

Fifth Amendment entitles aliens to due process of law in deportation proceedings, and detention during such proceedings is constitutionally valid aspect of deportation process. U.S.C.A. Const.Amend. 5.

[8] Constitutional Law 92 4438

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)20 Aliens, Immigration, and Citizenship
92k4438 k. Admission and Exclusion. Most Cited Cases
(Formerly 92k274.3)

When government deals with deportable aliens, Due Process Clause of the Fifth Amendment does not require it to employ least burdensome means to accomplish its goal. U.S.C.A. Const.Amend. 5.

[9] Constitutional Law 92 1065

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1065 k. In General. Most Cited Cases
(Formerly 92k82(6.1))

There is no constitutional prohibition against requiring parties to make difficult judgments as to which legal course to follow.

West Codenotes
Negative Treatment Reconsidered 8 U.S.C.A. § 1226(c)

*****1710** Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Under the Immigration and Nationality Act, 8 U.S.C. § 1226(c), "[t]he Attorney General shall take into custody any alien who" is removable from this country because he has been convicted of one of a specified set of crimes, including an "aggravated felony." After respondent, a lawful permanent resident alien, was convicted in state court of first-degree burglary and, later, of "petty theft with priors," the Immigration and Naturalization Service (INS) charged him with being deportable from the United States in light of these convictions, and detained him pending his removal hearing. Without disputing the validity of his convictions or the INS' conclusion that he is deportable and therefore subject to mandatory detention under § 1226(c), respondent filed a habeas corpus action challenging § 1226(c) on the ground that his detention thereunder violated due process because the INS had made no determination that he posed either a danger to society or a flight risk. The District Court agreed and granted respondent's petition subject to the INS' prompt undertaking of an individualized bond hearing, after which respondent was released on bond. In affirming, the Ninth Circuit held that § 1226(c) violates substantive due process as applied to respondent because he is a lawful permanent resident, the most favored category of aliens. The court rejected the Government's two principal justifications for mandatory detention under § 1226(c), discounting the

first-ensuring the presence of criminal aliens at their removal proceedings-upon finding that not all aliens detained pursuant to § 1226(c) would ultimately be deported, and discounting the second-protecting the public from dangerous criminal aliens-on the grounds that the aggravated felony classification triggering respondent's detention included crimes (such as respondent's) that the court did not consider "egregious" or otherwise sufficiently dangerous to the public to necessitate mandatory detention. Relying on *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653, the court concluded that the INS had not provided a justification for no-bail civil detention sufficient to overcome a permanent resident alien's liberty interest.

***511** *Held:*

1. Section 1226(e)-which states that "[t]he Attorney General's discretionary judgment regarding the application of this section shall not be subject to review" and that "[n]o court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien"-does not deprive the federal courts of jurisdiction to grant habeas relief to aliens challenging their detention under § 1226(c). Respondent does not challenge a "discretionary judgment" by the Attorney General or a "decision" that the Attorney General has made regarding his detention or release. Rather, respondent challenges the statutory framework that permits his detention without bail. Where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *E.g.*, *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632. And, where a provision precluding review is claimed to bar habeas review, the Court requires a particularly clear statement that such is Congress' intent. See ****1711***INS v. St. Cyr*, 533 U.S. 289, 308-309, 298, 327, 121 S.Ct. 2271, 150 L.Ed.2d 347. Section 1226(e) contains no explicit provision barring habeas review. Pp. 1713-1714.

2. Congress, justifiably concerned with evidence that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings. In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. *Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S.Ct. 1883, 48 L.Ed.2d 478. Although the Fifth Amendment entitles aliens to due process in deportation proceedings, *Reno v. Flores*, 507 U.S. 292, 306, 113 S.Ct. 1439, 123 L.Ed.2d 1, detention during such proceedings is a constitutionally valid aspect of the process, *e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 235, 16 S.Ct. 977, 41 L.Ed. 140, even where, as here, aliens challenge their detention on the grounds that there has been no finding that they are unlikely to appear for their deportation proceedings, *Carlson v. Landon*, 342 U.S. 524, 538, 72 S.Ct. 525, 96 L.Ed. 547. The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases. Respondent argues unpersuasively that the § 1226(c) detention policy violates due process under *Zadvydas*, 533 U.S., at 699, 121 S.Ct. 2491, in which the Court held that § 1231(a)(6) authorizes continued detention of an alien subject to a final removal order beyond that section's 90-day removal period for only such time as is reasonably necessary to secure the removal. *Zadvydas* is materially different from the present case in two respects. First, the aliens there challenging their detention following final deportation orders were ones for whom removal was "no longer practically attainable," such that their detention ***512** did not serve its purported immigration purpose. *Id.*, at 690, 121 S.Ct. 2491. In contrast, because the statutory provision at issue in this case governs detention of deportable criminal aliens *pending their removal proceedings*, the detention necessarily serves the purpose of preventing the aliens from fleeing prior to or during such proceedings. Second, while the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," *id.*, at 690-691, 121 S.Ct. 2491, the record shows that § 1226(c) detention not only has a definite termination point, but lasts, in the majority of cases, for less than the 90 days the Court considered presumptively valid in *Zadvydas*. Pp. 1714-1722.

276 F.3d 523, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which KENNEDY, J., joined in full, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined as to Part I, and in which O'CONNOR, SCALIA, and THOMAS, JJ., joined as to all but Part I. KENNEDY, J., filed a concurring opinion, *post*, p. 1722. O'CONNOR, J., filed an opinion

concurring in part and concurring in the judgment, in which SCALIA and THOMAS, JJ., joined, *post*, p. 1722. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 1726. BREYER, J., filed an opinion concurring in part and dissenting in part, *post*, p. 1746.

Theodore B. Olson, Solicitor General, Counsel of Record, Robert D. McCallum, Jr., Assistant Attorney General, Edwin S. Kneedler, Deputy Solicitor General, Austin C. Schlick, Assistant to the Solicitor General, Donald E. Keener, Mark C. Walters, Hugh G. Mullane, Michelle Gorden, Attorneys Department of Justice, Washington, D.C., for petitioners.

Liliana M. Garces, American Civil Liberties Union Foundation, Oakland, CA, Jayashri Srikantiah, American Civil Liberties Union Foundation of Northern California, San Francisco, CA, Brian Condon, Arnold ****1712** & Porter, Los Angeles, CA, Judy Rabinovitz, Counsel of Record, Lucas Guttentag, Lee Gelernt, Steven R. Shapiro, American Civil Liberties Union Foundation, New York City, A. Stephen Hut, Jr., Christopher J. Meade, Gregory S. Chernack, Katherine A. Fleet, Wilmer, Cutler & Pickering, Washington, D.C., for Respondent.

For U.S. Supreme Court briefs, see:2002 WL 31016560 (Pet.Brief)2002 WL 31455525 (Resp.Brief)2002 WL 31969024 (Reply.Brief)

***513** Chief Justice REHNQUIST delivered the opinion of the Court.

Section 236(c) of the Immigration and Nationality Act, 66 Stat. 200, as amended, 110 Stat. 3009-585, 8 U.S.C. § 1226(c), provides that "[t]he Attorney General shall take into custody any alien who" is removable from this country because he has been convicted of one of a specified set of crimes. Respondent is a citizen of the Republic of South Korea. He entered the United States in 1984, at the age of six, and became a lawful permanent resident of the United States two years later. In July 1996, he was convicted of first-degree burglary in state court in California and, in April 1997, he was convicted of a second crime, "petty theft with priors." The Immigration and Naturalization Service (INS) charged respondent with being deportable from the United States in light of these convictions, and detained him pending his removal hearing.[FN1] We hold that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings.

FN1. App. to Pet. for Cert. 32a; see 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii). Section 1226(c) authorizes detention of aliens who have committed certain crimes including, *inter alia*, any "aggravated felony," §§ 1226(c)(1)(B), 1227(a)(2)(A)(iii), and any two "crimes involving moral turpitude," §§ 1226(c)(1)(B), 1227(a)(2)(A)(ii). Although the INS initially included only respondent's 1997 conviction in the charging document, it subsequently amended the immigration charges against him to include his 1996 conviction for first-degree burglary as another basis for mandatory detention and deportation. Brief for Petitioners 3, n. 2 (alleging that respondent's convictions reflected two " 'crimes involving moral turpitude' ").

Respondent does not dispute the validity of his prior convictions, which were obtained following the full procedural protections our criminal justice system offers. Respondent also did not dispute the INS' conclusion that he is subject to ***514** mandatory detention under § 1226(c). See Brief in Opposition 1-2; App. 8-9.[FN2] In conceding that he was deportable, respondent forwent a hearing at which he would have been entitled to raise any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category. See 8 CFR § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999).[FN3] Respondent instead filed a ****1713** habeas corpus action pursuant to 28 U.S.C. § 2241 in the United States District Court for the Northern District of California challenging the constitutionality of § 1226(c) itself. App. to Pet. for Cert. 2a. He argued that his detention under § 1226(c) violated due process because the INS had made no determination that he posed either a danger to society or a flight risk. *Id.*, at 31a, 33a.

FN2. As respondent explained: "The statute requires the [INS] to take into custody any alien who 'is deportable' from the United States based on having been convicted of any of a wide range of crimes.... [Respondent]

does not challenge INS's authority to take him into custody after he finished serving his criminal sentence. His challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk." Brief in Opposition 1-2.

FN3. This "*Joseph* hearing" is immediately provided to a detainee who claims that he is not covered by § 1226(c). Tr. of Oral Arg. 22. At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention. See 8 CFR § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999). Because respondent conceded that he was deportable because of a conviction that triggers § 1226(c) and thus sought no *Joseph* hearing, we have no occasion to review the adequacy of *Joseph* hearings generally in screening out those who are improperly detained pursuant to § 1226(c). Such individualized review is available, however, and Justice SOUTER is mistaken if he means to suggest otherwise. See *post*, at 1735, 1736 (opinion concurring in part and dissenting in part) (hereinafter dissent).

The District Court agreed with respondent that § 1226(c)'s requirement of mandatory detention for certain criminal aliens was unconstitutional. *Kim v. Schiltgen*, No. C 99-2257***515** SI (Aug. 11, 1999), App. to Pet. for Cert. 31a-51a. The District Court therefore granted respondent's petition subject to the INS' prompt undertaking of an individualized bond hearing to determine whether respondent posed either a flight risk or a danger to the community. *Id.*, at 50a. Following that decision, the District Director of the INS released respondent on $5,000 bond.

The Court of Appeals for the Ninth Circuit affirmed. *Kim v. Ziglar*, 276 F.3d 523 (C.A.9 2002). That court held that § 1226(c) violates substantive due process as applied to respondent because he is a permanent resident alien. *Id.*, at 528. It noted that permanent resident aliens constitute the most favored category of aliens and that they have the right to reside permanently in the United States, to work here, and to apply for citizenship. *Ibid.* The court recognized and rejected the Government's two principal justifications for mandatory detention under § 1226(c): (1) ensuring the presence of criminal aliens at their removal proceedings; and (2) protecting the public from dangerous criminal aliens. The Court of Appeals discounted the first justification because it found that not all aliens detained pursuant to § 1226(c) would ultimately be deported. *Id.*, at 531-532. And it discounted the second justification on the grounds that the aggravated felony classification triggering respondent's detention included crimes that the court did not consider "egregious" or otherwise sufficiently dangerous to the public to necessitate mandatory detention. *Id.*, at 532-533. Respondent's crimes of first-degree burglary (burglary of an inhabited dwelling) and petty theft, for instance, the Ninth Circuit dismissed as "rather ordinary crimes." *Id.*, at 538. Relying upon our recent decision in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), the Court of Appeals concluded that the INS had not provided a justification "for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest." 276 F.3d, at 535.

***516** Three other Courts of Appeals have reached the same conclusion. See *Patel v. Zemski*, 275 F.3d 299 (C.A.3 2001); *Welch v. Ashcroft*, 293 F.3d 213 (C.A.4 2002); *Hoang v. Comfort*, 282 F.3d 1247 (C.A.10 2002). The Seventh Circuit, however, rejected a constitutional challenge to § 1226(c) by a permanent resident alien. *Parra v. Perryman*, 172 F.3d 954 (C.A.7 1999). We granted certiorari to resolve this conflict, see 536 U.S. 956, 122 S.Ct. 2696, 153 L.Ed.2d 833 (2002), and now reverse.

I

[1] We address first the argument that 8 U.S.C. § 1226(e) deprives us of jurisdiction to hear this case. See *Florida v. Thomas*, 532 U.S. 774, 777, 121 S.Ct. 1905, 150 L.Ed.2d 1 (2001) ("Although the parties did not raise the issue in their briefs on the merits, we must first consider whether we have jurisdiction to decide this case"). An *amicus* argues, and the concurring opinion agrees, that § 1226(e) deprives the federal courts of jurisdiction to ****1714** grant habeas relief to aliens challenging their detention under § 1226(c). See Brief for Washington Legal Foundation et al. as *Amici Curiae*. Section 1226(e) states:

"(e) Judicial review

"The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole."

The *amicus* argues that respondent is contesting a "decision by the Attorney General" to detain him under § 1226(c), and that, accordingly, no court may set aside that action. Brief for Washington Legal Foundation et al. as *Amici Curiae* 7-8.

But respondent does not challenge a "discretionary judgment" by the Attorney General or a "decision" that the Attorney General has made regarding his detention or release. ***517** Rather, respondent challenges the statutory framework that permits his detention without bail. *Parra v. Perryman*, *supra*, at 957 ("Section 1226(e) likewise deals with challenges to operational decisions, rather than to the legislation establishing the framework for those decisions").

[2][3] This Court has held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988); see also *Johnson v. Robison*, 415 U.S. 361, 367, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (holding that provision barring review of " 'decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans' " did not bar constitutional challenge (emphasis deleted)). And, where a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent. See *INS v. St. Cyr*, 533 U.S. 289, 308-309, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (holding that title of provision, "Elimination of Custody Review by Habeas Corpus," along with broad statement of intent to preclude review, was not sufficient to bar review of habeas corpus petitions); see also *id.*, at 298, 121 S.Ct. 2271 (citing cases refusing to find bar to habeas review where there was no specific mention of the Court's authority to hear habeas petitions); *id.*, at 327, 121 S.Ct. 2271 (SCALIA, J., dissenting) (arguing that opinion established "a superclear statement, 'magic words' requirement for the congressional expression of" an intent to preclude habeas review).

Section 1226(e) contains no explicit provision barring habeas review, and we think that its clear text does not bar respondent's constitutional challenge to the legislation authorizing his detention without bail.

II

[4] Having determined that the federal courts have jurisdiction to review a constitutional challenge to § 1226(c), we proceed to review respondent's claim. Section 1226(c) mandates***518** detention during removal proceedings for a limited class of deportable aliens-including those convicted of an aggravated felony. Congress adopted this provision against a backdrop of wholesale failure by the INS to deal with increasing rates of criminal activity by aliens. See, *e.g.*, Criminal Aliens in the United States: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 103d Cong., 1st Sess. (1993); S.Rep. No. 104-48, p. 1 (1995) (hereinafter S. Rep. 104-48) (confinement of criminal aliens alone cost $724 million in 1990). Criminal aliens were the fastest growing segment of the federal prison population, already constituting roughly 25% of all federal prisoners, and they formed a rapidly rising share of state prison populations as well. *Id.*, at 6-9. Congress' investigations****1715** showed, however, that the INS could not even *identify* most deportable aliens, much less locate them and remove them from the country. *Id.*, at 1. One study showed that, at the then-current rate of deportation, it would take 23 years to remove every criminal alien already subject to deportation. *Id.*, at 5. Making matters worse, criminal aliens who were deported swiftly reentered the country illegally in great numbers. *Id.*, at 3.

The INS' near-total inability to remove deportable criminal aliens imposed more than a monetary cost on the Nation. First, as Congress explained, "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others." S.Rep. No. 104-249, p. 7 (1996). Second, deportable criminal aliens who remained in the United States often committed more crimes before being removed. One 1986 study showed that, after criminal aliens were identified as deportable, 77% were arrested at least once

more and 45%-nearly half-were arrested multiple times before their deportation proceedings even began. Hearing on H.R. 3333 before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the ***519** Judiciary, 101st Cong., 1st Sess., 54, 52 (1989) (hereinafter 1989 House Hearing); see also *Zadvydas*, 533 U.S., at 713-714, 121 S.Ct. 2491 (KENNEDY, J., dissenting) (discussing high rates of recidivism for released criminal aliens).

Congress also had before it evidence that one of the major causes of the INS' failure to remove deportable criminal aliens was the agency's failure to detain those aliens during their deportation proceedings. See Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar.1996), App. 46 (hereinafter Inspection Report) ("Detention is key to effective deportation"); see also H.R.Rep. No. 104-469, p. 123 (1995). The Attorney General at the time had broad discretion to conduct individualized bond hearings and to release criminal aliens from custody during their removal proceedings when those aliens were determined not to present an excessive flight risk or threat to society. See 8 U.S.C. § 1252(a) (1982 ed.). Despite this discretion to conduct bond hearings, however, in practice the INS faced severe limitations on funding and detention space, which considerations affected its release determinations. S. Rep. 104-48, at 23 ("[R]elease determinations are made by the INS in large part, according to the number of beds available in a particular region"); see also Reply Brief for Petitioners 9.

Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings. See S. Rep. 104-48, at 2; see also Brief for Petitioners 19.[FN4] The ***520** dissent disputes that statistic, *post*, at 1738-1739 (opinion of SOUTER, J.), but goes on to praise a subsequent study conducted by the Vera Institute of Justice that more than confirms it. *Post*, at 1740-1741. As the dissent explains, the Vera study found that "77% of those [deportable criminal aliens] released on bond" showed up for their removal proceedings. *Post*, at 1740. This finding-that one out of four criminal aliens released on bond absconded prior to the completion of his removal proceedings-is even more striking than the one-in-five flight rate reflected in the evidence before Congress when it adopted ****1716** § 1226(c).[FN5] The Vera Institute study strongly supports Congress' concern that, even with individualized screening, releasing deportable criminal aliens on bond would lead to an unacceptable rate of flight.

FN4. Although the Attorney General had authority to release these aliens on bond, it is not clear that *all* of the aliens released were in fact given individualized bond hearings. See Brief for Petitioners 19 ("[M]ore than 20% of criminal aliens who were released on bond *or otherwise not kept in custody* throughout their deportation proceedings failed to appear for those proceedings" (emphasis added)), citing S. Rep. 104-48, at 2. The evidence does suggest, however, that *many* deportable criminal aliens in this "released criminal aliens" sample received such determinations. See Brief for Petitioners 19 (noting that, for aliens not evaluated for flight risk at a bond hearing, the prehearing skip rate doubled to 40%).

FN5. The dissent also claims that the study demonstrated that "92% of criminal aliens ... who were released under supervisory conditions attended all of their hearings." *Post*, at 1740 (opinion of SOUTER, J.). The study did manage to raise the appearance rate for criminal aliens through a supervision program known as the Appearance Assistance Program (AAP). But the AAP study is of limited value. First, the study included only 16 aliens who, like respondent, were released from prison and charged with being deportable on the basis of an aggravated felony. 1 Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. 33-34, 36 (Aug. 1, 2000). In addition, all 127 aliens in the AAP study were admitted into the study group only after being screened for "strength of family and community ties, appearance rates in prior legal proceedings, and eligibility to apply for a legal remedy." *Id.*, at 13; see also *id.*, at 37. Following this selection process, "supervision staff were in frequent, ongoing communication with participants," *id.*, at 14, through, among other things, required reporting sessions, periodic

home visits, and assistance in retaining legal representation, *id.*, at 41-42. And, in any event, respondent seeks an individualized bond hearing, not "community supervision." The dissent's claim that criminal aliens released under supervisory conditions are likely to attend their hearings, *post*, at 1740, therefore, is totally beside the point.

Congress amended the immigration laws several times toward the end of the 1980's. In 1988, Congress limited ***521** the Attorney General's discretion over custody determinations with respect to deportable aliens who had been convicted of aggravated felonies. See Pub.L. 100-690, Tit. VII, § 7343(a), 102 Stat. 4470. Then, in 1990, Congress broadened the definition of "aggravated felony," subjecting more criminal aliens to mandatory detention. See Pub.L. 101-649, Tit. V, § 501(a), 104 Stat. 5048. At the same time, however, Congress added a new provision, 8 U.S.C. § 1252(a)(2)(B) (1988 ed., Supp. II), authorizing the Attorney General to release permanent resident aliens during their deportation proceedings where such aliens were found not to constitute a flight risk or threat to the community. See Pub.L. 101-649, Tit. V, § 504(a)(5), 104 Stat. 5049.

During the same period in which Congress was making incremental changes to the immigration laws, it was also considering wholesale reform of those laws. Some studies presented to Congress suggested that detention of criminal aliens during their removal proceedings might be the best way to ensure their successful removal from this country. See, *e.g.*, 1989 House Hearing 75; Inspection Report, App. 46; S. Rep. 104-48, at 32 ("Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond"). It was following those Reports that Congress enacted 8 U.S.C. § 1226, requiring the Attorney General to detain a subset of deportable criminal aliens pending a determination of their removability.

[5] "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). The dissent seeks to avoid this fundamental premise of immigration law by repeatedly referring to it as "dictum." *Post*, at 1730-1731, n. 9 (opinion of SOUTER, J.). The Court in *Mathews*, however, made the statement the dissent now seeks to avoid in reliance on clear ***522** precedent establishing that " 'any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.' " 426 U.S., at 81, n. 17, 96 S.Ct. 1883 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-589, 72 S.Ct. 512, 96 L.Ed. 586 (1952)). And, since *Mathews*, ****1717** this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens. See, *e.g.*, *Zadvydas*, 533 U.S., at 718, 121 S.Ct. 2491 (KENNEDY, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens"); *Reno v. Flores*, 507 U.S. 292, 305-306, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993) ("Thus, 'in the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens" ' ") (quoting *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977), in turn quoting *Mathews, supra*, at 79-80, 96 S.Ct. 1883)); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990).

[6] In his habeas corpus challenge, respondent did not contest Congress' general authority to remove criminal aliens from the United States. Nor did he argue that he himself was not "deportable" within the meaning of § 1226(c). [FN6] Rather, ***523** respondent argued that the Government may not, consistent with the Due Process Clause of the Fifth Amendment, detain him for the brief period necessary for his removal proceedings. The dissent, after an initial detour on the issue of respondent's concession, see *post*, at 1727-1728 (opinion of SOUTER, J.), ultimately acknowledges the real issue in this case. *Post*, at 1735, n. 11; see also Brief in Opposition 1-2 (explaining that respondent's "challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention").

FN6. Respondent's concession on this score is relevant for two reasons: First, because of the concession, respondent by his own choice did not receive one of the procedural protections otherwise provided to aliens detained under § 1226(c). And, second, because of the

concession we do not reach a contrary argument raised by respondent for the first time in his brief on the merits in this Court. Specifically, in his brief on the merits, respondent suggests that he might not be subject to detention under § 1226(c) after all because his 1997 conviction for petty theft with priors might not qualify as an aggravated felony under recent Ninth Circuit precedent. Respondent now states that he intends to argue at his next removal hearing that "his 1997 conviction does not constitute an aggravated felony ... and his 1996 conviction [for first-degree burglary] does not constitute either an aggravated felony or a crime involving moral turpitude." Brief for Respondent 11-12. As respondent has conceded that he is deportable for purposes of his habeas corpus challenge to § 1226(c) at all previous stages of this proceeding, see n. 3, *supra*, we decide the case on that basis. Lest there be any confusion, we emphasize that by conceding he is "*deportable*" and, hence, subject to mandatory detention under § 1226(c), respondent did not concede that he *will ultimately be deported.* As the dissent notes, respondent has applied for withholding of removal. *Post*, at 1727 (opinion of SOUTER, J.).

[7] "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Flores, supra*, at 306, 113 S.Ct. 1439. At the same time, however, this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process. As we said more than a century ago, deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character." *Wong Wing v. United States*, 163 U.S. 228, 235, 16 S.Ct. 977, 41 L.Ed. 140 (1896); see also *Flores, supra*, at 305-306, 113 S.Ct. 1439; *Zadvydas*, 533 U.S., at 697, 121 S.Ct. 2491 (distinguishing constitutionally questioned detention there at issue from "detention pending a determination of removability"); *id.*, at 711, 121 S.Ct. 2491 (KENNEDY, J., dissenting) ("Congress' power to detain aliens in connection with removal or exclusion ... is part of the Legislature's considerable authority over immigration matters").[FN7]

FN7. In fact, prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings. See § 20, 34 Stat. 905.

****1718** In *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952), the Court considered a challenge to the detention of aliens who were deportable because of their participation in Communist activities.***524** The detained aliens did not deny that they were members of the Communist Party or that they were therefore deportable. *Id.*, at 530, 72 S.Ct. 525. Instead, like respondent in the present case, they challenged their detention on the grounds that there had been no finding that they were unlikely to appear for their deportation proceedings when ordered to do so. *Id.*, at 531-532, 72 S.Ct. 525; see also Brief for Petitioner in *Carlson v. Landon*, O.T.1951, No. 35, p. 12 (arguing that legislative determinations could not justify "depriving [an alien] of his liberty without facts personal to the individual"). Although the Attorney General ostensibly had discretion to release detained Communist aliens on bond, the INS had adopted a policy of refusing to grant bail to those aliens in light of what Justice Frankfurter viewed as the mistaken "conception that Congress had made [alien Communists] in effect unbailable." 342 U.S., at 559, 568, 72 S.Ct. 525 (dissenting opinion).

The Court rejected the aliens' claims that they were entitled to be released from detention if they did not pose a flight risk, explaining "[d]etention is necessarily a part of this deportation procedure." *Id.*, at 538, 72 S.Ct. 525; see also *id.*, at 535, 72 S.Ct. 525. The Court noted that Congress had chosen to make such aliens deportable based on its "understanding of [Communists'] attitude toward the use of force and violence ... to accomplish their political aims." *Id.*, at 541, 72 S.Ct. 525. And it concluded that the INS could deny bail to the detainees "by reference to the legislative scheme" even without any finding of flight risk. *Id.*, at 543, 72 S.Ct. 525; see also *id.*, at 550, 72 S.Ct. 525 (Black, J., dissenting) ("Denial [of bail] was not on the ground that if released [the aliens] might try to evade obedience to possible deportation orders"); *id.*, at 551, and n. 6, 72 S.Ct. 525.

The dissent argues that, even though the aliens in *Carlson* were not flight risks, "individualized findings of dangerousness were made" as to each of the aliens. *Post*, at 1744 (opinion of SOUTER, J.). The dissent,

again, is mistaken. The aliens in *Carlson* had *not* been found individually dangerous. ***525** The only evidence against them was their membership in the Communist Party and "a degree ... of participation in Communist activities." 342 U.S., at 541, 72 S.Ct. 525. There was no "individualized findin[g]" of likely future dangerousness as to any of the aliens and, in at least one case, there was a specific finding of nondangerousness.[FN8] The Court nonetheless concluded that the denial of bail was permissible "by reference to the legislative scheme to eradicate the evils of Communist activity." *Id.*, at 543, 72 S.Ct. 525.[FN9]

FN8. See *Carlson v. Landon*, 342 U.S., at 549, 72 S.Ct. 525 (Black, J., dissenting) (noting that, in at least one case, the alien involved had been found " '*not* likely to engage in any subversive activities' " (emphasis added)); see also *id.*, at 550, n. 5, 72 S.Ct. 525 (quoting the District Judge's finding in case No. 35 that " 'I don't know whether it is true ... that their release is dangerous to the security of the United States' "); *id.*, at 552, 72 S.Ct. 525 ("[T]he bureau agent is *not* required to prove that a person he throws in jail is ... 'dangerous' " (emphasis added)); see also *id.*, at 567, 72 S.Ct. 525 (Frankfurter, J., dissenting) ("[T]he Attorney General ... did *not* deny bail from an individualized estimate of 'the danger to the public safety of [each person's] presence within the community' " (emphasis added)).

FN9. Apart from its error with respect to the dangerousness determination, the dissent attempts to distinguish *Carlson* from the present case by arguing that the aliens in *Carlson* had engaged in " 'personal activity' " in support of a political party Congress considered " 'a menace to the public.' " *Post*, at 1742 (opinion of SOUTER, J.). In suggesting that this is a distinction, the dissent ignores the "personal activity" that aliens like respondent have undertaken in committing the crimes that subject them to detention in the first instance-personal activity that has been determined with far greater procedural protections than any finding of "active membership" in the Communist Party involved in *Carlson*. See 342 U.S., at 530, 72 S.Ct. 525 ("[T]he Director made allegation[s], supported by affidavits, that the Service's dossier of each petitioner contained evidence indicating to him that each was at the time of arrest a member of the Communist Party of the United States and had since 1930 participated ... in the Party's indoctrination of others"). In the present case, respondent became "deportable" under § 1226(c) only following criminal convictions that were secured following full procedural protections. These convictions, moreover, reflect "personal activity" that Congress considered relevant to future dangerousness. Cf. *Zadvydas v. Davis*, 533 U.S. 678, 714, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) (KENNEDY, J., dissenting) (noting that "a criminal record accumulated by an admitted alien" is a good indicator of future danger, and that "[a]ny suggestion that aliens who have completed prison terms no longer present a danger simply does not accord with the reality that a significant risk may still exist").

****1719 *526** In *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993), the Court considered another due process challenge to detention during deportation proceedings. The due process challenge there was brought by a class of alien juveniles. The INS had arrested them and was holding them in custody pending their deportation hearings. The aliens challenged the INS' policy of releasing detained alien juveniles only into the care of their parents, legal guardians, or certain other adult relatives. See, *e.g.*, *id.*, at 297, 113 S.Ct. 1439 (citing Detention and Release of Juveniles, 53 Fed.Reg. 17449 (1988) (codified as to deportation at 8 CFR § 242.24 (1992))). The aliens argued that the policy improperly relied "upon a 'blanket' presumption of the unsuitability of custodians other than parents, close relatives, and guardians" to care for the detained juvenile aliens. 507 U.S., at 313, 113 S.Ct. 1439. In rejecting this argument, the Court emphasized that "reasonable presumptions and generic rules," even when made by the INS rather than Congress, are not necessarily impermissible exercises of Congress' traditional power to legislate with respect to aliens. *Ibid.*; see also *id.*, at 313-314, 113 S.Ct. 1439 ("In the case of each detained alien juvenile, the INS makes those determinations that are specific to the individual and necessary to accurate application of the regulation .... The particularization and individuation need go no

further than this"). Thus, as with the prior challenges to detention during deportation proceedings, the Court in *Flores* rejected the due process challenge and upheld the constitutionality of the detention.

Despite this Court's longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings, respondent argues that the narrow detention policy reflected in 8 U.S.C. § 1226(c) violates due process. Respondent, like ***527** the four Courts of Appeals that have held § 1226(c) to be unconstitutional, relies heavily upon our recent opinion in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

In *Zadvydas*, the Court considered a due process challenge to detention of aliens under 8 U.S.C. § 1231 (1994 ed., Supp. V), which governs detention following a final order of removal. Section 1231(a)(6) provides, among other things, that when an alien who has been ordered removed is not in fact removed during the 90-day statutory "removal period," that alien "may be detained beyond the removal period" in the discretion of the Attorney General. The Court in *Zadvydas* read § 1231 to authorize continued detention of an alien following the 90-day removal period for only such time as is reasonably necessary to secure the alien's removal. 533 U.S., at 699, 121 S.Ct. 2491.

But *Zadvydas* is materially different from the present case in two respects.

First, in *Zadvydas*, the aliens challenging their detention following final orders of deportation were ones for whom removal was "no longer practically attainable." *Id.*, at 690, 121 S.Ct. 2491. The Court thus held that the detention there did not serve its purported immigration purpose. *Ibid.* ****1720** In so holding, the Court rejected the Government's claim that, by detaining the aliens involved, it could prevent them from fleeing prior to their removal. The Court observed that where, as there, "detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which the individual was committed." *Ibid.* (internal quotation marks and citation omitted).[FN10]

FN10. The dissent denies this point, insisting that the detention at issue in *Zadvydas* actually did bear a reasonable relation to its immigration purpose. *Post*, at 1738 (opinion of SOUTER, J.) ("[T]he statute in *Zadvydas* ... served the purpose of preventing aliens ... from fleeing prior to actual deportation").

In the present case, the statutory provision at issue governs detention of deportable criminal aliens *pending their* ****528*** *removal proceedings.* Such detention necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed. Respondent disagrees, arguing that there is no evidence that mandatory detention is necessary because the Government has never shown that individualized bond hearings would be ineffective. See Brief for Respondent 14. But as discussed above, see *supra*, at 1715-1716, in adopting § 1226(c), Congress had before it evidence suggesting that permitting discretionary release of aliens pending their removal hearings would lead to large numbers of deportable criminal aliens skipping their hearings and remaining at large in the United States unlawfully.

[8] Respondent argues that these statistics are irrelevant and do not demonstrate that individualized bond hearings "are ineffective or burdensome." Brief for Respondent 33-40. It is of course true that when Congress enacted § 1226, individualized bail determinations had not been tested under optimal conditions, or tested in all their possible permutations. But when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal. The evidence Congress had before it certainly supports the approach it selected even if other, hypothetical studies might have suggested different courses of action. Cf., *e.g.*, *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 436-437, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002); *Flores*, *supra*, at 315, 113 S.Ct. 1439 ("It may well be that other policies would be even better, but 'we are [not] a legislature charged with formulating public policy' " (quoting *Schall v. Martin*, 467 U.S. 253, 281, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984))).

Zadvydas is materially different from the present case in a second respect as well. While the period of detention at issue in *Zadvydas* was "indefinite" and "potentially permanent," 533 U.S., at 690-691, 121 S.Ct. 2491, the detention here is of a much shorter

duration.

529** *Zadvydas* distinguished the statutory provision it was there considering from § 1226 on these very grounds, noting that "post-removal-period detention, *unlike detention pending a determination of removability* (3)27, has no obvious termination point." *Id.*, at 697, 121 S.Ct. 2491 (emphasis added). Under § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*. [FN11] The Executive*1721** Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days. Brief for Petitioners 39-40. In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter. *Id.*, at 40. [FN12]

FN11. The dissent concedes that "[t]he scheme considered in *Zadvydas* did not provide review immediately .... [C]ustody review hearings usually occurred within three months of a transfer to a postorder detention unit." *Post*, at 1735, n. 11 (opinion of SOUTER, J.). Yet, in discussing the present case, the dissent insists that "the due process requirement of an individualized finding of necessity applies to detention periods shorter than" respondent's. *Post*, at 1742, n. 24 (citing *Schall v. Martin*, 467 U.S. 253, 270, 276-277, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984), in which "the detainee was entitled to a hearing" when threatened with "a maximum detention period of 17 days"). The dissent makes no attempt to reconcile its suggestion that aliens are entitled to an immediate hearing with the holding in *Zadvydas* permitting aliens to be detained for several months prior to such a hearing.

FN12. The very limited time of the detention at stake under § 1226(c) is not missed by the dissent. See *post*, at 1741 (opinion of SOUTER, J.) ("Successful challenges often require several months"); *post*, at 1742 (considering "[t]he potential for several months [worth] of confinement"); but see *post*, at 1731 ("potentially lengthy detention").

[9] These statistics do not include the many cases in which removal proceedings are completed while the alien is still serving time for the underlying conviction. *Id.*, at 40, ***530** n. 17.[FN13] In those cases, the aliens involved are never subjected to mandatory detention at all. In sum, the detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal. [FN14] Respondent was detained for somewhat***531** longer than the average-spending six months in INS custody prior to the District Court's order granting habeas relief, but respondent himself had requested a continuance of his removal hearing.[FN15]

FN13. Congress has directed the INS to identify and track deportable criminal aliens while they are still in the criminal justice system, and to complete removal proceedings against them as promptly as possible. See Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, §§ 432, 438(a), 110 Stat. 1273-1276; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, §§ 326, 329, 110 Stat. 3009-630 to 3009-631 (codified at 8 U.S.C. § 1228). The INS therefore established the Institutional Hearing Program (IHP) (subsequently subsumed under the "Institutional Removal Program"). By 1997, the General Accounting Office found that nearly half of all deportable criminal aliens' cases were completed through the IHP prior to the aliens' release from prison. See General Accounting Office, Report to the Chairman, Subcommittee on Immigration and Claims of the House Committee on the Judiciary, INS' Efforts to Remove Imprisoned Aliens Continue to Need Improvement 10, Fig. 1 (Oct.1998). The report urged, however, that the INS needed to improve its operations in order to complete removal proceedings against all deportable criminal aliens before their release. *Id.*, at 13. Should this come to pass, of course, § 1226(c) and the temporary detention it mandates would be rendered obsolete.

FN14. Prior to the enactment of § 1226(c), when the vast majority of deportable criminal aliens were not detained during their deportation proceedings, many filed frivolous appeals in order to delay their deportation. See S. Rep. 104-48, at 2 ("Delays can earn criminal aliens more than work permits and wages-if they delay long enough they may even obtain U.S. citizenship"). Cf. *Zadvydas*, 533 U.S., at 713, 121 S.Ct. 2491 (KENNEDY, J., dissenting) ("[C]ourt ordered release cannot help but encourage dilatory and obstructive tactics by aliens"). Respondent contends that the length of detention required to appeal may deter aliens from exercising their right to do so. Brief for Respondent 32. As we have explained before, however, "the legal system ... is replete with situations requiring the making of difficult judgments as to which course to follow," and, even in the criminal context, there is no constitutional prohibition against requiring parties to make such choices. *McGautha v. California*, 402 U.S. 183, 213, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971) (internal quotation marks omitted); accord, *Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

FN15. Respondent was held in custody for three months before filing his habeas petition. His removal hearing was scheduled to occur two months later, but respondent requested and received a continuance to obtain documents relevant to his withholding application. See Brief for Respondent 9, n. 12.

For the reasons set forth above, respondent's claim must fail. Detention during removal proceedings is a constitutionally ****1722** permissible part of that process. See, *e.g.*, *Wong Wing*, 163 U.S., at 235, 16 S.Ct. 977 ("We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid"); *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952); *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993). The INS detention of respondent, a criminal alien who has conceded that he is deportable, for the limited period of his removal proceedings, is governed by these cases. The judgment of the Court of Appeals is

Reversed.

Justice KENNEDY, concurring.

While the justification for 8 U.S.C. § 1226(c) is based upon the Government's concerns over the risks of flight and danger to the community, *ante*, at 1715-1716, the ultimate purpose behind the detention is premised upon the alien's deportability. As a consequence, due process requires individualized procedures to ensure there is at least some merit to the Immigration and Naturalization Service's (INS) charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing. See *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001) ("[W]here detention's goal is no longer practically attainable, detention no longer bears a reasonable relation to the purpose for which ***532** the individual was committed" (internal quotation marks and brackets omitted)); *id.*, at 718, 121 S.Ct. 2491 (KENNEDY, J., dissenting) ("Liberty under the Due Process Clause includes protection against unlawful or arbitrary personal restraint or detention"). If the Government cannot satisfy this minimal, threshold burden, then the permissibility of continued detention pending deportation proceedings turns solely upon the alien's ability to satisfy the ordinary bond procedures-namely, whether if released the alien would pose a risk of flight or a danger to the community. *Id.*, at 721, 121 S.Ct. 2491 (KENNEDY, J., dissenting).

As the Court notes, these procedures were apparently available to respondent in this case. Respondent was entitled to a hearing in which he could have "raise[d] any nonfrivolous argument available to demonstrate that he was not properly included in a mandatory detention category." *Ante*, at 1712-1713, and n. 3 (citing 8 CFR § 3.19(h)(2)(ii) (2002); *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999)). Had he prevailed in such a proceeding, the Immigration Judge then would have had to determine if respondent "could be considered ... for release under the general bond provisions" of § 1226(a). *Id.*, at 809. Respondent, however, did not seek relief under these procedures, and the Court had no occasion here to determine their adequacy. *Ante*, at 1712-1713, n. 3.

For similar reasons, since the Due Process Clause prohibits arbitrary deprivations of liberty, a lawful permanent resident alien such as respondent could be

entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified. *Zadvydas*, 533 U.S., at 684-686, 121 S.Ct. 2491; *id.*, at 721, 121 S.Ct. 2491 (KENNEDY, J., dissenting) ("[A]liens are entitled to be free from detention that is arbitrary or capricious"). Were there to be an unreasonable delay by the INS in pursuing and completing deportation proceedings, it could become necessary then to inquire whether the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness,***533** but to incarcerate for other reasons. That is not a proper inference, however, either from the statutory scheme itself or from the circumstances of this case. The Court's careful opinion is consistent with these premises, and I join it in full.

Justice O'CONNOR, with whom Justice SCALIA and Justice THOMAS join, concurring in part and concurring in the judgment.

I join all but Part I of the Court's opinion because, a majority having determined****1723** there is jurisdiction, I agree with the Court's resolution of respondent's challenge on the merits. I cannot join Part I because I believe that 8 U.S.C. § 1226(e) unequivocally deprives federal courts of jurisdiction to set aside "any action or decision" by the Attorney General in detaining criminal aliens under § 1226(c) while removal proceedings are ongoing. That is precisely the nature of the action before us.

I

I begin with the text of the statute:

> "The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside *any action or decision* by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." § 1226(e) (emphasis added).

There is no dispute that after respondent's release from prison in 1999, the Attorney General detained him "under this section," *i.e.*, under § 1226. And, the action of which respondent complains is one "regarding the detention or release of a[n] alien or the grant, revocation, or denial of bond or parole." § 1226(e). In my view, the only plausible reading of § 1226(e) is that Congress intended to prohibit federal courts from "set[ting] aside" the Attorney General's decision ***534** to deem a criminal alien such as respondent ineligible for release during the limited duration of his or her removal proceedings.

I recognize both the "strong presumption in favor of judicial review of administrative action" and our "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *INS v. St. Cyr*, 533 U.S. 289, 298, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). I also acknowledge that Congress will not be deemed to have repealed habeas jurisdiction in the absence of a specific and unambiguous statutory directive to that effect. See *id.*, at 312-313, 121 S.Ct. 2271; *Ex parte Yerger*, 8 Wall. 85, 105, 19 L.Ed. 332 (1869). Here, however, the signal sent by Congress in enacting § 1226(e) could not be clearer: "*No court* may set aside *any action or decision* ... regarding the detention or release of any alien." (Emphasis added.) There is simply no reasonable way to read this language other than as precluding all review, including habeas review, of the Attorney General's actions or decisions to detain criminal aliens pursuant to § 1226(c).

In *St. Cyr*, the Court held that certain provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) do not strip federal courts of their jurisdiction to review an alien's habeas claim that he or she is eligible for a waiver of deportation. 533 U.S., at 312, 121 S.Ct. 2271. I dissented in that case, and continue to believe it was wrongly decided. Nothing in *St. Cyr*, however, requires that we ignore the plain language and clear meaning of § 1226(e).

In *St. Cyr*, the Court stressed the significance of Congress' use of the term "judicial review" in each of the jurisdictional-limiting provisions at issue. In concluding that Congress had not intended to limit habeas jurisdiction by limiting "judicial review," the Court reasoned as follows:

> "The term 'judicial review' or 'jurisdiction to review' is the focus of each of these three provisions. In the immigration***535** context, 'judicial review' and 'habeas corpus' have historically distinct meanings. See *Heikkila v. Barber*, 345 U.S. 229[, 73 S.Ct. 603, 97 L.Ed. 972] (1953). In *Heikkila*, the Court concluded that the finality provisions at issue 'preclud [ed] judicial review' to the maximum extent possible under the Constitution, and thus con-

cluded that the [Administrative Procedure Act] was inapplicable. *Id.*, at 235[, 73 S.Ct. 603]. Nevertheless, the Court reaffirmed the right to habeas corpus. *Ibid.* Noting ****1724** that the limited role played by the courts in habeas corpus proceedings was far narrower than the judicial review authorized by the APA, the Court concluded that 'it is the scope of inquiry on habeas corpus that differentiates' habeas review from 'judicial review.' " *Id.*, at 311-312, 121 S.Ct. 2271.

In this case, however, § 1226(e) does not mention any limitations on "judicial review." To be sure, the first sentence of § 1226(e) precludes "review" of the Attorney General's "discretionary judgment[s]" to detain aliens under § 1226(c). But the second sentence is not so limited, and states unequivocally that "[n]o court may set aside any action or decision" to detain an alien under § 1226(c). It cannot seriously be maintained that the second sentence employs a term of art such that "no court" does not really mean "no court," or that a decision of the Attorney General may not be "set aside" in actions filed under the Immigration and Naturalization Act but may be set aside on habeas review.

Congress' use of the term "Judicial review" as the title of § 1226(e) does not compel a different conclusion. As the Court stated in *St. Cyr*, "a title alone is not controlling," *id.*, at 308, 121 S.Ct. 2271, because the title of a statute has no power to give what the text of the statute takes away. Where as here the statutory text is clear, " 'the title of a statute ... cannot limit the plain meaning of the text.' " *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947)).

***536** The Court also focused in *St. Cyr* on the absence of any language in the relevant statutory provisions making explicit reference to habeas review under 28 U.S.C. § 2241. See 533 U.S., at 313, n. 36, 121 S.Ct. 2271. This statutory silence spoke volumes, the Court reasoned, in light of the "historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders," *ibid.* In contrast, there is no analogous history of routine reliance on habeas jurisdiction to challenge the detention of aliens without bail pending the conclusion of removal proceedings. We have entertained such challenges only twice, and neither was successful on the merits. See *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952). See also Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L.Rev. 961, 1067, n. 120 (1998) (distinguishing detention pursuant to a final order of removal from the interlocutory detention at issue here). Congress' failure to mention § 2241 in this context therefore lacks the significance that the Court accorded Congress' silence on the issue in *St. Cyr*. In sum, nothing in *St. Cyr* requires us to interpret 8 U.S.C. § 1226(e) to mean anything other than what its plain language says.

I recognize that the two Courts of Appeals that have considered the issue have held that § 1226(e) does not preclude habeas claims such as respondent's. See *Patel v. Zemski*, 275 F.3d 299 (C.A.3 2001); *Parra v. Perryman*, 172 F.3d 954 (C.A.7 1999). In *Parra*, the Seventh Circuit held that § 1226(e) does not bar "challenges to § 1226(c) itself, as opposed to decisions implementing that subsection." *Id.*, at 957. Though the Court's opinion today relies heavily on this distinction, I see no basis for importing it into the plain language of the statute.

The Seventh Circuit sought support from our decision in *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) *(AADC)*, but our holding there supports my reading of § 1226(e). In *AADC*, the Court construed a statute that sharply limits review of claims "arising from the ***537** decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against ****1725** any alien under this [Act]." 8 U.S.C. § 1252(g) (1994 ed., Supp. III). The Court concluded that this provision imposes jurisdictional limits only on claims addressing one of the three " 'decision[s] or action[s]' " specifically enumerated in the statute. *AADC, supra*, at 482, 119 S.Ct. 936. Nowhere in *AADC* did the Court suggest, however, that the statute's jurisdictional limits might not apply depending on the particular grounds raised by an alien for challenging the Attorney General's decisions or actions in these three areas. *AADC* therefore provides no support for imposing artificial limitations on the broad scope of 8 U.S.C. § 1226(e).

II

Because § 1226(e) plainly deprives courts of

federal habeas jurisdiction over claims that mandatory detention under § 1226(c) is unconstitutional, one could conceivably argue that such a repeal violates the Suspension Clause, which provides as follows: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. The clarity of § 1226(e)'s text makes such a question unavoidable, unlike in *St. Cyr*, where the Court invoked the doctrine of constitutional doubt and interpreted the relevant provisions of AEDPA and IIRIRA not to repeal habeas jurisdiction. *St. Cyr*, *supra*, at 314, 121 S.Ct. 2271; see also *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 57, n. 9, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (where the text of a statute is clear, the "preference for avoiding a constitutional question" cannot be invoked to defeat the plainly expressed intent of Congress).

In my view, any argument that § 1226(e) violates the Suspension Clause is likely unavailing. *St. Cyr* held that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.' " 533 U.S., at 301, 121 S.Ct. 2271 (quoting *Felker v. Turpin*, 518 U.S. 651, 663-664, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)). The constitutionality***538** of § 1226(e)'s limitation on habeas review therefore turns on whether the writ was generally available to those in respondent's position in 1789 (or, possibly, thereafter) to challenge detention during removal proceedings.

Admittedly, discerning the relevant habeas corpus law for purposes of Suspension Clause analysis is a complex task. Nonetheless, historical evidence suggests that respondent would not have been permitted to challenge his temporary detention pending removal until very recently. Because colonial America imposed few restrictions on immigration, there is little case law prior to that time about the availability of habeas review to challenge temporary detention pending exclusion or deportation. See *St. Cyr*, *supra*, at 305, 121 S.Ct. 2271. The English experience, however, suggests that such review was not available:

> "In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the King without the consent of Parliament. It was formerly exercised by the King, but in later times by Parliament, which passed several acts on the subject between 1793 and 1848. Eminent English judges, sitting in the Judicial Committee of the Privy Council, have gone very far in supporting the exclusion or expulsion, by the executive authority of a colony, of aliens having no absolute right to enter its territory or to remain therein." *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) (citations omitted).

In this country, Congress did not pass the first law regulating immigration until 1875. See 18 Stat. (pt. 3) 477. In the late 19th century, as statutory controls on immigration tightened, the number of challenges brought by aliens to Government deportation or exclusion decisions also increased. See ****1726***St. Cyr*, *supra*, at 305-306, 121 S.Ct. 2271. Because federal immigration laws from 1891 until 1952 made no express provision for judicial review, what limited review existed took the form of petitions***539** for writs of habeas corpus. See, *e.g.*, *Ekiu v. United States*, 142 U.S. 651, 12 S.Ct. 336, 35 L.Ed. 1146 (1892); *Fong Yue Ting v. United States*, *supra*; *The Japanese Immigrant Case*, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721 (1903); *Chin Yow v. United States*, 208 U.S. 8, 28 S.Ct. 201, 52 L.Ed. 369 (1908); *Kwock Jan Fat v. White*, 253 U.S. 454, 40 S.Ct. 566, 64 L.Ed. 1010 (1920); *Ng Fung Ho v. White*, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922). Though the Court was willing to entertain these habeas challenges to Government exclusion and deportation decisions, in no case did the Court question the right of immigration officials to temporarily detain aliens while exclusion or deportation proceedings were ongoing.

By the mid-20th century, the number of aliens in deportation proceedings being released on parole rose considerably. See, *e.g.*, *Carlson v. Landon*, 342 U.S., at 538, n. 31, 72 S.Ct. 525. Nonetheless, until 1952 habeas corpus petitions remained the only means by which deportation orders could be challenged. *Heikkila v. Barber*, 345 U.S. 229, 236-237, 73 S.Ct. 603, 97 L.Ed. 972 (1953). Under this regime, an alien who had been paroled but wished to challenge a final deportation order had to place himself in Government custody before filing a habeas petition challenging the order. *Bridges v. Wixon*, 326 U.S. 135, 140, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945). Given this, it is not surprising that the Court was not faced with numerous habeas claims brought by aliens seeking release from detention pending deportation.

So far as I am aware, not until 1952 did we en-

tertain such a challenge. See *Carlson v. Landon, supra.* And there, we reaffirmed the power of Congress to order the temporary detention of aliens during removal proceedings. *Id.*, at 538, 72 S.Ct. 525. In *Reno v. Flores,* we likewise rejected a similar challenge to such detention. And, *Flores* was a wide-ranging class action in which 28 U.S.C. § 2241 was but one of several statutes invoked as the basis for federal jurisdiction. 507 U.S., at 296, 113 S.Ct. 1439. All in all, it appears that in 1789, and thereafter until very recently, the writ was not generally available to aliens to challenge their detention while removal proceedings were ongoing.

***540** Because a majority of the Court has determined that jurisdiction exists over respondent's claims, I need not conclusively decide the thorny question whether 8 U.S.C. § 1226(e) violates the Suspension Clause. For present purposes, it is enough to say that in my view, § 1226(e) unambiguously bars habeas challenges to the Attorney General's decisions regarding the temporary detention of criminal aliens under § 1226(c) pending removal. That said, because a majority of the Court has determined that there is jurisdiction, and because I agree with the majority's resolution of the merits of respondent's challenge, I join in all but Part I of the Court's opinion.

Justice SOUTER, with whom Justice STEVENS and Justice GINSBURG join, concurring in part and dissenting in part.

Respondent Kim is an alien lawfully admitted to permanent residence in the United States. He claims that the Constitution forbids the Immigration and Naturalization Service (INS) from detaining him under 8 U.S.C. § 1226(c) unless his detention serves a government interest, such as preventing flight or danger to the community. He contends that due process affords him a right to a hearing before an impartial official,[FN1] giving him a chance to show that ****1727** he poses no risk that would justify confining him between the moment the Government claims he is removable and the adjudication of the Government's claim.

FN1. Kim does not claim a hearing before any specific official. The generality of his claim may reflect the fact, noted just below, that the INS released him on bond without any hearing whatsoever after the District Court entered its judgment in this case. App. 11-13. Accordingly, there is no occasion to enquire whether due process requires access to any particular arbiter, such as one unaffiliated with the INS. I therefore use the neutral term "impartial" in describing the hearing Kim claims.

I join Part I of the Court's opinion, which upholds federal jurisdiction in this case, but I dissent from the Court's disposition***541** on the merits. The Court's holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process. The INS has never argued that detaining Kim is necessary to guarantee his appearance for removal [FN2] proceedings or to protect anyone from danger in the meantime. Instead, shortly after the District Court issued its order in this case, the INS, *sua sponte* and without even holding a custody hearing, concluded that Kim "would not be considered a threat" and that any risk of flight could be met by a bond of $5,000. App. 11-13. He was released soon thereafter, and there is no indication that he is not complying with the terms of his release.

FN2. In 1996, Congress combined "deportation" and "exclusion" proceedings into a single "removal" proceeding. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, § 304(a), 110 Stat. 3009-587, adding 8 U.S.C. § 1229a. Because this case requires consideration of cases decided both before and after 1996, this opinion refers to "removal" generally but, where the context requires, distinguishes between "deportation" of aliens who have entered the United States and "exclusion" of aliens who seek entry.

The Court's approval of lengthy mandatory detention can therefore claim no justification in national emergency or any risk posed by Kim particularly. The Court's judgment is unjustified by past cases or current facts, and I respectfully dissent.

I

At the outset, there is the Court's mistaken suggestion that Kim "conceded" his removability, *ante,* at

1712, 1717, and n. 6, 1722. The Court cites no statement before any court conceding removability, and I can find none. At the first opportunity, Kim applied to the Immigration Court for withholding of removal, Brief for Respondent 9, n. 12, and he ***542** represents that he intends to assert that his criminal convictions are not for removable offenses and that he is independently eligible for statutory relief from removal, *id.*, at 11-12; see also *ante*, at 1717, n. 6. In his brief before the Ninth Circuit, Kim stated that his removability was "an open question," that he was "still fighting [his] removal administratively," and that the Immigration Court had yet to hold a merits hearing. Brief of Petitioner-Appellee in No. 99-17373(CA9), pp. 4, 13-14, 24, 33-34, and n. 28, 48-49. At oral argument here, his counsel stated that Kim was challenging his removability. See Tr. of Oral Arg. 36-38, 44.

The suggestion that Kim should have contested his removability in this habeas corpus petition, *ante*, at 1717, and n. 6, misses the point that all he claims, or could now claim, is that his detention pending removal proceedings violates the Constitution. Challenges to removability itself, and applications for relief from removal, are usually submitted in the first instance to an immigration judge. See 8 U.S.C. § 1229a(a)(3). The Immigration Judge had not yet held an initial hearing on the substantive issue of removability when Kim filed his habeas petition in the District Court, even though Kim had been detained for over three months under § 1226(c). If Kim's habeas corpus petition had claimed "that he himself was not 'deportable,' " as the Court suggests it should have, *ante*, at 1717, the District Court ****1728** would probably have dismissed the claim as unexhausted. *E.g.*, *Espinal v. Filion*, No. 00-CIV-2647-HB-JCF, 2001 WL 395196 (S.D.N.Y., Apr.17, 2001). Kim did not, therefore, "conced[e] that he is deportable," *ante*, at 1722, by challenging removability before the Immigration Judge and challenging detention in a federal court.[FN3]

FN3. The Court's effort to explain its reference to a nonexistent concession, *ante*, at 1717, n. 6, seeks to gain an advantage from the fact that the Immigration and Nationality Act uses the word "deportable" in various ways, one being to describe classes of aliens who may be removed if the necessary facts are proven, *e. g.*, § 1227(a), and another to describe aliens who have actually been adjudged as being in the United States unlawfully, *e. g.*, § 1229b. An alien is not adjudged "deportable" until an order enters "concluding that the alien is deportable or ordering deportation," and such an order is not final until affirmed by the Board of Immigration Appeals or until the time expires for seeking review. §§ 1101(a)(47)(A)-(B). To suggest, as the Court seems to do, that an alien has conceded removability simply because he does not dispute that he has been charged with facts that will render him removable if those facts are later proven is like saying that a civil defendant has conceded liability by failing to move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) or that a criminal defendant has conceded guilt by failing to dispute the validity of the indictment. But even if the Court's reasoning were sound, it would not cover Kim's situation, for he has stated (and the Court acknowledges) his intent to contest the sufficiency of his criminal convictions as a basis for removal. *Ante*, at 1717, n. 6. This discussion, which the Court calls a "detour," *ante*, at 1717, is necessary only because of the Court's insistence in stating that Kim conceded that he is "deportable." *Ante*, at 1712, 1717, 1722.

***543** Kim may continue to claim the benefit of his current status unless and until it is terminated by a final order of removal. 8 CFR § 1.1(p) (2002). He may therefore claim the due process to which a lawful permanent resident is entitled.

II

A

It has been settled for over a century that all aliens within our territory are "persons" entitled to the protection of the Due Process Clause. Aliens "residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility." *Fong Yue Ting v. United States*, 149 U.S. 698, 724, 13 S.Ct. 1016, 37 L.Ed. 905 (1893). *The Japanese Immigrant Case*, 189 U.S. 86, 100-101, 23 S.Ct. 611, 47 L.Ed. 721 (1903), settled any lin-

gering doubt that the Fifth Amendment's Due Process Clause gives aliens a right to challenge mistreatment of their person or property.

The constitutional protection of an alien's person and property is particularly strong in the case of aliens lawfully ***544** admitted to permanent residence (LPRs). The immigration laws give LPRs the opportunity to establish a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen. In fact, the law of the United States goes out of its way to encourage just such attachments by creating immigration preferences for those with a citizen as a close relation, 8 U.S.C. §§ 1153(a)(1), (3)-(4), and those with valuable professional skills or other assets promising benefits to the United States, §§ 1153(b)(1)-(5).

Once they are admitted to permanent residence, LPRs share in the economic freedom enjoyed by citizens: they may compete for most jobs in the private and public sectors without obtaining job-specific authorization, and apart from the franchise, jury duty, and certain forms of public assistance, their lives are generally indistinguishable from those of United States citizens. That goes for obligations as well as opportunities. Unlike temporary, nonimmigrant aliens, who are generally****1729** taxed only on income from domestic sources or connected with a domestic business, 26 U.S.C. § 872, LPRs, like citizens, are taxed on their worldwide income, 26 CFR §§ 1.1-1(b), 1.871-1(a), 1.871-2(b) (2002). Male LPRs between the ages of 18 and 26 must register under the Selective Service Act of 1948, ch. 625, Tit. I, § 3, 62 Stat. 605. [FN4] "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973). And if they choose, they may apply for full membership in the national polity through naturalization.

FN4. Although an LPR may seek exemption or discharge from registration on the grounds of alienage, such an action permanently bars the LPR from seeking United States citizenship. 8 U.S.C. § 1426(a).

The attachments fostered through these legal mechanisms are all the more intense for LPRs brought to the United States as children. They grow up here as members of the society around them, probably without much touch with their country of citizenship, probably considering the United ***545** States as home just as much as a native-born, younger brother or sister entitled to United States citizenship. "[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens." *Woodby v. INS*, 385 U.S. 276, 286, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966). Kim is an example. He moved to the United States at the age of six and was lawfully admitted to permanent residence when he was eight. His mother is a citizen, and his father and brother are LPRs. LPRs in Kim's situation have little or no reason to feel or to establish firm ties with any place besides the United States.[FN5]

FN5. See also *Welch v. Ashcroft*, 293 F.3d 213, 215 (C.A.4 2002) (detainee obtained LPR status at age 10); *Hoang v. Comfort*, 282 F.3d 1247, 1252-1253 (C.A.10 2002) (ages 3 and 15), cert. pending, No. 01-1616 [Reporter's Note: See *post*, p. 1963].

Our decisions have reflected these realities. As early as 1892, we addressed an issue of statutory construction with the realization that "foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice ... is to be presumed." *Lau Ow Bew v. United States*, 144 U.S. 47, 61-62, 12 S.Ct. 517, 36 L.Ed. 340.[FN6] Fifty years later in dealing with a question of evidentiary competence in *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945), we said that "the notions of fairness on which our legal system is founded" applied with full force to "aliens whose roots may have become, as ***546** they are in the present case, deeply fixed in this land," *id.*, at 154, 65 S.Ct. 1443. And in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 73 S.Ct. 472, 97 L.Ed. 576 (1953), we read the word "excludable" in a regulation as having no application to LPRs, since such a reading would have been questionable given "a resident alien's constitutional right to due process." *Id.*, at 598-599, 73 S.Ct. 472. [FN7] ****1730** Kwong Hai Chew adopted the statement of Justice Murphy, concurring in Bridges, that " 'once an alien lawfully enters and resides in this country he becomes invested with the rights guaran-

teed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.' " 344 U.S., at 596-597, n. 5, 73 S.Ct. 472 (quoting *Bridges, supra,* at 161, 65 S.Ct. 1443). See also *United States v. Verdugo-Urquidez,* 494 U.S. 259, 271, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country"); *Woodby, supra,* at 285, 87 S.Ct. 483 (holding that deportation orders must be supported by clear, unequivocal, and convincing evidence owing to the "drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification"); *Johnson v. Eisentrager,* 339 U.S. 763, 770-771, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) ("The alien, to whom the United States has been traditionally***547** hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. ... [A]t least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties-such as the due process of law of the Fourteenth Amendment").

FN6. In *The Venus,* 8 Cranch 253, 3 L.Ed. 553 (1814), we held that property belonging to American citizens who were resident in England during the War of 1812 was to be treated as belonging to English proprietors for purposes of prize law. We stated that, as permanent residents of England, the American citizens were "bound, by such residence, to the society of which they are members, subject to the laws of the state, and owing a qualified allegiance thereto; they are obliged to defend it, (with an exception in favor of such a subject, in relation to his native country) in return for the protection it affords them, and the privileges which the laws bestow upon them as subjects," *id.,* at 282.

FN7. "Although the holding [in *Kwong Hai Chew*] was one of regulatory interpretation, the rationale was one of constitutional law. Any doubts that *Chew* recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg v. Fleuti,* [374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963),] where we described *Chew* as holding 'that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him.' 374 U.S., at 460[, 83 S.Ct. 1804]." *Landon v. Plasencia,* 459 U.S. 21, 33, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982).

The law therefore considers an LPR to be at home in the United States, and even when the Government seeks removal, we have accorded LPRs greater protections than other aliens under the Due Process Clause. In *Landon v. Plasencia,* 459 U.S. 21, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982), we held that a long-term resident who left the country for a brief period and was placed in exclusion proceedings upon return was entitled to claim greater procedural protections under that Clause than aliens seeking initial entry. The LPR's interest in remaining in the United States is, we said, "without question, a weighty one." *Id.,* at 34, 103 S.Ct. 321. See also *Rosenberg v. Fleuti,* 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963); *Kwong Hai Chew, supra.*

Although LPRs remain subject to the federal removal power, that power may not be exercised without due process, and any decision about the requirements of due process for an LPR must account for the difficulty of distinguishing in practical as well as doctrinal terms between the liberty interest of an LPR and that of a citizen.[FN8] In evaluating Kim's challenge to his mandatory detention under 8 U.S.C. § 1226(c), the only reasonable starting point is the traditional doctrine concerning the Government's physical confinement of individuals.[FN9]

FN8. This case provides no occasion to determine the constitutionality of mandatory detention of aliens other than LPRs.

FN9. The statement that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," *Mathews v. Diaz,* 426 U.S. 67, 79-80,

96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), cannot be read to leave limitations on the liberty of aliens unreviewable. *Ante*, at 1716. *Diaz* involved a federal statute that limited eligibility for a federal medical insurance program to United States citizens and LPRs who had been continuously resident in the United States for five years. 426 U.S., at 69-70, 96 S.Ct. 1883. Reversing a lower court judgment that this statute violated equal protection, we said this:

> "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry. The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is 'invidious.' " *Id.*, at 79-80, 96 S.Ct. 1883 (footnotes omitted).

Taken in full, the meaning of this paragraph is plain: through the exercise of the deportation and exclusion power, Congress exposes aliens to a treatment (expulsion) that cannot be imposed on citizens. The cases cited in the footnotes to this paragraph accordingly all concern Congress's power to enact grounds of exclusion or deportation. *Id.*, at 80, nn. 14-15, 96 S.Ct. 1883 (citing *Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 33 L.Ed.2d 683 (1972); *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 98 L.Ed. 911 (1954); and *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952)); cf. *ante*, at 1716 (quoting *Diaz*, *supra*, at 81, n. 17, 96 S.Ct. 1883, in turn quoting *Harisiades*). Nothing in *Diaz* addresses due process protection of liberty or purports to sanction any particular limitation on the liberty of LPRs under circumstances comparable to those here.

Even on its terms, the *Diaz* statement is dictum. We acknowledged immediately that "[t]he real question presented by *[Diaz]* is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens-allowing benefits to some aliens but not to others-is permissible." 426 U.S., at 80, 96 S.Ct. 1883. Our holding that Congress could consider length of residence and immigration status in allocating medical insurance in no way suggests the existence of a federal power to imprison a long-term resident alien when the Government concedes that there is no need to do so.

The Court does not explain why it believes the *Diaz* dictum to be relevant to this case, other than to repeat it and identify prior instances of its quotation. *Ante*, at 1716. The Court resists calling the statement " 'dictum,' " *ibid.*, but it does not deny that *Diaz* involved "discrimination *within* the class of aliens" rather than "discrimination between citizens and aliens," 426 U.S., at 80, 96 S.Ct. 1883, thus making any suggestion about Congress's power to treat citizens and aliens differently unnecessary to the holding. Nor does the Court deny that *Diaz* dealt with an equal protection challenge to the allocation of medical insurance and had nothing to say on the subject of the right of LPRs to protection of their liberty under the Due Process Clause. See *supra*, at 1728-1730.

****1731 *548** B

Kim's claim is a limited one: not that the Government may not detain LPRs to ensure their appearance at removal hearings,***549** but that due process under the Fifth Amendment conditions a potentially lengthy detention on a hearing and an impartial decisionmaker's finding that detention is necessary to a governmental purpose. He thus invokes our repeated decisions that the claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual. THE CHIEF JUSTICE wrote in 1987 that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755, 107 S.Ct. 2095, 95 L.Ed.2d 697. See also *Reno v. Flores*, 507 U.S. 292, 316, 113 S.Ct.

1439, 123 L.Ed.2d 1 (1993) (O'CONNOR, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny"); *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); *id.*, at 90, 112 S.Ct. 1780 (KENNEDY, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution").

Accordingly, the Fifth Amendment permits detention only where "heightened, substantive due process scrutiny" finds a " 'sufficiently compelling' " governmental ****1732** need. *Flores, supra*, at 316, 113 S.Ct. 1439 (O'CONNOR, J., concurring) (quoting *Salerno*, 481 U.S., at 748, 107 S.Ct. 2095). In deciding in *Salerno* that this principle did not categorically bar pretrial detention of criminal defendants without bail under the Bail Reform Act of 1984, it was crucial that the statute provided that, "[i]n a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.*, at 750, 107 S.Ct. 2095 (citing ***550**18 U.S.C. § 3142(f)). We stressed that the Act was not a "scattershot attempt to incapacitate those who are merely suspected of" serious offenses, 481 U.S., at 750, 107 S.Ct. 2095, and held that due process allowed some pretrial detention because the Act confined it to a sphere of real need: "[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community." *Id.*, at 751, 107 S.Ct. 2095; see also *Foucha, supra*, at 81, 112 S.Ct. 1780 (calling the pretrial detention statute in *Salerno* a "sharply focused scheme").

We have reviewed involuntary civil commitment statutes the same way. In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), we held that a State could not civilly commit the mentally ill without showing by "clear and convincing evidence" that the person was dangerous to others, *id.*, at 433, 99 S.Ct. 1804. The elevated burden of proof was demanded because "[l]oss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior." *Id.*, at 427, 99 S.Ct. 1804. The statutory deficiency was the same in *Foucha*, where we held that Louisiana's civil commitment statute failed due process because the individual was denied an "adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community." 504 U.S., at 81, 112 S.Ct. 1780. See also *id.*, at 88, 112 S.Ct. 1780 (opinion of O'CONNOR, J.) (civil commitment depends on a "necessary connection between the nature and purposes of confinement").

In addition to requiring a compelling reason for detention, we held that the class of persons affected must be narrow and, in pretrial-type lockup, the time must be no more than what is reasonably necessary before the merits can be resolved. In the case of the Bail Reform Act, we placed weight on the fact that the statute applied only to defendants suspected of "the most serious of crimes," *Salerno, supra*, at 747, 107 S.Ct. 2095; see also *Foucha, supra*, at 81, 112 S.Ct. 1780, while the statute in *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), likewise provided ***551** only for confinement of "a limited subclass of dangerous persons" who had committed " 'a sexually violent offense' " and who suffered from " 'a mental abnormality or personality disorder' " portending " 'predatory acts of sexual violence,' " *id.*, at 357, 117 S.Ct. 2072 (quoting Kan. Stat. Ann. § 59-29a02(a) (1994)). *Salerno* relied on the restriction of detention "by the stringent time limitations of the Speedy Trial Act," 481 U.S., at 747, 107 S.Ct. 2095, whereas in *Foucha*, it was a fault that the statute did not impose any comparable limitation, 504 U.S., at 82, 112 S.Ct. 1780 (citing *Salerno*). See also *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed").

The substantive demands of due process necessarily go hand in hand with the procedural, and the cases insist at the least on an opportunity for a detainee to challenge the reason claimed for committing him. *E.g.*, *Hendricks, supra*, at 357, 117 S.Ct. 2072 (stating that civil commitment was permitted where "the confinement takes place pursuant to proper procedures

and evidentiary standards"); ****1733***Foucha, supra,* at 81-82, 112 S.Ct. 1780 (invalidating a statute under which "the State need prove nothing to justify continued detention"); *Salerno, supra,* at 751, 107 S.Ct. 2095 ("[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination"); *Addington, supra,* at 427, 99 S.Ct. 1804 (requiring a heightened burden of proof "to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered").

These cases yield a simple distillate that should govern the result here. Due process calls for an individual determination before someone is locked away. In none of the cases cited did we ever suggest that the government could avoid the Due Process Clause by doing what § 1226(c) does, by selecting a class of people for confinement on a categorical basis and denying members of that class any chance to dispute the ***552** necessity of putting them away. The cases, of course, would mean nothing if citizens and comparable residents could be shorn of due process by this sort of categorical sleight of hand. Without any "full-blown adversary hearing" before detention, *Salerno, supra,* at 750, 107 S.Ct. 2095, or heightened burden of proof, *Addington, supra,* or other procedures to show the government's interest in committing an individual, *Foucha, supra; Jackson, supra,* procedural rights would amount to nothing but mechanisms for testing group membership. Cf. *Foucha, supra,* at 88, 112 S.Ct. 1780 (opinion of O'CONNOR, J.) ("Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes"). And if procedure could be dispensed with so expediently, so presumably could the substantive requirements that the class of detainees be narrow and the detention period strictly limited. *Salerno, supra; Hendricks, supra.*

C

We held as much just two Terms ago in *Zadvydas v. Davis,* 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), which stands for the proposition that detaining an alien requires more than the rationality of a general detention statute; any justification must go to the alien himself. *Zadvydas* considered detention of two aliens, Zadvydas and Ma, who had already been ordered removed and therefore enjoyed no lawful immigration status. Their cases arose because actual removal appeared unlikely owing to the refusal of their native countries to accept them, with the result that they had been detained not only for the standard 90-day removal period, during which time most removal orders are executed, but beyond that period because the INS considered them to be a " 'risk to the community' " and " 'unlikely to comply with the order of removal.' " *Id.,* at 682, 121 S.Ct. 2491 (quoting 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V)). Zadvydas and Ma challenged their continued and potentially indefinite detention under the Due Process Clause of the Fifth Amendment.

***553** The *Zadvydas* opinion opened by noting the clear applicability of general due process standards: physical detention requires both a "special justification" that "outweighs the 'individual's constitutionally protected interest in avoiding physical restraint' " and "adequate procedural protections." 533 U.S., at 690, 121 S.Ct. 2491 (quoting *Hendricks,* 521 U.S., at 356, 117 S.Ct. 2072). Nowhere did we suggest that the "constitutionally protected liberty interest" in avoiding physical confinement, even for aliens already ordered removed, was conceptually different from the liberty interest of citizens considered in *Jackson, Salerno, Foucha,* and *Hendricks.* On the contrary, we cited those cases and expressly adopted their reasoning, even as applied to aliens whose right to remain in the United States had already been declared forfeited. *Zadvydas,* 533 U.S., at 690, 121 S.Ct. 2491.

****1734** Thus, we began by positing commonly accepted substantive standards and proceeded to enquire into any "special justification" that might outweigh the aliens' powerful interest in avoiding physical confinement "under [individually ordered] release conditions that may not be violated." *Id.,* at 696, 121 S.Ct. 2491. We found nothing to justify the Government's position. The statute was not narrowed to a particularly dangerous class of aliens, but rather affected "aliens ordered removed for many and various reasons, including tourist visa violations." *Id.,* at 691, 121 S.Ct. 2491. The detention itself was not subject to "stringent time limitations," *Salerno, supra,* at 747, 107 S.Ct. 2095, but was potentially indefinite or even permanent, *Zadvydas,* 533 U.S., at 691, 121 S.Ct. 2491. Finally, although both Zadvydas and Ma appeared to be dangerous, this conclusion was undermined by defects in the procedures resulting in the finding of dangerousness. *Id.,* at 692, 121 S.Ct. 2491. The upshot was such serious doubt about the consti-

tutionality of the detention statute that we construed it as authorizing continuing detention only when an alien's removal was "reasonably foreseeable." *Id.*, at 699, 121 S.Ct. 2491. In the cases of Zadvydas and Ma, the fact that their countries of citizenship were not willing to accept their return weighed ***554** against the Government's interest in keeping them at hand for instant removal, even though both were serious flight risks, *id.*, at 684-686, 690, 121 S.Ct. 2491, and we remanded the cases to the Courts of Appeals for a determination of the sufficiency of the Government's interests in Zadvydas's and Ma's individual detention, *id.*, at 702, 121 S.Ct. 2491.

Our individualized analysis and disposition in *Zadvydas* support Kim's claim for an individualized review of his challenge to the reasons that are supposed to justify confining him prior to any determination of removability. In fact, aliens in removal proceedings have an additional interest in avoiding confinement, beyond anything considered in *Zadvydas:* detention prior to entry of a removal order may well impede the alien's ability to develop and present his case on the very issue of removability. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 20-23. After all, our recognition that the serious penalty of removal must be justified on a heightened standard of proof, *Woodby v. INS*, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362 (1966), will not mean all that much when the INS can detain, transfer, and isolate aliens away from their lawyers, witnesses, and evidence. Cf. *Stack v. Boyle*, 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951). Kim's right to defend against removal gives him an even stronger claim than the aliens in *Zadvydas* could raise.

In fact, the principal dissenters in *Zadvydas,* as well as the majority, accepted a theory that would compel success for Kim in this case. The dissent relied on the fact that Zadvydas and Ma were subject to a "final order of removal" and had "no right under the basic immigration laws to remain in this country," 533 U.S., at 720, 121 S.Ct. 2491 (opinion of KENNEDY, J.), in distinguishing them "from aliens with a lawful right to remain here," *ibid.*, which is Kim's position. The dissent recognized the right of all aliens, even "removable and inadmissible" ones, to be "free from detention that is arbitrary or capricious," *id.*, at 721, 121 S.Ct. 2491, and the opinion explained that detention would pass the "arbitrary or capricious" test "when ***555** necessary to avoid the risk of flight or danger to the community," *ibid.* [FN10]

FN10. In support of its standard, the dissent relied on a report by the United Nations High Commissioner for Refugees, which likewise countenanced detention only "in cases of *necessity*" and stated, under a heading entitled "Guideline 3: Exceptional Grounds for Detention":

> "There should be a presumption against detention. Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements ...), these should be applied *first* unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose." United Nations High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Feb.1999) (hereinafter Detention Guidelines) (emphasis in original), cited in *Zadvydas*, 533 U.S., at 721, 121 S.Ct. 2491 (opinion of KENNEDY, J.).
>
> The High Commissioner also referred to the "minimum procedural guarante[e]" for a detainee "either personally or through a representative, to challenge the necessity of the deprivation of liberty at the review hearing, and to rebut any findings made." Detention Guidelines, Guideline 5: Procedural Safeguards.

****1735** Hence the *Zadvydas* dissent's focus on "whether there are adequate procedures" allowing "persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Ibid.;* see also *id.*, at 722-723, 121 S.Ct. 2491. Indeed, there is further support for Kim's claim in the dissent's view that the process afforded to removable aliens like

Zadvydas and Ma "[went] far toward th[e] objective" of satisfying procedural due process, *id.*, at 722, 121 S.Ct. 2491; [FN11] that process stands in stark contrast to the total absence***556** of custody review available in response to Kim's claim that he is neither dangerous nor a flight risk.[FN12] The removable aliens in *Zadvydas* had the right to a hearing, to representation, and to consideration of facts bearing on risk of flight, including criminal history, evidence of rehabilitation, and ties to the United States. *Ibid.* The references to the "necessity" of an individual's detention and the discussion of the procedural requirements show that the principal *Zadvydas* dissenters envisioned due process as individualized review, and the Court of Appeals in this case correctly held that Kim's mandatory detention without benefit of individualized enquiry violated due process as understood by both the *Zadvydas* majority and Justice KENNEDY in dissent. *Kim v. Ziglar*, 276 F.3d 523, 535-537 (C.A.9 2002). Every Court of Appeals to consider the detention of ***557** an LPR under § 1226(c) after *Zadvydas* reached the ****1736** same conclusion. [FN13]

FN11. The scheme considered in *Zadvydas* did not provide review immediately after the removability determination; the dissent noted that custody review hearings usually occurred within three months of a transfer to a postorder detention unit, with further reviews annually or more frequently if the alien requested them. 533 U.S., at 722-723, 121 S.Ct. 2491. But the lag was fitted to the circumstances. In the usual case, removal in fact would come promptly; it is only when it did not that interim custody raised a substantial issue. The issue here, of course, is not timing but the right to individualized review at all.

FN12. The hearing recognized in *Matter of Joseph*, 22 I. & N. Dec. 799, 1999 WL 339053 (BIA 1999), is no response to this deficiency. As the Court notes, the " '*Joseph* hearing' " only permits an alien to show that he does not meet the statutory criteria for mandatory detention under § 1226(c). *Ante*, at 1712-1713, and n. 3. Kim argues that, even assuming that he fits under the statute, the statute's application to LPRs like him does not fit under the Due Process Clause.

Justice KENNEDY recognizes that the Due Process Clause requires "an individualized determination as to [an LPR's] risk of flight and dangerousness if the continued detention [becomes] unreasonable or unjustified." *Ante*, at 1722 (concurring opinion). It is difficult to see how Kim's detention in this case is anything but unreasonable and unjustified, since the Government concedes that detention is not necessary to completion of his removal proceedings or to the community's protection. Certainly the fact that "there is at least some merit to the [INS's] charge" that Kim should be held to be removable, *ibid.*, does not establish a compelling reason for detention. The INS releases many noncriminal aliens on bond or on conditional parole under § 1226(a)(2) pending removal proceedings, and the fact that Kim has been convicted of criminal offenses does not on its own justify his detention, see *supra*, at 1732-1733.

FN13. *Welch v. Ashcroft*, 293 F.3d 213 (C.A.4 2002); *Hoang v. Comfort*, 282 F.3d 1247 (C.A.10 2002), cert. pending, No. 01-1616 [Reporter's Note: See *post*, p. 1963]; *Patel v. Zemski*, 275 F.3d 299 (C.A.3 2001). The Seventh Circuit's decision in *Parra v. Perryman*, 172 F.3d 954 (1999), preceded our decision in *Zadvydas*.

D

In sum, due process requires a "special justification" for physical detention that "outweighs the individual's constitutionally protected interest in avoiding physical restraint" as well as "adequate procedural protections." *Zadvydas*, 533 U.S., at 690-691, 121 S.Ct. 2491 (internal quotation marks omitted). "There must be a 'sufficiently compelling' governmental interest to justify such [an] action, usually a punitive interest in imprisoning the convicted criminal or a regulatory interest in forestalling danger to the community." *Flores*, 507 U.S., at 316, 113 S.Ct. 1439 (O'CONNOR, J., concurring) (quoting *Salerno*, 481 U.S., at 748, 107 S.Ct. 2095). The class of persons subject to confinement must be commensurately narrow and the duration of confinement limited accordingly. *Zadvydas*, *supra*, at 691, 121 S.Ct. 2491; *Hendricks*, 521 U.S., at 368, 117 S.Ct. 2072; *Foucha*, 504 U.S., at 81-82, 112 S.Ct. 1780; *Salerno*, *supra*, at

747, 750, 107 S.Ct. 2095. Justice KENNEDY's dissenting view in *Zadvydas*, like that of the majority, disapproved detention that is not "necessary" to counter a risk of flight or danger; it is "arbitrary or capricious" and violates the substantive component of the Due Process Clause. 533 U.S., at 721, 121 S.Ct. 2491. Finally, procedural due process requires, at a minimum, that a detainee have the benefit of an impartial decisionmaker able to consider particular circumstances on the issue of necessity. *Id.*, at 691-692, 121 S.Ct. 2491; *id.*, at 722, 121 S.Ct. 2491 (KENNEDY, J., dissenting); *Foucha*, *supra*, at 81, 112 S.Ct. 1780; *Salerno*, *supra*, at 750, 107 S.Ct. 2095. See also *Kenyeres v. Ashcroft*, *ante*, 538 U.S., at 1305, 123 S.Ct. 1386 (KENNEDY, J., in chambers) ("An opportunity to present one's meritorious grievances to a court supports the legitimacy and public acceptance of a statutory regime").

***558** By these standards, Kim's case is an easy one. "[H]eightened, substantive due process scrutiny," *Flores*, *supra*, at 316, 113 S.Ct. 1439 (O'CONNOR, J., concurring), uncovers serious infirmities in § 1226(c). Detention is not limited to dangerous criminal aliens or those found likely to flee, but applies to all aliens claimed to be deportable for criminal convictions, even where the underlying offenses are minor. *E.g.*, *Michel v. INS*, 206 F.3d 253, 256 (C.A.2 2000) (possession of stolen bus transfers); *Matter of Bart*, 20 I. & N. Dec. 436, 1992 WL 195800 (BIA 1992) (issuance of a bad check). Detention under § 1226(c) is not limited by the kind of time limit imposed by the Speedy Trial Act, and while it lasts only as long as the removal proceedings, those proceedings have no deadline and may last over a year. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 23-26; see also *id.*, at 10-20 (citing examples). Section 1226(c) neither requires nor permits an official to determine whether Kim's detention was necessary to prevent flight or danger.

Kim's detention without particular justification in these respects, or the opportunity to enquire into it, violates both components of due process, and I would accordingly affirm the judgment of the Court of Appeals requiring the INS to hold a bail hearing to see whether detention is needed to avoid a risk of flight or a danger to the community.[FN14] This is surely little enough, given the fact that 8 U.S.C. § 1536 gives an LPR charged with ****1737** being a foreign terrorist the right to a release hearing pending a determination that he be removed.

FN14. Although Kim is a convicted criminal, we are not concerned here with a State's interest in punishing those who violate its criminal laws. Kim completed the criminal sentence imposed by the California courts on February 1, 1999, and California no longer has any interest in incarcerating him.

III

The Court proceeds to the contrary conclusion on the premise that "the Government may constitutionally detain ***559** deportable aliens during the limited period necessary for their removal proceedings." *Ante*, at 1719. Sometimes, maybe often, it may, but that is not the point in contention. Kim has never challenged the INS's general power to detain aliens in removal proceedings or even its power to detain him in particular, if it affords him a chance to participate in an enquiry whether he poses a flight risk or a danger to society.

The question, rather, is whether Congress has chosen " 'a constitutionally permissible means of implementing' [its immigration] power." *Zadvydas*, *supra*, at 695, 121 S.Ct. 2491 (quoting *INS v. Chadha*, 462 U.S. 919, 941-942, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983)); see also *Carlson v. Landon*, 342 U.S. 524, 537, 72 S.Ct. 525, 96 L.Ed. 547 (1952) (stating that the deportation power "is, of course, subject to judicial intervention under the 'paramount law of the Constitution' "). As in *Zadvydas*, we are here concerned not with the power to remove aliens but with the "important constitutional limitations" on that power's exercise. *Zadvydas*, *supra*, at 695, 121 S.Ct. 2491.[FN15]

FN15. The Court's citations to *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896), are therefore inapposite. *Ante*, at 1717, 1722. In *Wong Wing*, we hypothesized that detention "necessary to give effect" to the removal of an alien "would be valid"; the use of the subjunctive mood makes plain that the issue was not before the Court. 163 U.S., at 235, 16 S.Ct. 977. *Wong Wing* certainly did not hold that detention in aid of removal was exempt from the Due Process Clause.

Moreover, the *Wong Wing* dictum must be understood in light of the common contemporary practice in the federal courts of releasing aliens on bail pending deportation proceedings. While the Court is correct that the first statutory provision permitting Executive officials to release aliens on bond was enacted in 1907, *ante*, at 1717, n. 7, the Court ignores the numerous judicial grants of bail prior to that year. See, *e. g.*, *United States ex rel. Turner v. Williams*, 194 U.S. 279, 283, 24 S.Ct. 719, 48 L.Ed. 979 (1904) (stating that the lower court admitted the appellant to bail pending appeal to this Court); *Fong Yue Ting v. United States*, 149 U.S. 698, 704, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) (same); *United States v. Moy Yee Tai*, 109 F. 1 (C.A.2 1901) *(per curiam)*; *In re Lum Poy*, 128 F. 974, 975 (CC Mont.1904) (noting that "the practice in California, Idaho, and Oregon has been and is to admit Chinese persons to bail pending an investigation into the lawfulness of their residence within the United States, and before any order for deportation has been made"); *In re Ah Tai*, 125 F. 795, 796-797 (Mass.1903) (identifying a practice in several federal districts admitting aliens to bail, both before an initial finding of deportability and during the appeal therefrom); *In re Chow Goo Pooi*, 25 F. 77, 78 (CC Cal. 1884). The breadth of this practice is evident from one court's statement that "[t]o hold bail altogether inadmissible ... would invalidate hundreds of existing recognizances." *Ah Tai, supra*, at 797.

As Judge Augustus Hand later noted, the only change in 1907 was that bail decisions were committed to the discretion of Executive officials, rather than judges:

"Prior to the passage by Congress in 1907 of the act empowering the administrative official to fix bail, various courts made it a practice to grant bail to aliens during deportation hearings.... In our opinion that act was intended to place the general determination of granting bail in the hands of the authorities charged with the enforcement of the deportation laws as persons ordinarily best qualified to perform such a function...." *United States ex rel. Potash v. District Director of Immigration and Naturalization*, 169 F.2d 747, 751 (C.A.2 1948) (citations omitted).

Thus, while *Wong Wing* stated in passing that detention may be used where it was "part of the means necessary" to the removal of aliens, 163 U.S., at 235, 16 S.Ct. 977, that statement was written against the background of the general availability of judicial relief from detention pending deportation proceedings.

The judicial grants of bail prior to 1907 arose in federal habeas proceedings. Contrary to Justice O'CONNOR's objection to federal jurisdiction in this matter, there is indeed a "history of routine reliance on habeas jurisdiction to challenge the detention of aliens without bail pending the conclusion of removal proceedings." *Ante*, at 1724 (opinion concurring in part and concurring in judgment).

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The Court spends much effort trying to distinguish *Zadvydas*, but even if the Court succeeded, success would not avail it much. *Zadvydas* was an application of principles developed in over a century of cases on the rights of aliens and the limits on the government's power to confine individuals. While there are differences between detention pending removal proceedings (this case) and detention after entry of a removal order *(Zadvydas)*, the differences merely point up ***561** that Kim's is the stronger claim, see *supra*, at 1734-1735. In any case, the analytical framework set forth in *Salerno*, *Foucha*, *Hendricks*, *Jackson*, and other physical confinement cases applies to both, and the two differences the Court relies upon fail to remove Kim's challenge from the ambit of either the earlier cases or *Zadvydas* itself.[FN16]

FN16. The Court tellingly does not even mention *Salerno*, *Foucha*, *Hendricks*, or *Jackson*.

First, the Court says that § 1226(c) "serves the purpose of preventing deportable criminal aliens from

fleeing prior to or during their removal proceedings." *Ante*, at 1720. Yes it does, and the statute in *Zadvydas*, viewed outside the context of any individual alien's detention, served the purpose of preventing aliens ordered to be deported from fleeing prior to actual deportation. In each case, the fact that a statute serves its purpose in general fails to justify the detention of an individual in particular. Some individual aliens covered by § 1226(c) have meritorious challenges to removability or claims for relief from removal. See Brief for Citizens and Immigrants for Equal Justice et al. as *Amici Curiae* 10-20. As to such aliens, as with Zadvydas and Ma, the Government has only a weak reason under the immigration laws for detaining them.

The Court appears to respond that Congress may require detention of removable aliens based on a general conclusion that detention is needed for effective removal of criminal aliens on a class-wide basis. But on that logic *Zadvydas* should have come out the other way, for detention of the entire class of aliens who have actually been ordered removed will in general "serv[e] the purpose" of their effective removal, *ante*, at 1720. Yet neither the Court nor Justice KENNEDY in dissent suggested that scrutiny under the Due Process Clause could be satisfied at such a general level. Rather, we remanded the individual cases of Zadvydas and Ma for determinations of the strength of the Government's ***562** reasons for detaining them in particular. 533 U.S., at 702, 121 S.Ct. 2491.[FN17] We can insist on nothing less here, since the Government's justification for detaining individuals like Zadvydas and Ma, who had no right to remain in this country and were proven flight risks and dangers to society, *id.*, at 684-686, 121 S.Ct. 2491, is certainly stronger (and at least no weaker) than its interest in detaining a lawful permanent resident who has not been ****1739** shown (or even claimed) to be either a flight risk or a threat to the community.[FN18]

FN17. The Court is therefore mistaken in suggesting that I view the detention of the individual aliens in *Zadvydas* as serving a governmental purpose. *Ante*, at 1720, n. 10. The Court confuses the "statute in *Zadvydas*, viewed outside the context of any individual alien's detention," *supra*, at 1738, with the "detention at issue in *Zadvydas*," *ante*, at 1720, n. 10, namely, the detention of Zadvydas and Ma as individuals. The due process analysis in *Zadvydas* concentrated on the latter, holding that the detention of Zadvydas and Ma would not serve a legitimate immigration purpose if there were no "significant likelihood of removal in the reasonably foreseeable future." 533 U.S., at 701, 121 S.Ct. 2491. Thus, the Court's suggestion in this case that "the statutory provision" authorizes "detention" that prevents deportable aliens from fleeing as a general matter, *ante*, at 1720, is no sufficient basis for claiming *Zadvydas* as support for the Court's methodology or result. Rather, the Court should consider whether the detention of Kim as an individual is necessary to a compelling Government interest, just as it did for the detention of Zadvydas and Ma as individuals. As the Government concedes, Kim's individual detention serves no Government purpose at all.

FN18. Nor can the general risk of recidivism, *ante*, at 1715, justify this measure. The interest in preventing recidivism may be vindicated "by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." *Foucha v. Louisiana*, 504 U.S. 71, 82, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The ability to detain aliens in removal proceedings who pose threats to the community also satisfies this interest. Cf. *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The alternative to detention, of course, is not unrestricted liberty, but supervised release, which also addresses the risk of recidivism. *Zadvydas*, 533 U.S., at 696, 121 S.Ct. 2491.

The Court's closest approach to a reason justifying class-wide detention without exception here is a Senate Report stating that over 20% of nondetained criminal aliens failed ***563** to appear for removal hearings. *Ante*, at 1715 (citing S.Rep. No. 104-48 (1995) (hereinafter Senate Report)). To begin with, the Senate Report's statistic treats all criminal aliens alike and does not distinguish between LPRs like Kim, who are likely to have developed strong ties within the United States, see *supra*, at 1728-1730, and temporary visitors or illegal entrants. Even more importantly, the statistic tells us nothing about flight risk at all because,

as both the Court and the Senate Report recognize, the INS was making its custody determinations not on the ground of likelihood of flight or dangerousness, but "in large part, according to the number of beds available in a particular region." Senate Report 23, cited *ante*, at 1715; see also H.R.Rep. No. 104-469, p. 124 (1995) (hereinafter House Report) ("[I]n deciding to release a deportable alien, the INS is making a decision that the alien cannot be detained given its limited resources"); App. 26-27. This meant that the INS often could not detain even the aliens who posed serious flight risks. Senate Report 23 (noting that the INS had only 3,500 detention beds for criminal aliens in the entire country and the INS district comprising Pennsylvania, Delaware, and West Virginia had only 15). The desperate lack of detention space likewise had led the INS to set bonds too low, because "if the alien is not able to pay, the alien cannot be released, and a needed bed space is lost." House Report 124. The Senate Report also recognized that, even when the INS identifies a criminal alien, the INS "often refuses to take action because of insufficient agents to transport prisoners, or because of limited detention space." Senate Report, at 2. Four former high-ranking INS officials explained the Court's statistics as follows: "Flight rates were so high in the early 1990s not as a result of chronic discretionary judgment failures by [the] INS in assessing which aliens might pose a flight risk. Rather, the rates were alarmingly high because decisions to release aliens in proceedings were driven overwhelmingly***564** by a lack of detention facilities." Brief for T. Alexander Aleinikoff et al. as *Amici Curiae* 19.

The Court's recognition that, at the time of the enactment of § 1226(c), "individualized bail determinations had not been tested under optimal conditions" is thus rather an understatement. *Ante*, at 1720. The Court does not explain how the INS's resource-driven decisions to release individuals who pose serious flight risks, and their predictable failure to attend removal hearings, could justify a systemwide denial of any opportunity for release to individuals like Kim who are neither flight risks nor threats to the public.

The Court also cites a report by the Department of Justice relied upon by the Government. Department of Justice, Office of the Inspector General, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued, Rep. No. I-96-03 (Mar.1996) (hereinafter Post-Order Report), cited *ante*, at 1715, 1716. But that report does not even address the issue of detention before a ****1740** determination has been made that an alien is removable. As its title indicates, the Post-Order Report analyzed removal rates only for aliens who had already received final orders of removability.[FN19] See also Post-Order Report, App. 25 ("This current review was limited to actions taken by INS to remove aliens after [immigration judges or the Board of Immigration Appeals] had issued final orders"). [FN20]

FN19. Detention of such aliens is governed by the statute at issue in *Zadvydas*, § 1231(a), not by § 1226(c).

FN20. A prior study by the same body noted that nonappearance rates by aliens in deportation proceedings before issuance of orders to deport (aliens, that is, like Kim) were approximately 23% for the first half of 1993 and 21% for all of 1992. Department of Justice, Office of the Inspector General, Case Hearing Process in the Executive Office for Immigration Review, Rep. No. I-93-03, p. 5 (May 1994) (hereinafter Case Hearing Report). Congress appears to have considered these relevant figures, Senate Report 2 ("Over 20 percent of nondetained criminal aliens fail to appear for deportation proceedings"), without referring to irrelevant postorder numbers. The Government relied on the Post-Order Report in its brief and at oral argument. Brief for Petitioners 7, 19-20, and n. 7; Tr. of Oral Arg. 23. The Government did not cite the Case Hearing Report.

***565** More relevant to this case, and largely ignored by the Court, is a recent study conducted at the INS's request concluding that 92% of criminal aliens (most of whom were LPRs) who were released under supervisory conditions attended all of their hearings. 1 Vera Institute of Justice, Testing Community Supervision for the INS: An Evaluation of the Appearance Assistance Program, pp. ii, 33, 36 (Aug. 1, 2000) (hereinafter Vera Institute Study). Even without supervision, 82% of criminal aliens released on recognizance showed up, as did 77% of those released on bond, leading the reporters to conclude that "supervision was especially effective for criminal aliens" and that "mandatory detention of virtually all criminal

aliens is not necessary." *Id.*, at ii, 36, 42.[FN21]

FN21. The Court throws in minor criticisms of the Vera Institute Study that have no bearing on its relevance here. The institute's supervised release program included 127 criminal aliens who would be subject to mandatory detention under § 1226(c) because of their criminal histories. Vera Institute Study 33. Since the INS seeks Kim's removal on the grounds of either crimes of moral turpitude or an aggravated felony, see *ante*, at 1712, n. 1, the fact that most of the Vera Institute Study's subjects were convicted of crimes of moral turpitude but not an aggravated felony, *ante*, at 1716, n. 5, is of no moment. Nor were all of the aliens studied subject to intensive supervision, *ibid.;* most were subject to "regular supervision," which involved no mandatory reporting sessions beyond an initial orientation session with supervision staff and required only that the alien keep the staff apprised of a current mailing address, appear in court, and comply with the orders of the immigration judge, Vera Institute Study 17-18. That the institute considered various screening criteria before authorizing supervised release, *ante*, at 1716, n. 5, does not undermine the value of the study, since any program adopted by the INS in lieu of mandatory detention could do the same. Cf. *Zadvydas*, 533 U.S., at 696, 121 S.Ct. 2491. Finally, the fact that Kim sought and was granted release on bond rather than supervised release, *ante*, at 1716, n. 5, does not detract from the relevance of the Vera Institute Study. Regardless of what methods the INS decides to employ to prevent flight, the study supports the conclusion that mandatory detention under § 1226(c) is "not necessary" to prevent flight, Vera Institute Study 42, and therefore violates the Due Process Clause.

***566** The Court nowhere addresses the Vera Institute's conclusion that criminal aliens released under supervisory conditions are overwhelmingly likely to attend their hearings. Instead, the Court fixes on the fact that 23% of the comparison group of aliens released on bond failed to attend all of their hearings. *Ante*, at 1715. Since the bond determinations were made by the INS, the fact remains that resource-driven concerns may well have led the INS to release individuals who were evident flight risks on bonds too low to ensure their attendance. See *supra*, at 1739. The Court's assumption that the INS's bond determinations involved "individualized screening" for flight risk, *ante*, ****1741** at 1716, finds no support in the Vera Institute Study. Thus the Court's reliance on the failure rate of aliens released by the INS on bond, whether it comes from the Senate Report or the Vera Institute Study, *ante*, at 1715-1716, does not support its conclusion.

In sum, the Court's inapposite statistics do not show that detention of criminal LPRs pending removal proceedings, even on a general level, is necessary to ensure attendance at removal hearings, and the Vera Institute Study reinforces the point by establishing the effectiveness of release under supervisory conditions, just as we did in *Zadvydas*, 533 U.S., at 696, 121 S.Ct. 2491 (noting that imprisonment was constitutionally suspect given the possibility of "supervision under release conditions that may not be violated").[FN22] The Court's first attempt to distinguish *Zadvydas* accordingly fails.

FN22. This case accordingly presents no issue of " 'court ordered release,' " *ante*, at 1721, n. 14 (quoting *Zadvydas*, *supra*, at 713, 121 S.Ct. 2491 (KENNEDY, J., dissenting)); in this case, for example, the INS reached its own determination to release Kim on bond. This case concerns only the uncontroversial requirement that detention serve a compelling governmental interest and that detainees be afforded adequate procedures ensuring against erroneous confinement. *E. g.*, *Salerno*, 481 U.S., at 751, 107 S.Ct. 2095 ("[T]he procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination"); see also *Zadvydas*, *supra*, at 721, 121 S.Ct. 2491 (KENNEDY, J., dissenting) (stating that due process requires "adequate procedures" permitting detained aliens to show that "they no longer present special risks or danger" warranting confinement).

***567** The Court's second effort is its claim that mandatory detention under § 1226(c) is generally of a

"much shorter duration" than the incarceration at issue in *Zadvydas. Ante*, at 1720. While it is true that removal proceedings are unlikely to prove "indefinite and potentially permanent," 533 U.S., at 696, 121 S.Ct. 2491, they are not formally limited to any period, and often extend beyond the time suggested by the Court, that is, " an average time of 47 days" or, for aliens who exercise their right of appeal, "an average of four months," *ante*, at 1721; see also Case Hearing Report 12 (finding that the average time from receipt of charging documents by a detained alien to a final decision by the immigration judge was 54 days). Even taking these averages on their face, however, they are no legitimate answer to the due process claim to individualized treatment and hearing.

In the first place, the average time from receipt of charging documents to decision obscures the fact that the alien may receive charging documents only after being detained for a substantial period. Kim, for example, was not charged until five weeks after the INS detained him. Brief for Respondent 9.

Even more revealing is an explanation of the raw numbers that are averaged out. As the Solicitor General conceded, the length of the average detention period in great part reflects the fact that the vast majority of cases involve aliens who raise no challenge to removability at all. Tr. of Oral Arg. 57. LPRs like Kim, however, will hardly fit that pattern. Unlike many illegal entrants and temporary nonimmigrants, LPRs are the aliens most likely to press substantial ***568** challenges to removability requiring lengthy proceedings. [FN23] See Vera Institute Study 33, 37 (stating that many of the criminal aliens studied were "lawful permanent residents who have spent much or all of their adult lives in the United States" and that 40% of those released on supervision "were allowed to stay in the United States"). Successful challenges often require several months of proceedings, see Brief for Citizens****1742** and Immigrants for Equal Justice et al. as *Amici Curiae* 10-20; detention for an open-ended period like this falls far short of the "stringent time limitations" held to be significant in *Salerno*, 481 U.S., at 747, 107 S.Ct. 2095. The potential for several months of confinement requires an individualized finding of necessity under *Zadvydas*. [FN24]

FN23. Criminal aliens whose "removal proceedings are completed while [they are] still serving time for the underlying conviction," *ante*, at 1721, are irrelevant to this case, since they are never detained pending removal proceedings under § 1226(c).

FN24. The Court calls several months of unnecessary imprisonment a "very limited time," *ante*, at 1721, n. 12. But the due process requirement of an individualized finding of necessity applies to detention periods shorter than Kim's. *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984), involved a maximum detention period of 17 days, *id.*, at 270, 104 S.Ct. 2403, yet our due process analysis noted that the detainee was entitled to a hearing in which he could challenge the necessity of his confinement before an impartial decisionmaker required to state the facts and reasons underlying any decision to detain, *id.*, at 276-277, 104 S.Ct. 2403. The 90-day removal period in § 1231(a)(1) not only has a fixed endpoint, but also applies only after the alien has been adjudged removable, § 1231(a)(1)(B). The discussion of that provision in *Zadvydas* cannot be read to indicate any standard of permissible treatment of an LPR who has not yet been found removable.

B

The Court has failed to distinguish *Zadvydas* in any way that matters. It does no better in its effort to portray its result in this case as controlled by *Carlson v. Landon*, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952), and *Reno v. Flores*, 507 U.S. 292, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

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Carlson did not involve mandatory detention. It involved a system similar to the one Kim contends for here. The aliens' detention pending deportation proceedings in *Carlson* followed a decision on behalf of the Attorney General that custody was preferable to release on bond or on conditional parole. 342 U.S., at 528, n. 5, 72 S.Ct. 525 (citing Internal Security Act of 1950, § 23, 64 Stat. 1011). We sustained that decision because we found that the District Director of the INS, to whom the Attorney General had delegated the authority, did not abuse his discretion in concluding that "evidence of membership [in the Communist Party] plus personal activity in supporting and extending the

Party's philosophy concerning violence" made the aliens "a menace to the public interest." 342 U.S., at 541, 72 S.Ct. 525. The significance of looking to "personal activity" in our analysis was complemented by our express recognition that there was "no evidence or contention that all persons arrested as deportable ... for Communist membership are denied bail," *id.*, at 541-542, 72 S.Ct. 525, and by a Government report showing that in fact "the large majority" of aliens arrested on charges comparable to the *Carlson* petitioners' were allowed bail. *Id.*, at 542, 72 S.Ct. 525; see also *id.*, at 538, n. 31, 72 S.Ct. 525 (noting that it was "quite clear" that "detention without bond has been the exception").

Indeed, the *Carlson* Court's constitutional analysis relying on the opportunity for individualized bond determinations simply followed the argument in the brief for the United States in that case. In response to the aliens' argument that the statute made it "mandatory on the Attorney General to deny bail to alien communists," the Government stated, "[w]e need not consider the constitutionality of such a law for that is not what the present law provides." Brief for Respondent in *Carlson v. Landon*, O.T.1951, No. 35, p. 19; see also *id.*, at 20 ("[T]he act itself, by its terms, leaves no doubt that the power to detain is discretionary, not mandatory"). The ***570** Government also presented the following excerpt of a statement of the chairman of the House Judiciary Committee:

> " 'No particular hardship is going to be worked on anyone because, bear this fact in mind, *it is not mandatory on the Attorney General to hold people in detention. He is given discretionary power.******1743*** If in his judgment one of the class of people I have just mentioned ought to be held for paramount national reasons, he may detain him, but he is not obliged to hold anybody, *although I trust that in every case of a subversive or a hardened criminal he will.' " Id.*, at 19 (quoting 96 Cong. Rec. 10449-10450 (1950) (statement of Rep. Walter) (emphasis added in Brief for Respondent in *Carlson v. Landon, supra*)).

In short, *Carlson* addressed a very different scheme from the one here.

It is also beside the point for the Court to suggest that "like respondent in the present case," the *Carlson* petitioners challenged their detention because "there had been no finding that they were unlikely to appear for their deportation proceedings." *Ante*, at 1718. Each of them was detained after being found to be "a menace to the public interest," 342 U.S., at 541, 72 S.Ct. 525, and their challenge, unlike Kim's, was that the INS had locked them up for an impermissible reason (danger to society) whereas only a finding of risk of flight would have justified detention. *Id.*, at 533-534, 72 S.Ct. 525 ("It is urged ... that where there is no evidence to justify a fear of unavailability for the hearings or for the carrying out of a possible judgment of deportation, denial of bail under the circumstances of these cases is an abuse of discretion"); see also *id.*, at 551, 72 S.Ct. 525 (Black, J., dissenting) ("A power to put in jail because dangerous cannot be derived from a power to deport").[FN25] ***571** We rejected that contention, leaving the petitioners in detention because they were dangerous to the public interest, and on that issue, an official had determined that the *Carlson* petitioners ought to be detained. Here, however, no impartial decisionmaker has determined that detaining Kim is required for any purpose at all, and neither the Government nor the Court even claims such a need.

> FN25. Similarly, the question presented in *Butterfield v. Zydok*, argued and decided together with *Carlson*, was "[w]hether, in exercising his discretion to grant or withhold bail pending final determination of the deportability of an alien, the Attorney General is justified in denying bail on the ground that the alien is an active participant in Communist Party affairs, or whether he is bound also to consider other circumstances, particularly the likelihood that the alien will report as ordered." Pet. for Cert. in *Butterfield v. Zydok*, O.T.1951, No. 136, p. 2.

For the same reason it is beside the point to note that the unsuccessful *Carlson* petitioners' brief raised a claim that detention without reference to facts personal to their individual cases would violate the Due Process Clause. *Ante*, at 1718. As the United States pointed out in its own *Carlson* brief, that issue was never presented, since the District Director's exercise of discretion was based on individualized determinations that the petitioners were dangerous to society. See *supra*, at 1742-1743.[FN26] Nor is the Court entitled to invoke *Carlson* by saying that the INS "had adopted a policy of refusing to grant bail" to alien Commun-

ists, which made the Attorney General's discretion to release aliens on bond merely "ostensibl [e]." *Ante*, at 1718. The *Carlson* Court found that "[t]here is no evidence or contention that all persons***572** arrested as deportable ... for Communist membership are denied****1744** bail." 342 U.S., at 541-542, 72 S.Ct. 525.

> FN26. While a prior conviction may sometimes evidence a risk of future danger, it is not conclusive in all cases, and Kim is a good example, given that the Government found that he "would not be considered a threat." App. 13. Indeed, the Court acknowledges that convictions are only "relevant to" dangerousness, *ante*, at 1719, n. 9; it does not state that they compel a finding of danger in all cases. As even the *Zadvydas* dissent recognized, due process requires that detained criminal aliens be given an opportunity to rebut the necessity of detention by showing "that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." 533 U.S., at 721, 121 S.Ct. 2491 (opinion of KENNEDY, J.).

The Court refuses to accept the opinion of the *Carlson* Court and the representations made in the successful brief for the Government in that case. The Court not only fails to acknowledge the actual holding of *Carlson;* it improperly adopts as authority statements made in dissent. The Court's emphatic assertion that "[t]here was no 'individualized findin[g]' of likely future dangerousness as to any of the aliens," *ante*, at 1718, rests entirely on opinions voiced in dissent, although the Court only mentions this fact in a footnote, *ante*, at 1718, n. 8 (citing 342 U.S., at 549, 550, n. 5, 552, 72 S.Ct. 525 (Black, J., dissenting), and *id.*, at 567, 72 S.Ct. 525 (Frankfurter, J., dissenting)). Statements made in dissent do not override the *Carlson* Court's express finding that the petitioners in that case were found to be not only members of the Communist Party, but "active in Communist work" and to "a degree, minor perhaps in [one] case, [participants] in Communist activities." *Id.*, at 541, 72 S.Ct. 525.[FN27]

> FN27. In the footnote immediately following its citation of dissenting opinions, the Court cites a passage from the *Carlson* majority opinion confirming that the *Carlson* petitioners' detention rested on the "allegation, supported by affidavits, that the [INS's] dossier of each petitioner contained evidence" of Communist Party membership and activities "to the prejudice of the public interest." 342 U.S., at 530, 72 S.Ct. 525 (quoted *ante*, at 1718, n. 9).

Moreover, the *Carlson* dissenters did not suggest that no individualized determinations had occurred; rather, they contended that the District Director's individual findings of dangerousness were unsupported by sufficient reliable evidence. See *id.*, at 549-550, 72 S.Ct. 525 (Black, J., dissenting) (arguing that the aliens were not in fact " 'dangerous' " at all); *id.*, at 552, 72 S.Ct. 525 (arguing that danger findings were based on "the rankest hearsay evidence" instead of the INS being "required to prove" that the detainee was dangerous); *id.*, at 555-556, 72 S.Ct. 525 (arguing that activity within the Communist movement did not make the aliens "dangerous"); ***573***id.*, at 566-567, 72 S.Ct. 525 (Frankfurter, J., dissenting) (arguing that evidence of Communist party membership was "insufficient to show danger"; that evidence of some aliens' activities was stale; and that the history of treatment of the aliens involved forced him to conclude that the Attorney General was not actually exercising discretion on an individual basis).[FN28] And even if the *Carlson* dissenters were factually correct, all that would show is that the *Carlson* Court was misled (by the Government, no less) into deciding the case on the basis that individualized findings of dangerousness were made. Given that the *Carlson* Court clearly believed that it was deciding a case in which individualized determinations occurred, it is serious error for this Court to treat *Carlson* as deciding a case in which they did not.

> FN28. Justice Black's dissenting statement that one of the aliens was " 'not likely to engage in any subversive activities,' " 342 U.S., at 549, 72 S.Ct. 525, does not amount to a "specific finding of nondangerousness," *ante*, at 1718. On the contrary, the Court expressly stated that the Government could prove dangerousness based on "personal activity" in the Communist Party; it simply was not required to go so far as to show "specific acts of sabotage or incitement to subversive action." *Carlson, supra*, at 541, 72 S.Ct. 525.

> Thus while there was no finding of "subversive action," there certainly was a finding of "danger," albeit one that Justice Black found unconvincing.
>
> > Likewise, Justice Frankfurter's statement in dissent that the Solicitor General of the United States had "advised" that "it has been the Government's policy ... to terminate bail" for aliens awaiting deportation who were "present active Communists," 342 U.S., at 568, 72 S.Ct. 525, is difficult to reconcile with the contrary statements in both the majority opinion and the United States's brief in *Carlson*, see *supra*, at 1742-1743. Whatever its basis, Justice Frankfurter's reference to a "policy" of bail denials does not bear the weight that the Court places upon it today.

Finally, the Court gets no help from the isolated passages of the *Carlson* opinion that it quotes. Although the *Carlson* ****1745** Court stated that detention was " 'a part' " of deportation procedure, *ante*, at 1718 (quoting *Carlson*, 342 U.S., at 538, 72 S.Ct. 525), it nowhere said that detention was part of every deportation proceeding. Instead, it acknowledged that "the far larger part" of aliens deportable on "subversive charges" were released***574** on "modest bonds or personal recognizances" pending their deportation proceedings. *Id.*, at 538, n. 31, 72 S.Ct. 525. Contrary to the Court's holding today, the *Carlson* Court understood that discretion to admit to bail was necessary, since "[o]f course [a] purpose to injure [the United States] could not be imputed generally to all aliens subject to deportation." *Id.*, at 538, 72 S.Ct. 525. It was only in this light that the Court said that the INS could "justify [its] refusal of bail by reference to the legislative scheme to eradicate the evils of Communist activity"; the Court was referring to the INS's power to detain on a finding that a given alien was engaged in Communist activity that threatened society. *Id.*, at 543, 72 S.Ct. 525. The Court nowhere addressed, much less approved, the notion that the INS could justify, or that Congress could compel, an individual's detention without any determination at all that his detention was necessary to some Government purpose. And if there was ever any doubt on this point, it failed to survive our subsequent, unanimous recognition that the detention scheme in *Carlson* required "some level of individualized determination" as a precondition to detention. *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 194-195, 112 S.Ct. 551, 116 L.Ed.2d 546 (1991); see also *Flores*, 507 U.S., at 313, 113 S.Ct. 1439. *Carlson* stands at odds with the Court's outcome in this case.

2

The Court's paragraph on *Flores*, *supra*, is no more help to it. Like *Carlson*, *Flores* did not involve mandatory detention, and the INS regulation at issue in *Flores* actually required that alien juveniles be released pending removal proceedings unless the INS determined that detention was required " 'to secure [the juvenile's] timely appearance before the [INS] or the immigration court or to ensure the juvenile's safety or that of others.' " 507 U.S., at 297, 113 S.Ct. 1439 (quoting 8 CFR § 242.24(b)(1) (1992)). Again, Kim agrees that such a system is constitutional and contends for it here. *Flores* turned not on the necessity of detention, but on the regulation's restriction***575** that alien juveniles could only be released to the custody of the juvenile's parent, legal guardian, or another specified adult relative. Even this limitation, however, was subject to exception for releasing a juvenile to another person in " 'unusual and compelling circumstances and in the discretion of the [INS] district director or chief patrol agent.' " 507 U.S., at 297, 113 S.Ct. 1439 (quoting 8 CFR § 242.24(b)(4) (1992)).

Thus, the substantive due process issue in *Flores* was not whether the aliens' detention was necessary to a governmental purpose: " 'freedom from physical restraint' " was "not at issue" at all because, as juveniles, the aliens were " 'always in some form of custody.' " 507 U.S., at 302, 113 S.Ct. 1439 (quoting *Schall v. Martin*, 467 U.S. 253, 265, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984)). Since " '[l]egal custody' rather than 'detention' more accurately describes the reality of the arrangement" in *Flores*, 507 U.S., at 298, 113 S.Ct. 1439, that case has no bearing on this one, which concerns the detention of an adult.[FN29]

> FN29. Nor is it to the point for the Court to quote *Flores* as rejecting the aliens' challenge to a " ' "blanket" presumption of the unsuitability of custodians other than parents, close relatives, and guardians.' " *Ante*, at 1719 (quoting 507 U.S., at 313, 113 S.Ct. 1439). *Flores* expressly stated that the regulation did not implicate the core liberty interest in avoiding physical confinement. *Id.*,

at 302, 113 S.Ct. 1439 ("The 'freedom from physical restraint' ... is not at issue in this case").

****1746** *Flores* is equally distinguishable at the procedural level. We held that the procedures for the custody decision sufficed constitutionally because any determination to keep the alien "in the custody of the [INS], released on recognizance, or released under bond" was open to review by the immigration court, the Board of Immigration Appeals, and the federal courts. *Id.*, at 308, 113 S.Ct. 1439. Like the aliens in *Carlson*, the juveniles in *Flores* were subject to a different system and raised a different complaint from Kim's.

While *Flores* holds that the INS may use "reasonable presumptions and generic rules" in carrying out its statutory discretion, 507 U.S., at 313, 113 S.Ct. 1439, it gave no *carte blanche* to general***576** legislation depriving an entire class of aliens of liberty during removal proceedings. *Flores* did not disturb established standards that detention of an adult must be justified in each individual instance.[FN30]

FN30. Indeed, the passages the Court quotes from *Flores* did not concern the regulation's constitutionality at all, but rather its validity as an implementation of the authorizing statute. *Id.*, at 313, 113 S.Ct. 1439 ("Respondents also contend that the INS regulation violates the statute because it relies upon a 'blanket' presumption"). *Flores* clearly separated its analysis of the regulation under the Due Process Clause from its analysis of the regulation under the statute. See *id.*, at 300, 113 S.Ct. 1439; see also *id.*, at 318-319, 113 S.Ct. 1439 (O'CONNOR, J., concurring) (pointing out the substantive due process analysis at *id.*, at 301-306, 113 S.Ct. 1439, and the procedural due process analysis at *id.*, at 306-309, 113 S.Ct. 1439).

IV

This case is not about the National Government's undisputed power to detain aliens in order to avoid flight or prevent danger to the community. The issue is whether that power may be exercised by detaining a still lawful permanent resident alien when there is no reason for it and no way to challenge it. The Court's holding that the Due Process Clause allows this under a blanket rule is devoid of even ostensible justification in fact and at odds with the settled standard of liberty. I respectfully dissent.

Justice BREYER, concurring in part and dissenting in part.

I agree with the majority that the courts have jurisdiction, and I join Part I of its opinion. If I believed (as the majority apparently believes, see *ante*, at 1712-1713, and n. 3) that Kim had conceded that he is deportable, then I would conclude that the Government could detain him without bail for the few weeks ordinarily necessary for formal entry of a removal order. Brief for Petitioners 39-40; see *ante*, at 1720-1722. Time limits of the kind set forth in *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), should govern these and longer periods of detention, for an alien's concession that he is deportable ***577** seems to me the rough equivalent of the entry of an order of removal. See *id.*, at 699-701, 121 S.Ct. 2491 (reading the statute, under constitutional compulsion, as commonly imposing a presumption of a 6-month "reasonable" time limit for post-removal-order detention).

This case, however, is not one in which an alien concedes deportability. As Justice SOUTER points out, Kim argues to the contrary. See *ante*, at 1727-1728 (opinion concurring in part and dissenting in part). Kim claims that his earlier convictions were neither for an " 'aggravated felony' " nor for two crimes of " 'moral turpitude.' " Brief for Respondent 3, 11-12, 31-32, and n. 29. And given shifting lower court views on such matters, I cannot say that his arguments are insubstantial or interposed solely for purposes of delay. See, *e.g.*, *United States v. Corona-Sanchez*, 291 F.3d 1201, 1213 (C.A.9 2002) (petty theft with a prior not an "aggravated felony"). Compare *Omagah v. Ashcroft*, 288 F.3d 254, 259 (C.A.5 2002) (" 'Moral turpitude refers generally to conduct that shocks the public conscience as ****1747** being inherently base, vile, or depraved' "), with *Guarneri v. Kessler*, 98 F.2d 580, 580-581 (C.A.5 1938) ("Moral turpitude" involves " '[a]nything done contrary to justice, honesty, principle or good morals' "), and *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (C.A.3 1956) ("The borderline of 'moral turpitude' is not an easy one to locate").

That being so-as long as Kim's legal arguments are neither insubstantial nor interposed solely for

purposes of delay-then the immigration statutes, interpreted in light of the Constitution, permit Kim (if neither dangerous nor a flight risk) to obtain bail. For one thing, Kim's constitutional claims to bail in these circumstances are strong. See *ante*, at 1731-1733, 1736 (SOUTER, J., concurring in part and dissenting in part). Indeed, they are strong enough to require us to "ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may ***578** be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 76 L.Ed. 598 (1932); accord, *Zadvydas*, *supra*, at 689, 121 S.Ct. 2491.

For another, the relevant statutes literally say nothing about an individual who, armed with a strong argument against deportability, might, or might not, fall within their terms. Title 8 U.S.C. § 1226(c) tells the Attorney General to "take into custody any alien who ... *is* deportable" (emphasis added), not one who may, or may not, fall into that category. Indeed, the Government now permits such an alien to obtain bail if his argument against deportability is significantly *stronger* than substantial, *i.e.*, strong enough to make it "substantially unlikely" that the Government will win. *Matter of Joseph*, 22 I. & N. Dec. 799 (BIA 1999). Cf. 8 CFR § 3.19(h)(2)(ii) (2002).

Finally, bail standards drawn from the criminal justice system are available to fill this statutory gap. Federal law makes bail available to a criminal defendant after conviction and pending appeal provided (1) the appeal is "not for the purpose of delay," (2) the appeal "raises a substantial question of law or fact," and (3) the defendant shows by "clear and convincing evidence" that, if released, he "is not likely to flee or pose a danger to the safety" of the community. 18 U.S.C. § 3143(b). These standards give considerable weight to any special governmental interest in detention (*e.g.*, process-related concerns or class-related flight risks, see *ante*, at 1720). The standards are more protective of a detained alien's liberty interest than those currently administered in the Immigration and Naturalization Service's *Joseph* hearings. And they have proved workable in practice in the criminal justice system. Nothing in the statute forbids their use when § 1226(c) deportability is in doubt.

I would interpret the (silent) statute as imposing these bail standards. Cf. *Zadvydas*, *supra*, at 698, 121 S.Ct. 2491; *United States v. Witkovich*, 353 U.S. 194, 201-202, 77 S.Ct. 779, 1 L.Ed.2d 765 (1957); *Kent v. Dulles*, 357 U.S. 116, 129, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). So interpreted, the statute would require the Government to permit a detained alien to seek ***579** an individualized assessment of flight risk and dangerousness as long as the alien's claim that he is not deportable is (1) not interposed solely for purposes of delay and (2) raises a question of "law or fact" that is not insubstantial. And that interpretation, in my view, is consistent with what the Constitution demands. I would remand this case to the Ninth Circuit to determine whether Kim has raised such a claim.

With respect, I dissent from the Court's contrary disposition.

U.S.,2003.
Demore v. Kim
538 U.S. 510, 123 S.Ct. 1708, 187 A.L.R. Fed. 633, 155 L.Ed.2d 724, 71 USLW 4315, 03 Cal. Daily Op. Serv. 3579, 2003 Daily Journal D.A.R. 4599, 16 Fla. L. Weekly Fed. S 245

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Supreme Court of the United States
Margarita FUENTES, Appellant,
v.
Robert L. SHEVIN, Attorney General of Florida, et al.
Paul PARHAM et al., Appellants,
v.
Americo V. CORTESE et al.

Nos. 70-5039, 70-5138.
Argued Nov. 9, 1971.
Decided June 12, 1972.
Rehearing Denied Oct. 10, 1972.

See 93 S.Ct. 177, 180.

Actions challenging constitutionality of Florida and Pennsylvania prejudgment replevin statutes. A three-judge United States District Court for the Southern District of Florida, 317 F.Supp. 954, and a three-judge United States District Court for the Eastern District of Pennsylvania, 326 F.Supp. 127, upheld constitutionality of the statutes, and the Supreme Court noted probable jurisdiction. Mr. Justice Stewart delivered the opinion of the Supreme Court that the prejudgment replevin statutes worked a deprivation of property without procedural due process of law insofar as they denied the right to prior opportunity to be heard before chattels were taken from their possessor.

Judgments of District Courts vacated and cases remanded for further proceedings.

Mr. Justice White filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in the consideration or decision of the cases.

West Headnotes

[1] Constitutional Law 92 3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In General. Most Cited Cases
(Formerly 92k251.6, 92k251)

Central meaning of "procedural due process" is that parties whose rights are to be affected are entitled to be heard and, in order that they may enjoy that right, they must first be notified. U.S.C.A.Const. Amend. 14.

[2] Constitutional Law 92 3879

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3878 Notice and Hearing
92k3879 k. In General. Most Cited Cases
(Formerly 92k251.6, 92k251)

Procedural due process includes right to notice and opportunity to be heard at meaningful time and in meaningful manner. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 4460

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)23 Search, Seizure, and Confiscation
92k4460 k. In General. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

Constitutional right to be heard is basic aspect of duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions; purpose of requirement is not only to ensure abstract fair play to the individual but to protect his

use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the state seizes goods simply upon application of and for benefit of private party. U.S.C.A.Const. Amend. 14.

[4] Constitutional Law 92 3865

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3865 k. In General. Most Cited Cases
(Formerly 92k278(1))

Prohibition against deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 4460

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)23 Search, Seizure, and Confiscation
92k4460 k. In General. Most Cited Cases
(Formerly 92k303, 92k278(1), 92k279(1))

Right to notice and hearing as to seizure of person's goods must be granted at time when deprivation can still be prevented inasmuch as, even though at later hearing his possessions can be returned to him or damages may be awarded for wrongful deprivation, no later hearing and no damage award can undo fact that arbitrary taking that was subject to right of procedural due process has already occurred. U.S.C.A.Const. Amend. 14.

[6] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

Whatever its form, opportunity for hearing must be provided before deprivation of property interest takes effect, although procedural due process tolerates variances in form which are appropriate to nature of case and which depend upon importance of interest involved and nature of subsequent proceedings, if any. U.S.C.A.Const. Amends. 5, 14.

[7] Constitutional Law 92 4483

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4479 Special, Summary, or Provisional Remedies and Proceedings
92k4483 k. Replevin. Most Cited Cases
(Formerly 92k312(4), 92k305(2))

Replevin 335 2

335 Replevin
335I Right of Action and Defenses
335k2 k. Statutory Provisions and Remedies. Most Cited Cases

Facts that Florida and Pennsylvania prejudgment replevin statutes require that party seeking writ must first post bond, allege conclusorily that he is entitled to specific goods and open himself to possible liability and damages if he is wrong do not obviate right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. F.S.A. §§ 78.01, 78.07, 78.08, 78.10, 78.13; 12 P.S. Pa. § 1821; Pa.R.C.P. Nos. 1073(a, b), 1076, 1077,12 P.S. Appendix; U.S.C.A.Const. Amend. 14.

[8] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process

92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

Right to prior hearing attaches only to deprivation of interest encompassed within Fourteenth Amendment's protection. U.S.C.A.Const. Amend. 14.

[9] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1))

A temporary, nonfinal deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[10] Constitutional Law 92 3865

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3865 k. In General. Most Cited Cases
(Formerly 92k278(1))

Any significant taking of property by state is within purview of the due process clause. U.S.C.A.Const. Amend. 14.

[11] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

While length and consequent severity of a deprivation of property by state may be factor to weigh in determining appropriate form of hearing needed prior to the deprivation, it is not decisive of basic right to prior hearing of some kind. U.S.C.A.Const. Amend. 14.

[12] Constitutional Law 92 3874(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(1) k. In General. Most Cited Cases
(Formerly 92k277(1))

Constitutional Law 92 3874(2)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(2) k. Source of Right or Interest. Most Cited Cases
(Formerly 92k277(1))

Fourteenth Amendment's protection of property does not safeguard only rights of undisputed ownership but extends to any significant property interest including statutory entitlements. U.S.C.A.Const. Amend. 14.

[13] Constitutional Law 92 4416

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4416 k. In General. Most Cited Cases

(Formerly 92k277(1))

Where, under conditional sales contracts, buyers were entitled to possession and use of chattels before transfer of title to them, buyers, in exchange for immediate possession, agreed to pay a major financing charge beyond basic price of the merchandise and, by time goods were summarily repossessed, they had made substantial installment payments, buyers' possessory interest in goods was sufficient to invoke protection of due process clause. U.S.C.A.Const. Amend. 14.

[14] Constitutional Law 92 4483

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4479 Special, Summary, or Provisional Remedies and Proceedings
92k4483 k. Replevin. Most Cited Cases
(Formerly 92k277(1))

Where there was dispute between wife and her estranged husband over which of them had legal right to custody of child and to possession of the child's clothes, furniture and toys, wife's interest in such chattels was protected by ordinary property law and her interest was sufficient to invoke due process safeguards with respect to seizure under writ of replevin. U.S.C.A.Const. Amend. 14.

[15] Constitutional Law 92 4417

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4417 k. Enforcement; Proceedings. Most Cited Cases
(Formerly 92k300(2), 92k305(2))

Even if buyers had fallen behind in their installment contracts and had no other valid defenses to repossession of the property, they were still entitled under due process clause, to hearing before the property was repossessed. U.S.C.A.Const. Amend. 14.

[16] Constitutional Law 92 4417

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4417 k. Enforcement; Proceedings. Most Cited Cases
(Formerly 92k300(2), 92k305(2))

Right of party in possession of property to be heard before he is deprived of it does not depend upon an advance showing that he will surely prevail at the hearing and it is enough to invoke procedural safeguards of Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods. U.S.C.A.Const. Amend. 14.

[17] Secured Transactions 349A 228

349A Secured Transactions
349AVII Default and Enforcement
349Ak228 k. Possession by Secured Party. Most Cited Cases

With respect to rights of buyers under conditional sales contracts to hearing before repossession of chattels purchased, it was enough that the right to continued possession of goods was open to some dispute at hearing since sellers of goods had to show, at the least, that buyers had defaulted in their payments. U.S.C.A.Const. Amend. 14.

[18] Secured Transactions 349A 228

349A Secured Transactions
349AVII Default and Enforcement
349Ak228 k. Possession by Secured Party. Most Cited Cases

Simplicity of issue of ultimate right of conditional buyers to continued possession of chattels purchased might be relevant to formality or scheduling of a hearing before repossession, but it would not preclude right to prior hearing of some kind. U.S.C.A.Const. Amend. 14.

[19] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1), 92k277(1))

Due process requirement of hearing before deprivation of property takes effect is not limited to protection of only a few types of property interest. U.S.C.A.Const. Amend. 14.

[20] Constitutional Law 92 3874(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(1) k. In General. Most Cited Cases
(Formerly 92k277(1))

Constitutional Law 92 4255

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)11 Contracts
92k4255 k. In General. Most Cited Cases
(Formerly 92k277(1))

A stove, stereo, table, bed and other household goods for which buyers had contracted and paid substantial sums were within protection of procedural due process of law, whether or not they were absolute necessities of life. U.S.C.A.Const. Amend. 14.

[21] Constitutional Law 92 3874(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3874 Property Rights and Interests
92k3874(1) k. In General. Most Cited Cases
(Formerly 92k277(1))

It is not business of court in adjudicating due process rights with respect to deprivation of goods chosen by individual to make its own critical evaluation of individual's choices and to protect only the ones which, by its own lights, are "necessary." U.S.C.A.Const. Amend. 14.

[22] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

Relative weight of liberty or property interests is relevant to form of notice and hearing required by due process before deprivation of such liberty or interest, but some form of notice and hearing, formal or informal, is required before deprivation of property interests that cannot be characterized as de minimis. U.S.C.A.Const. Amend. 14.

[23] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most

Cited Cases
(Formerly 92k278(1.1), 92k278(1))

To justify postponing notice and opportunity for a hearing before deprivation of property interest on basis of an extraordinary situation, the situation must be truly unusual. U.S.C.A.Const. Amend. 14.

[24] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

The rather ordinary costs in time, effort and expense resulting from hearing held prior to deprivation of property interest cannot outweigh the constitutional right to such a hearing. U.S.C.A.Const. Amend. 14.

[25] Constitutional Law 92 3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors Considered; Flexibility and Balancing. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken. U.S.C.A.Const. Amend. 14.

[26] Constitutional Law 92 4460

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)23 Search, Seizure, and Confiscation
92k4460 k. In General. Most Cited Cases
(Formerly 92k303, 92k278(1))

Outright seizure of property interest without opportunity for prior hearing is justified only when a seizure is directly necessary to secure an important governmental or general public interest, there is a special need for very prompt action and the state keeps strict control over its monopoly of legitimate force, that is, the person initiating the seizure has been a government official responsible for determining, under standards of a narrowly drawn statute, that it is necessary and justified in the particular instance. U.S.C.A.Const. Amend. 14.

[27] Constitutional Law 92 4417

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4417 k. Enforcement; Proceedings. Most Cited Cases
(Formerly 92k300(2), 92k305(2))

Procedural due process does not require that hearing be held before repossession of property sold under conditional sales contract unless buyer, having received notice of his opportunity for such a hearing prior to repossession, takes advantage of it. U.S.C.A.Const. Amend. 14.

[28] Replevin 335 2

335 Replevin
335I Right of Action and Defenses
335k2 k. Statutory Provisions and Remedies. Most Cited Cases

Broadly drawn Florida and Pennsylvania replevin statutes which do not limit summary seizure to special situations demanding prompt action, under which private parties may unilaterally invoke state power to replevy goods without any state official participating in decision to seek writ, reviewing basis for claim to repossession or evaluating need for immediate seizure and which do not even require that plaintiff provide any information to court on such matters did not serve

an important state interest such as might justify summary seizure. U.S.C.A.Const. Amend. 14; F.S.A. §§ 78.01, 78.07, 78.08, 78.10, 78.13; 12 P.S. Pa. § 1821; Pa.R.C.P. Nos. 1073(a, b), 1076, 1077, 12 P.S. Appendix.

[29] Constitutional Law 92 950

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k950 k. Presumptions Regarding Estoppel or Waiver. Most Cited Cases
(Formerly 92k43(1))

In civil, no less than criminal area, courts indulge every reasonable presumption against waiver of procedural due process rights. U.S.C.A.Const. Amend. 14.

[30] Constitutional Law 92 947

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k947 k. Waiver in General. Most Cited Cases
(Formerly 92k43(1))

Constitutional Law 92 948

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k948 k. Contractual Waiver. Most Cited Cases
(Formerly 92k43(1))

Waiver of constitutional rights in any context must, at the very least, be clear and courts will not be concerned with involuntariness or unintelligence of waiver when the contractual language relied upon does not even, on its face, amount to a waiver.

[31] Constitutional Law 92 948

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(B) Estoppel, Waiver, or Forfeiture
92k948 k. Contractual Waiver. Most Cited Cases
(Formerly 92k43(1))

Where conditional sales contracts simply provided that upon default the seller "may take back," "may retake" or "may repossess" merchandise, contracts included nothing about waiver of prior hearing before the taking or repossession and contract did not indicate how or through what process, whether final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without prior hearing, seller could take back the goods, the purported waiver provisions did not waive buyers' constitutional right to a preseizure hearing of some kind. U.S.C.A.Const. Amend. 14.

[32] Constitutional Law 92 4483

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4479 Special, Summary, or Provisional Remedies and Proceedings
92k4483 k. Replevin. Most Cited Cases
(Formerly 92k312(4), 92k305(2))

Replevin 335 2

335 Replevin
335I Right of Action and Defenses
335k2 k. Statutory Provisions and Remedies. Most Cited Cases

Florida and Pennsylvania prejudgment replevin statutes work a deprivation of property without procedural due process of law insofar as they deny right to prior opportunity to be heard before chattels are taken from their possessor. U.S.C.A.Const. Amend. 14; F.S.A. §§ 78.01, 78.07, 78.08, 78.10, 78.13; 12 P.S. Pa. § 1821; Pa.R.C.P. Nos. 1073(a, b), 1076, 1077, 12 P.S. Appendix.

[33] Constitutional Law 92 2503(1)

92 Constitutional Law
92XX Separation of Powers

92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2499 Particular Issues and Applications
92k2503 Civil Remedies and Procedure
92k2503(1) k. In General. Most Cited Cases
(Formerly 92k70.1(11))

Constitutional Law 92 4417

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4415 Liens, Mortgages, and Security Interests
92k4417 k. Enforcement; Proceedings. Most Cited Cases
(Formerly 92k312(4), 92k312)

Constitutional Law 92 4480

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4479 Special, Summary, or Provisional Remedies and Proceedings
92k4480 k. In General. Most Cited Cases
(Formerly 92k312(4), 92k312)

State has power to seize goods before final judgment to protect security interests of creditors so long as the creditors have tested their claim to goods through process of a fair prior hearing, thereby affording procedural due process, but nature and form of such prior hearings are legitimately open to many potential variations and are subject for legislation, not adjudication. U.S.C.A.Const. Amend. 14.

[34] Constitutional Law 92 3912

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3912 k. Duration and Timing of Deprivation; Pre- or Post-Deprivation Remedies. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

Constitutional Law 92 4411

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)19 Tort or Financial Liabilities
92k4411 k. Debtor and Creditor in General. Most Cited Cases
(Formerly 92k278(1.1), 92k278(1))

Essential reason for requirement of prior hearing before depriving person of property interest is to prevent unfair and mistaken deprivations of property; the hearing must provide a real test and due process is afforded only by the kinds of notice and hearing that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor. U.S.C.A.Const. Amend. 14.

****1987 *67** Syllabus[FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Appellants, most of whom were purchasers of household goods under conditional sales contracts, challenge the constitutionality of prejudgment replevin provisions of Florida law (in No. 70-5039) and Pennsylvania law (in No. 70-5138). These provisions permit a private party, without a hearing or prior notice to the other party, to obtain a prejudgment writ of replevin through a summary process of ex parte application to a court clerk, upon the posting of a bond for double the value of the property to be seized. The sheriff is then required to execute the writ by seizing the property. Under the Florida statute the officer seizing the property must keep it for three days. During that period the defendant may reclaim possession by posting his own security bond for double the

property's value, in default of which the property is transferred to the applicant for the writ, pending a final judgment in the underlying repossession action. In Pennsylvania the applicant need not initiate a repossession action or allege (as Florida requires) legal entitlement to the property, it being sufficient that he file an 'affidavit of the value of the property'; and to secure a ****1988** post-seizure hearing the party losing the property through replevin must himself initiate a suit to recover the property. He may also post his own counterbond within three days of the seizure to regain possession. Included in the printed-form sales contracts that appellants signed were provisions for the sellers' repossession of the merchandise on the buyers' default. Three-judge District Courts in both cases upheld the constitutionality of the challenged replevin provisions. Held:

1. The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a ***68** prior opportunity to be heard before chattels are taken from the possessor. Pp. 1994-2001.

(a) Procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another, and the minimal deterrent effect of the bond requirement against unfounded applications for a writ constitutes no substitute for a presiezure hearing. Pp. 1994-1996.

(b) From the standpoint of the application of the Due Process Clause it is immaterial that the deprivation may be temporary and nonfinal during the three-day post-seizure period. Pp. 1996-1997.

(c) The possessory interest of appellants, who had made substantial installment payments, was sufficient for them to invoke procedural due process safeguards notwithstanding their lack of full title to the replevied goods. Pp. 1997-1998.

(d) The District Courts erred in rejecting appellants' constitutional claim on the ground that the household goods seized were not items of 'necessity' and therefore did not require due process protection, as the Fourteenth Amendment imposes no such limitation. Pp. 1998-1999.

(e) The broadly drawn provisions here involved serve no such important a state interest as might justify summary seizure. Pp. 1999-2001.

2. The contract provisions for repossession by the seller on the buyer's default did not amount to a waiver of the appellants' procedural due process rights, those provisions neither dispensing with a prior hearing nor indicating the procedure by which repossession was to be achieved. D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124, distinguished. Pp. 2001-2002.

No. 70-5039, 317 F.Supp. 954, and No. 70-5138, 326 F.Supp. 127, vacated and remanded.
C. Michael Abbott, Atlanta, Ga., for appellants Margarita Fuentes and others, pro hac vice, by special leave of Court.

***69** Herbert T. Schwartz, Deputy Atty. Gen., Tallahassee, Fla., for appellee Robert L. Shevin, Atty. Gen., of the State of Fla.

George W. Wright, Jr., Miami, Fla., for appellee Firestone Tire and Rubber Co.

David A. Scholl, Philadelphia, Pa., for the appellants Paul Parham and others, pro hac vice, by special leave of Court.

Robert F. Maxwell, Philadelphia, Pa., for appellees, Americo V. Cortese and others.

Mr. Justice STEWART delivered the opinion of the Court.

We here review the decisions of two three-judge federal District Courts that upheld the constitutionality of Florida and Pennsylvania laws authorizing the summary seizure of goods or chattels in a person's possession under a writ of replevin. Both statutes provide for the issuance of writs ordering state agents to seize a person's possessions, simply upon ****1989** the ex parte application of any other person who claims a right to them and posts a ***70** security bond. Neither statute provides for notice to be given to the possessor of the property, and neither statute gives the possessor an opportunity to challenge the seizure at any kind of prior hearing. The question is whether these statutory procedures violate the Fourteenth

Amendment's guarantee that no State shall deprive any person of property without due process of law.

I

The appellant in No. 5039, Margarita Fuentes, is a resident of Florida. She purchased a gas stove and service policy from the Firestone Tire and Rubber Co. (Firestone) under a conditional sales contract calling for monthly payments over a period of time. A few months later, she purchased a stereophonic phonograph from the same company under the same sort of contract. The total cost of the stove and stereo was about $500, plus an additional financing charge of over $100. Under the contracts, Firestone retained title to the merchandise, but Mrs. Fuentes was entitled to possession unless and until she should default on her installment payments.

For more than a year, Mrs. Fuentes made her installment payments. But then, with only about $200 remaining to be paid, a dispute developed between her and Firestone over the servicing of the stove. Firestone instituted an action in a small-claims court for repossession of both the stove and the stero, claiming that Mrs. Fuentes had refused to make her remaining payments. Simultaneously with the filing of that action and before Mrs. Fuentes had even received a summons to answer its complaint, Firestone obtained a writ of replevin ordering a sheriff to seize the disputed goods at once.

In conformance with Florida procedure,[FN1] Firestone ***71** had only to fill in the blanks on the appropriate form documents and submit them to the clerk of the small-claims court. The clerk signed and stamped the documents and issued a writ of replevin. Later the same day, a local deputy sheriff and an agent of Firestone went to Mrs. Fuentes' home and seized the stove and stereo.

FN1. See Infra, at 1990-1991.

Shortly thereafter, Mrs. Fuentes instituted the present action in a federal district court, challenging the constitutionality of the Florida prejudgment replevin procedures under the Due Process Clause of the Fourteenth Amendment. [FN2] She sought declaratory and injunctive relief against continued enforcement of the procedural provisions of the state statutes that authorize prejudgment replevin.[FN3]

FN2. Both Mrs. Fuentes and the appellants in No. 5138 also challenged the prejudgment replevin procedures under the Fourth Amendment, made applicable to the States by the Fourteenth. We do not, however, reach that issue. See n. 32, infra.

FN3. Neither Mrs. Fuentes nor the appellants in No. 5138 sought an injunction against any pending or future court proceedings as such. Compare Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669. Rather, they challenged only the summary extra-judicial process of prejudgment seizure of property to which they had already been subjected. They invoked the jurisdiction of the federal district courts under 42 U.S.C. s 1983 and 28 U.S.C. s 1343(3).

The appellants in No. 5138 filed a very similar action in a federal district court in Pennsylvania, challenging the constitutionality of that State's prejudgment replevin process. Like Mrs. Fuentes, they had had possessions seized under writs of replevin. Three of the appellants had purchased personal property-a bed, a table, and other household goods-under installment sales contracts like the one signed by Mrs. Fuentes; and the sellers of the property had obtained and executed summary writs of replevin, claiming that the appellants had fallen behind in their installment payments. ***72** The experience of the fourth ****1990** appellant, Rosa Washington, had been more bizarre. She had been divorced from a local deputy sheriff and was engaged in a dispute with him over the custody of their son. Her former husband, being familiar with the routine forms used in the replevin process, had obtained a writ that ordered the seizure of the boy's clothes, furniture, and toys. [FN4]

FN4. Unlike Mrs. Fuentes in No. 5039, none of the appellants in No. 5138 was ever sued in any court by the party who initiated seizure of the property. See infra, at 1992-1993.

In both No. 5039 and No. 5138, three-judge District Courts were convened to consider the appellants' challenges to the constitutional validity of the Florida and Pennsylvania statutes. The courts in both cases upheld the constitutionality of the statutes. Fuentes v. Faircloth, 317 F.Supp. 954 (S.D.Fla.); Epps v. Cortese, 326 F.Supp. 127 (E.D.Pa.).[FN5] We noted probable

jurisdiction of both appeals. 401 U.S. 906, 91 S.Ct. 893, 27 L.Ed.2d 804; 402 U.S. 994, 91 S.Ct. 2185, 29 L.Ed.2d 159.

FN5. Since the announcement of this Court's decision in Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 summary prejudgment remedies have come under constitutional challenge throughout the country. The summary deprivation of property under statutes very similar to the Florida and Pennsylvania statutes at issue here has been held unconstitutional by at least two courts. Laprease v. Raymours Furniture Co., 315 F.Supp. 716 (N.D.N.Y.); Blair v. Pitchess, 5 Cal.3d 258, 96 Cal.Rptr. 42, 486 P.2d 1242. But see Brunswick Corp. v. J. & P., Inc., 424 F.2d 100 (CA10); Wheeler v. Adams Co., 322 F.Supp. 645 (D.Md.); Almor Furniture & Appliances, Inc. v. MacMillan, 116 N.J.Super. 65, 280 A.2d 862. Applying Sniadach to other closely related forms of summary prejudgment remedies, some courts have construed that decision as setting forth general principles of procedural due process and have struck down such remedies. E.g., Adams v. Egley, 338 F.Supp. 614 (S.D.Cal., 1972); Collins v. Viceroy Hotel Corp., 338 F.Supp. 390 (N.D.Ill.1972); Santiago v. McElroy, 319 F.Supp. 284 (E.D.Pa.); Klim v. Jones, 315 F.Supp. 109 (N.D.Cal.); Randone v. Appellate Dept., 5 Cal.3d 536, 96 Cal.Rptr. 709, 488 P.2d 13; Larson v. Fetherston, 44 Wis.2d 712, 172 N.W.2d 20; Jones Press, Inc. v. Motor Travel Services, Inc., 286 Minn. 205, 176 N.W.2d 87. See Lebowitz v. Forbes Leasing & Finance Corp., 326 F.Supp. 1335, 1341-1348 (E.D.Pa.). Other courts, however, have construed Sniadach as closely confined to its own facts and have upheld such summary prejudgment remedies. E.g., Reeves v. Motor Contract Co., 324 F.Supp. 1011 (N.D.Ga.); Black Watch Farms v. Dick, 323 F.Supp. 100 (D.Conn.); Ameican Olean Tile Co. v. Zimmerman, 317 F.Supp. 150 (D.Hawaii); Young v. Ridley, 309 F.Supp. 1308 (D.C.); Termplan, Inc. v. Superior Court of Maricopa County, 105 Ariz. 270, 463 P.2d 68; 300 West 154th Street Realty Co. v. Department of Buildings, 26 N.Y.2d 538, 311 N.Y.S.2d 899, 260 N.E.2d 534.

***73** II

Under the Florida statute challenged here,[FN6] '(a)ny person whose goods or ****1991** chattels are wrongfully detained by any other person . . . may have a writ of replevin to recover them . . ..' Fla.Stat.Ann. s 78.01 (Supp.1972-1973). There is no requirement that the applicant make a convincing showing before the seizure***74** that the goods are, in fact, 'wrongfully detained.' Rather, Florida law automatically relies on the bare assertion of the party seeking the writ that he is entitled to one and allows a court clerk to issue the writ summarily. It requires only that the applicant file a complaint, initiating a court action for repossession and reciting in conclusory fashion that he is 'lawfully entitled to the possession' of the property, and that he file a security bond

FN6. The relevant Florida statutory provisions are the following:

Fla.Stat.Ann. s 78.01 (Supp.1972-1973):

'Right to replevin.-Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond.'

Fla.Stat.Ann. s 78.07 (Supp.1972-1973):

'Bond; requisites.-Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defen-

dant in the action.'

Fla.Stat.Ann. s 78.08 (Supp.1972-1973):

'Writ; form; return.-The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.'

Fla.Stat.Ann. s 78.10 (Supp.1972-1973):

'Writ; execution on property in buildings, ect.-In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.'

Fla.Stat.Ann. s 78.13 (Supp.1972-1973):

'Writ; disposition of property levied on.-The officer executing the writ shall deliver the property to plaintiff after the lapse of three (3) days from the time the property was taken unless within the three (3) days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant.'

'in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action.' Fla.Stat.Ann. s 78.07 (Supp.1972-1973).

***75** On the sole basis of the complaint and bond, a writ is issued 'command(ing) the officer to whom it may be directed to replevy the goods and chattels in possession of defendant . . . and to summon the defendant to answer the complaint.' Fla.Stat.Ann. s 78.08 (Supp.1972-1973). If the goods are 'in any dwelling house or other building or enclosure,' the officer is required to demand their delivery; but if they are not delivered, 'he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ . . ..' Fla.Stat.Ann. s 78.10 (Supp.1972-1973).

Thus, at the same moment that the defendant receives the complaint seeking repossession of property through court action, the property is seized from him. He is provided no prior notice and allowed no opportunity whatever to challenge the issuance of the writ. After the property has been seized, he will eventually have an opportunity for a hearing, as the defendant in the trial of the court action for repossession, which the plaintiff is required to pursue. And he is also not wholly without recourse in the meantime. For under the Florida statute, the officer who seizes the property must keep it for three days, and during that period the defendant may reclaim possession of the property by posting his own security bond in double its value. But if he does not post such a bond, the property is transferred to the party who sought the writ, pending a final judgment in the underlying action for repossession. Fla.Stat.Ann. s 78.13 (Supp.1972-1973).

The Pennsylvania law[FN7] differs, though not in its essential nature, from ****1992** that of Florida. As in Florida, ***76** a private party may obtain a prejudgment writ of replevin through a summary process of ex part application to a prothonotary. As in Florida, the party seeking ***77** the writ may simply post with his application a bond in double the value of the property to be seized. Pa.Rule Civ.Proc. 1073(a). There is no opportunity for a prior hearing and no prior notice to the other party. On this basis, a sheriff is requried to execute the writ by seizing the specified property. Unlike the Florida statute, however, the Pennsylvania law does not require that there ever be opportunity for a hearing on the merits of the conflicting claims to possession of the replevied ****1993** property. The party seeking the writ is not obliged to initiate a court action for repossession.[FN8] Indeed,***78** he need not even formally allege that he is lawfully entitled to the property. The most that is required is that he file an 'affidavit of the value of the property to be replevied.' Pa.Rule Civ.Proc. 1073(a). If the party who loses

property through replevin seizure is to get even a post-seizure hearing, he must initiate a lawsuit himself.[FN9] He may also, as under Florida law, post his own counterbond within three days after the seizure to regain possession. Pa.Rule Civ.Proc. 1076.

FN7. The basic Pennsylvania statutory provision regarding the issuance of writs of replevin is the following:

Pa.Stat.Ann., Tit. 12, s 1821. Writs of replevin authorized

'It shall and may be lawfull for the justices of each county in this province to grant writs of replevin, in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law.'

The procedural prerequisites to issuance of a prejudgment writ are, however, set forth in the Pennsylvania Rules of Civil Procedure, 12 P.S. Appendix. The relevant rules are the following:

'Rule 1073. Commencement of Action

'(a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with

'(1) the plaintiff's affidavit of the value of the property to be replevied, and

'(2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay to the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.

'(b) An action of replevin without bond shall be commenced by filing with the prothonotary

'(1) a praecipe for a writ of replevin without bond or

'(2) a complaint.

'If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subsidivision (a) of this rule, may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property.

'Rule 1076. Counterbond

'(a) A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming only a lien thereon, within seventy-two (72) hours after the property has been replevied, or within seventy-two (72) hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077(a), or within such extension of time as may be granted by the court upon cause shown.

'(b) The counterbond shall be in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintain his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason of the delivery of the replevied property to the party filing the counterbond.

'Rule 1077. Disposition of Replevied Property. Sheriff's Return

'(a) When a writ of replevin with bond is issued, the sheriff shall leave the property

during the time allowed for the filing of a counterbond in the possession of the defendant or of any other person if the plaintiff so authorizes him in writing.

'(b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.

'(c) If the property is not ordered to be impounded and the person in possession files a counterbond, the property shall be delivered to him, but if he does not file a counterbond, the property shall be delivered to the party first filing a counterbond.

'(d) When perishable property is replevied the court may make such order relating to its sale or disposition as shall be proper.

'(e) The return of the sheriff to the writ of replevin with bond shall state the disposition made by him of the property and the name and address of any person found in possession of the property.'

FN8. Pa.Rule Civ.Proc. 1073(b) does establish a procedure whereby an applicant may obtain a writ by filing a complaint, initiating a later court action. See n. 7, supra. In the case of every appellant in No. 70-5138, the applicant proceeded under Rule 1073(a) rather than 1073(b), seizing property under no more than a security bond and initiating no court action.

FN9. Pa.Rule Civ.Proc. 1037(a) establishes the procedure for initiating such a suit:

'If an action is not commenced by a complaint (under Rule 1073(b)), the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros.'

None of the appellants in No. 70-5138 attempted to initiate the process to require the filing of a post-seizure complaint under Rule 1037(a).

III

Although these prejudgment replevin statutes are descended from the common-law replevin action of six centureis ago, they bear very little resemblance to it. Replevin at common law was an action for the return of specific goods wrongfully taken or 'distrained.' Typically, it was used after a landlord (the 'distrainor') had seized possessions from a tenant (the 'distrainee') to satisfy a debt allegedly owed. If the tenant then instituted a replevin action and posted security, the landlord could be ordered to return the property at ***79** once, pending a final judgment in the underlying action.[FN10] However, this prejudgment replevin of goods at common law did not follow from an entirely ex parte process of pleading by the distrainee. For '(t)he distrainor could always stop the action of replevin by claiming to be the owner of the goods; and as this claim was often made merely to delay the proceedings, the writ de proprietate probanda was devised early in the fourteenth century, which enabled the sheriff to determine summarily the question of ownership. If the question of ownership was determined against the distrainor the goods were delivered back to the distrainee (pending final judgment).' 3 W. Holdsworth, History of English Law 284 (1927).

FN10. See T. Plucknett, A Concise History of the Common Law 367-369 (1956); 3 W. Holdsworth, History of English Law 284-285 (1927); 2 F. Pollock & F. Maitland, History of English Law 577 (1909); J. Cobbey, Replevin 19-29 (1890).

Prejudgment replevin statutes like those of Florida and Pennsylvania are derived from this ancient possessory action in that they authorize the seizure of property before a final judgment. But the similarity ends there. As in the present cases, such statutes are most commonly used by creditors to seize goods allegedly wrongfully detained-not wrongfully taken-by debtors. At common law, if a creditor wished to invoke state power to recover goods wrongfully detained, he had to proceed through the action of debt or detinue.[FN11] These actions, however, did not provide

for a return of property before final judgment.[FN12] And, more importantly, on the **1994 occasions when the common law did allow prejudgment seizure by state power, it provided some kind *80 of notice and opportunity to be heard to the party then in possession of the property, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.

FN11. See Plucknett, supra, n. 10, at 362-365; Pollock & Maitland, supra, n. 10, at 173-175, 203-211.

FN12. The creditor could, of course, proceed without the use of state power, through self-help, by 'distraining' the property before a judgment. See n. 10, supra.

IV

[1][2] For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' Baldwin v. Hale, 1 Wall. 223, 233, 17 L.Ed. 531. See Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914; Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215; Grannis v. Oredean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62.

The primary question in the present cases is whether these state statutes are constitutionally defective in failing to provide for hearings 'at a meaningful time.' The Florida replevin process guarantees an opportunity for a hearing after the seizure of goods, and the Pennsylvania process allows a post-seizure hearing if the aggrieved party shoulders the burden of initiating one. But neither the Florida nor the Pennsylvania statute provides for notice or an opportunity to be heard before the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing before the State authorizes its agents to seize property in the possession of a person upon the application of another.

[3][4] The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not *81 only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See Lynch v. Household Finance Corp., 405 U.S. 538, 552, 92 S.Ct. 1113, 1122, 31 L.Ed.2d 424.

The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . (And n)o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-172, 71 S.Ct. 624, 647, 95 L.Ed. 817 Frankfurter, J., concurring).

[5] If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly **1995 taken in the first place. Damages may even be *82 awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 647, 92 S.Ct 1208, 1210, 31 L.Ed.2d 551.

[6] This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the form of a hearing 'appropriate to the nature of the case,' Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313, 70 S.Ct. 652, 657, 94 L.Ed. 865, and 'depending upon the importance of the interests involved and the nature of the subsequent proceedings (if any),' Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect. E.g., Bell v. Burson, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90; Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515; Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; Armstrong v. Manzo, 380 U.S., at 551, 85 S.Ct., at 1191; Mullane v. Central Hanover Tr. Co., supra, 339 U.S. at 313, 70 S.Ct. at 656; Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-153, 61 S.Ct. 524, 535-536, 85 L.Ed. 624; United States v. Illnois Central R. Co., 291 U.S. 457, 463, 54 S.Ct. 471, 473, 78 L.Ed. 909; Londoner v. City & County of Denver, 210 U.S. 373, 385-386, 28 S.Ct. 708, 713-714, 52 L.Ed. 1103. See In re Ruffalo, 390 U.S. 544, 550-551, 88 S.Ct. 1222, 1225-1226, 20 L.Ed.2d 117. 'That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' Boddie v. Connecticut, supra, 401 U.S., at 378-379, 91 S.Ct., at 783 (emphasis in original).

***83** The Florida and Pennsylvania prejudgment replevin statutes fly in the face of this principle. To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for a writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights.[FN13] Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced. Lawyers and judges are familiar with the phenomenon of a party mistakenly but firmly convinced that his view of the facts and law will prevail, and therefore quite willing to risk the costs of litigation. Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides-and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

> FN13. They may not even test that much. For if an applicant for the writ knows that he is dealing with an uneducated, uniformed consumer with little access to legal help and little familiarity with legal procedures, there may be a substantial possibility that a summary seizure of property-however unwarranted-may go unchallenged, and the applicant may feel that he can act with impunity.

[7] The minimal deterrent effect of a bond requirement is, in a practical ****1996** sense, no substitute for an informed evaluation by a neutral official. More specifically, as a matter of constitutional principle, it is no replacement for the right to a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property. While the existence of these other, less ***84** effective, safeguards may be among the considerations that affect the form of hearing demanded by due process, they are far from enough by themselves to obviate the right to a prior hearing of some kind.

V

[8] The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection. In the present cases, the Florida and Pennsylvania statutes were applied to replevy chattels in the appellants' possession. The replevin was not cast as a final judgment; most, if not all, of the appellants lacked full title to the chattels; and their claim even to continued possession was a matter in dispute. Moreover, the chattels at stake were nothing more than an assortment of household goods. Nonetheless, it is clear that the appellants were deprived of possessory interests in those chattels that were within the protection of the Fourteenth Amendment.

A

[9] A deprivation of a person's possessions under a prejudgment writ of replevin, at least in theory, may be only temporary. The Florida and Pennsylvania statutes do not require a person to wait until a post-seizure hearing and final judgment to recover what has been replevied. Within three days after the seizure, the statutes allowing him to recover the goods if he, in return, surrenders other property-a payment necessary to secure a bond in double the value of the goods seized from him.[FN14] But it is now ***85** well settled that a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment. Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349; Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90. Both Sniadach and Bell involved takings of property pending a final judgment in an underlying dispute. In both cases, the challenged statutes included recovery provisions, allowing the defendants to post security to quickly regain the property taken from them.[FN15] Yet the Court firmly held that these ****1997** were deprivations of property that had to be preceded by a fair hearing.

FN14. The appellants argue that this opportunity for quick recovery exists only in theory. They allege that very few people in their position are able to obtain a recovery bond, even if they know of the possibility. Appellant Fuentes says that in her case she was never told that she could recover the stove and stereo and that the deputy sheriff seizing them gave them at once to the Firestone agent, rather than holding them for three days. She further asserts that of 442 cases of prejudgment replevin in small-claims courts in Dade County, Florida, in 1969, there was not one case in which the defendant took advantage of the recovery provision.

FN15. Bell v. Burson, 402 U.S. 535, 536, 91 S.Ct. 1586, 1587, 29 L.Ed.2d 90. Although not mentioned in the Sniadach opinion, there clearly was a quick recovery provision in the Wisconsin prejudgment garnishment statute at issue. Wis.Stat.Ann. s 267.21(1) (Supp.1970-1971). Family Finance Corp. v. Sniadach, 37 Wis.2d 163, 173-174, 154 N.W.2d 259, 265. Mr. Justice Harlan adverted to the recovery provision in his concurring opinion. 395 U.S. 337, at 343, 89 S.Ct. 1820, at 1823, 23 L.Ed.2d 349.

These sorts of provisions for recovery of property by posting security are, of course, entirely different from the security requirement upheld in Lindsey v. Normet, 405 U.S. 56, 65, 92 S.Ct. 862, 870, 31 L.Ed.2d 36. There, the Court upheld a requirement that a tenant wanting a continuance of an eviction hearing must post security for accruing rent during the continuance. The tenant did not have to post security in order to remain in possession before a hearing; rather, he had to post security only in order to obtain a continuance of the hearing. Moreover, the security requirement in Lindsey was not a recovery provision. For the tenant was not deprived of his possessory interest even for one day without opportunity for a hearing.

[10][11] The present cases are no different. When officials of Florida or Pennsylvania seize one piece of property from a person's possession and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision. ***86** The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

B

[12] The appellants who signed conditional sales contracts lacked full legal title to the replevied goods. The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' Boddie v. Connecticut, 401 U.S., at 379, 91 S.Ct., at 786, including statutory entitlements. See Bell v. Burson, 402 U.S., at 539, 91 S.Ct., at 1589; Goldberg v. Kelly, 397 U.S., at 262, 90 S.Ct., at 1017.

[13][14] The appellants were deprived of such an interest in the replevied goods-the interest in contin-

ued possession and use of the goods. See Sniadach v. Family Finance Corp., 395 U.S., at 342, 89 S.Ct., at 1823 (Harlan, J., concurring). They had acquired this interest under the conditional sales contracts that entitled them to possession and use of the chattels before transfer of title. In exchange for immediate possession, the appellants had agreed to pay a major financing charge beyond the basic price of the merchandise. Moreover, by the time the goods were summarily repossessed, they had made substantial installment payments. Clearly, their possessory interest in the goods, dearly bought and protected by contract,[FN16] ***87** was sufficient to invoke the protection of the Due Process Clause.

FN16. The possessory interest of Rosa Washington, an appellant in No. 5138, in her son's clothes, furniture, and toys was no less sufficient to invoke due process safeguards. Her interest was not protected by contract. Rather, it was protected by ordinary property law, there being a dispute between her and her estranged husband over which of them had a legal right not only to custody of the child but also to possession of the chattels.

[15][16][17][18] Their ultimate right to continued possession was, of course, in dispute. If it were shown at a hearing that the appellants had defaulted on their contractual obligations, it might well be that the sellers of the goods would be entitled to repossession. But even assuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses,[FN17] that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merit.' Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 35 S.Ct. 625, 629, 59 L.Ed. 1027. It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at ****1998** stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods.[FN18]

FN17. Mrs. Fuentes argues that Florida law allows her to defend on the ground that Firestone breached its obligations under the sales contract by failing to repair serious defects in the stove it sold her. We need not consider this issue here. It is enough that the right to continued possession of the goods was open to some dispute at a hearing since the sellers of the goods had to show, at the least, that the appellants had defaulted in their payments.

FN18. The issues decisive of the ultimate right to continued possession, of course, may be quite simple. The simplicity of the issues might be relevant to the formality or scheduling of a prior hearing. See Lindsey v. Normet, 405 U.S. 56, 65, 92 S.Ct. 862, 869, 31 L.Ed.2d 36. But it certainly cannot undercut the right to a prior hearing of some kind.

***88** C

Nevertheless, the District Courts rejected the appellants' constitutional claim on the ground that the goods seized from them-a stove, a stereo, a table, a bed, and so forth-were not deserving of due process protection, since they were not absolute necessities of life. The courts based this holding on a very narrow reading of Sniadach v. Family Finance Corp., supra, and Goldberg v. Kelly, supra, in which this Court held that the Constitution requires a hearing before prejudgment wage garnishment and before the termination of certain welfare benefits. They reasoned that Sniadach and Goldberg, as a matter of constitutional principle, established no more than that a prior hearing is required with respect to the deprivation of such basically 'necessary' items as wages and welfare benefits.

[19] This reading of Sniadach and Goldberg reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect.[FN19] E.g., Opp Cotton Mills v. Administrator, 312 U.S., at 152-153, 61 S.Ct., at 535-536; United States v. Illinois Central R. Co., 291 U.S., at 463, 54 S.Ct., at 473; Southern R. Co. v. Virginia ex rel. Shirley, 290 U.S. 190, 54 S.Ct. 148, 78 L.Ed. 260; Londoner v. City & County of Denver, 210 U.S. 373, 28 S.Ct. 708, 52

L.Ed. 1103; Central of Georgia R. Co. v. Wright, 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134; ***89**Security Trust & Safety Vault Co. v. Lexington, 203 U.S. 323, 27 S.Ct. 87, 51 L.Ed. 204; Hibben v. Smith, 191 U.S. 310, 24 S.Ct. 88, 48 L.Ed. 195; Glidden v Harrington, 189 U.S. 255, 23 S.Ct. 574, 47 L.Ed. 798. In none of those cases did the court hold that this most basic due process requirement is limited to the protection of only a few types of property interests. While Sniadach and Goldberg emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine. FN20

FN19. The Supreme Court of California recently put the matter accurately: 'sniadach put the matter accurately: 'Sniadach in constitutional adjudication. It is not a rivulet of wage garnishment but part of the mainstream of the past procedural due process decisions of the United States Supreme Court.' Randone v. Appellate Dept., 5 Cal.3d 536, 550, 96 Cal.Rptr. 709, 718, 488 P.2d 13, 22.

FN20. Sniadach v. Family Finance Corp., supra, 395 U.S., at 340, 89 S.Ct., at 1822; Goldberg v. Kelly, 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287. Of course, the primary issue in Goldberg was the form of hearing demanded by due process before termination of welfare benefits; the importance of welfare was directly relevant to that question.

Nor did they carve out a rule of 'necessity' for the sort of nonfinal deprivations of property that they involved. That was made clear in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90, holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an 'important interest,' id., at 539, 91 S.Ct., at 1589, entitled to the protection of procedural due process of law.

****1999** [20] The household goods, for which the appellants contracted and paid substantial sums, are deserving of similar protection. While a driver's license, for example, 'may become (indirectly) essential in the pursuit of a livelihood,' ibid., a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives. It is, after all, such consumer goods that people work and earn a livelihood in order to acquire.

[21][22] No doubt, there may be many gradations in the 'importance' or 'necessity' of various consumer goods. Stoves could be compared to television sets, or bedscould***90** be compared to tables. But if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions. The Fourteenth Amendment speaks of 'property' generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are 'necessary.'FN21

FN21. The relative weight of liberty or property interests is relevant, of course, to the form of notice and hearing required by due process. See, e.g., Boddie v. Connecticut, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 and cases cited therein. But some form of notice and hearing-formal or informal-is required before deprivation of a property interest that 'cannot be characterized as de minimis.' Sniadach v. Family Finance Corp., supra, 395 U.S., at 342, 89 S.Ct., at 1823 (Harlan, J., concurring).

VI

[23][24][25][26][27] There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 U.S., at 379, 91 S.Ct., at 786. These situations, however, must be truly unusual.FN22 Only in a few limited situations***91** has this Court allowed outright seizureFN23 without ****2000** opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property ***92** to collect

the internal revenue of the United States,[FN24] to meet the needs of a national war effort,[FN25] to protect against the economic disaster of a bank failure,[FN26] and to protect the public from misbranded drugs[FN27] and contaminated food.[FN28]

FN22. A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See Bell v. Burson, supra, 402 U.S., at 540-541, 91 S.Ct., at 1589-1590; Goldberg v. Kelly, supra, 397 U.S., at 261, 90 S.Ct., at 1016. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

'The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.' Stanley v. Illinois, 405 U.S. 645, 656, 92 S.Ct. 1208, 1215, 31 L.Ed.2d 551.

FN23. Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, e.g., Sniadach v. Family Finance Corp., supra. In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases-a bank failure. Coffin Bros. & Co. v. Bennett, 277 U.S. 29, 48 S.Ct. 422, 72 L.Ed. 768. Another case involved attachment necessary to secure jurisdiction in state court-clearly a most basic and important public interest. Ownbey v. Morgan, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837. It is much less clear what interests were involved in the third case, decided with an unexplicated per curiam opinion simply citing Coffin Bros. and Ownbey. McKay v. McInnes, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975. As far as essential procedural due process doctrine goes, McKay cannot stand for any more than was established in the Coffin Bros. and Ownbey cases on which it relied completely. See Sniadach v. Family Finance Corp., supra, 395 U.S., at 340, 89 S.Ct., at 1822; id., at 344, 89 S.Ct. 1823 (Harlan, J., concurring).

In cases involving deprivation of other interests, such as government employment, the Court similarly has required an unusually important governmental need to outweigh to right to a prior hearing. See, e.g., Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895-896, 81 S.Ct. 1743, 1748-1749, 6 L.Ed.2d 1230.

Seizure under a search warrant is quite a different matter, see n. 30, infra.

FN24. Phillips v. Commissioner of Internal Revenue, 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289. The Court stated that '(d)elay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.' Id., at 597, 51 S.Ct., at 611 (emphasis supplied). The Court, then relied on 'the need of the government promptly to secure its revenues.' Id., at 596, 51 S.Ct., at 611.

FN25. Central Union Trust Co. v. Garvan, 254 U.S. 554, 566, 41 S.Ct. 214, 215, 65 L.Ed. 403; Stoehr v. Wallace, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604; United States v. Pfitsch, 256 U.S. 547, 553, 41 S.Ct. 569, 571, 65 L.Ed. 1084.

FN26. Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030.

FN27. Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088.

FN28. North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195.

[28] The Florida and Pennsylvania prejudgment replevin statutes serve no such important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake. FN29 The replevin of chattels, as in the ***93** present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health.

FN29. By allowing repossession without an opportunity for a prior hearing, the Florida and Pennsylvania statutes may be intended specifically to reduce the costs for the private party seeking to seize goods in another party's possession. Even if the private gain at stake in repossession actions were equal to the great public interests recognized in this Court's past decisions, see nn. 24-28, supra, the Court has made clear that the avoidance of the ordinary costs imposed by the opportunity for a hearing is not sufficient to override the constitutional right. See n. 22, supra. The appellees argue that the cost of holding hearings may be especially onerous in the context of the creditor-debtor relationship. But the Court's holding in Sniadach v. Family Finance Corp., supra, indisputably demonstrates that ordinary hearing costs are no more able to override due process rights in the creditordebtor context than in other contexts.

In any event, the aggregate cost of an opportunity to be heard before repossession should not be exaggerated. For we deal here only with the right to an opportunity to be heard. Since the issues and facts decisive of rights in repossession suits may very often be quite simple, there is a likelihood that many defendants would forgo their opportunity, sensing the futility of the exercise in the particular case. And, of course, no hearing need be held unless the defendant, having received notice of his opportunity, takes advantage of it.

Nor do the broadly drawn Florida and Pennsylvania statutes limit the summary seizure of goods to special situations demanding prompt action. There may be ****2001** cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods. But the statutes before us are not 'narrowly drawn to meet any such unusual condition.' Sniadach v. Family Finance Corp., supra, 395 U.S. at 339, 89 S.Ct. at 1821. And no such unusual situation is presented by the facts of these cases.

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark. FN30

FN30. The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need-e.g., the apprehension and conviction of criminals-rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. But cf. Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809.

***94** VII

Finally, we must consider the contention that the appellants who signed conditional sales contracts thereby waived their basic procedural due process rights. The contract signed by Mrs. Fuentes provided that 'in the event of default of any payment or payments, Seller at its option may take back the merchandise . . ..' The contracts signed by the Pennsylvania appellants similarly provided that the seller 'may retake' or 'repossess' the merchandise in the event of a 'default in any payment.' These terms were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning.

[29] In D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124, the Court recently outlined the considerations relevant to determination of a contractual waiver of due process rights. Applying the standards governing waiver of constitutional rights in a criminal proceeding [FN31] -although not holding that such standards must necessarily apply-the Court held that, on the particular facts of that case, the contractual waiver of due process ***95** rights was 'voluntarily, intelligently, and knowingly' made. Id., at 187, 92 S.Ct., at 783. The contract in Overmyer was negotiated between two corporations; the waiver provision was specifically bargained for and drafted by their lawyers in the process of these negotiations. As the Court noted, it was 'not a case of unequal bargaining power or overreaching. The Overmyer-Frick agreement, from the start, was not a contract of adhesion.' ****2002**Id., at 186, 92 S.Ct., at 782. Both parties were 'aware of the significance' of the waiver provision. Ibid.

> FN31. See Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747; Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461. In the civil area, the Court has said that '(w)e do not presume acquiescence in the loss of fundamental rights,' Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 731, 81 L.Ed. 1093. Indeed, in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.' Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177.

The facts of the present cases are a far cry from those of Overmyer. There was no bargaining over contractual terms between the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatever that the appellants were actually aware or made aware of the significance of the fine print now relied upon as a waiver of constitutional rights.

[30] The Court in Overmyer observed that 'where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the (waiver) provision, other legal consequences may ensue.' Id., at 188, 92 S.Ct., at 783. Yet, as in Overmyer, there is no need in the present cases to canvass those consequences fully. For a waiver of constitutional rights in any context must, at the very least, be clear. We need not concern ourselves with the involuntariness or unintelligence of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver.

[31] The conditional sales contracts here simply provided that upon a default the seller 'may take back,' 'may retake' or 'may repossess' merchandise. The contracts ***96** included nothing about the waiver of a prior hearing. They did not indicate how or through what process-a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin without a prior hearing-the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon occurrence of certain events. The appellees do not suggest that these provisions waived the appellants' right to a full post-seizure hearing to determine whether those events had, in fact, occurred and to consider any other available defenses. By the same token, the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind.

VIII

[32][33][34] We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor.[FN32] Our holding, however, is a narrow one. We do not question the power of a State to seize goods before

a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a ***97** subject, at this point, for legislation-not adjudication.[FN33] Since the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test. '(D)ue process is afforded only by the kinds of 'notice' and 'hearing'****2003** that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property . . ..' Sniadach v. Family Finance Corp., supra, 395 U.S. at 343, 89 S.Ct. at 1823 (Harlan, J., concurring). See Bell v. Burson, supra, 402 U.S. at 540, 91 S.Ct. at 1589; Goldberg v. Kelly, supra, 397 U.S. at 267, 90 S.Ct. at 1020.

FN32. We do not reach the appellants' argument that the Florida and Pennsylvania statutory procedures violate the Fourth Amendment, made applicable to the States by the Fourteenth. See n. 2, supra. For once a prior hearing is required, at which the applicant for a writ must establish the probable validity of his claim for repossession, the Fourth Amendment problem may well be obviated. There is no need for us to decide that question at this point.

FN33. Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has little probability of succeeding on the merits of the dispute.

For the foregoing reasons, the judgments of the District Courts are vacated and these cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Vacated and remanded.

Mr. Justice POWELL and Mr. Justice REHNQUIST did not participate in the consideration or decision of these cases.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice BLACKMUN join, dissenting.

Because the Court's opinion and judgment improvidently, in my view, call into question important aspects of the statutes of almost all the States governing secured transactions and the procedure for repossessing personal property, I must dissent for the reasons that follow.

First: It is my view that when the federal actions were filed in these cases and the respective District ***98** Courts proceeded to judgment there were state court proceedings in progress. It seems apparent to me that the judgments should be vacated and the District Courts instructed to reconsider these cases in the light of the principles announced in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688; Boyle v. Landry, 401 U.S. 77, 91 S.Ct. 758, 27 L.Ed.2d 696; and Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701.

In No. 70-5039, the Florida statutes provide for the commencement of an action of replevin, with bond, by serving a writ summoning the defendant to answer the complaint. Thereupon the sheriff may seize the property, subject to repossession by defendant within three days upon filing of a counterbond, failing which the property is delivered to plaintiff to await final judgment in the replevin action. Fla.Stat.Ann. s 78.01 et seq. (Supp.1972-1973). This procedure was attacked in a complaint filed by appellant Fuentes in the federal court, alleging that an affidavit in replevin had been filed by Firestone Tire & Rubber Co. in the Small Claims Court of Dade County; that a writ of replevin had been issued pursuant thereto and duly served, together with the affidavit and complaint; and that a trial date had been set in the Small Claims Court. Firestone's answer admitted that the replevin action was pending in the Small Claims Court and asserted that Mrs. Fuentes, plaintiff in the federal court and appellant here, had not denied her default or alleged that she had the right to possession of the property. Clearly, state court proceedings were pending, no bad faith or harassment was alleged, and no irreparable injury appeared that could not have been averted by raising constitutional objections in the pending state court proceeding. In this posture, it would appear that

the case should be reconsidered under Younger v. Harris and companion cases, which were announced after the District Court's judgment.

***99** In No. 70-5138, Pennsylvania Rule of Civil Procedure 1073 expressly provides that an '(a)ction of replevin with bond shall be commended by filing with the prothonotary a praecipe for a writ of replevin with bond . . ..' When the writ issues and is served, the defendant has three days to file a counterbond and should he care to have a hearing he may file his own praecipe, in which event the plaintiff must proceed further in the action by filing and serving his complaint.

In the cases before us, actions in replevin were commenced in accordance ****2004** with the rules, and appellee Sears, Roebuck & Co. urged in the District Court that plaintiffs had 'adequate remedies at law which they could pursue in the state court proceedings which are still pending in accordance with the statutes and rules of Pennsylvania.' App. 60. Under Younger v. Harris and companion cases, the District Court's judgment should be vacated and the case reconsidered.

Second: It goes without saying that in the typical installment sale of personal property both seller and buyer have interests in the property until the purchase price is fully paid, the seller early in the transaction often having more at stake than the buyer. Nor is it disputed that the buyer's right to possession is conditioned upon his making the stipulated payments and that upon default the seller is entitled to possession. Finally, there is no question in these cases that if default is disputed by the buyer he has the opportunity for a full hearing, and that if he prevails he may have the property or its full value as damages.

The narrow issue, as the Court notes, is whether it comports with due process to permit the seller, pending final judgment, to take possession of the property through a writ of replevin served by the sheriff without affording the buyer opportunity to insist that the seller establish at a hearing that there is reasonable ***100** basis for his claim of default. The interests of the buyer and seller are obviously antagonistic during this interim period: the buyer wants the use of the property pending final judgment; the seller's interest is to prevent further use and deterioration of his security. By the Florida and Pennsylvania laws the property is to all intents and purposes placed in custody and immobilized during this time. The buyer loses use of the property temporarily but is protected against loss; the seller is protected against deterioration of the property but must undertake by bond to make the buyer whole in the event the latter prevails.

In considering whether this resolution of conflicting interests is unconstitutional, much depends on one's perceptions of the practical considerations involved. The Court holds it constitutionally essential to afford opportunity for a probable-cause hearing prior to repossession. Its stated purpose is 'to prevent unfair and mistaken deprivations of property.' But in these typical situations, the buyer-debtor has either defaulted or he has not. If there is a default, it would seem not only 'fair,' but essential, that the creditor be allowed to repossess; and I cannot say that the likelihood of a mistaken claim of default is sufficiently real or recurring to justify a broad constitutional requirement that a creditor do more than the typical state law requires and permits him to do. Sellers are normally in the business of selling and collecting the price for their merchandise. I could be quite wrong, but it would not seem in the creditor's interest for a default occasioning repossession to occur; as a practical matter it would much better serve his interests if the transaction goes forward and is completed as planned. Dollar-and-cents considerations weigh heavily against false claims of default as well as against precipitate action that would allow no opportunity for mistakes to surface and be ***101** corrected.[FN*] Nor does it ****2005** seem to me that creditors would lightly undertake the expense of instituting replevin actions and putting up bonds.

FN* Appellants Paul and Ellen Parham admitted in their complaints that they were delinquent in their payments. They stipulated to this effect as well as to receipt of notices of delinquency prior to institution of the replevin action, and the District Court so found.

Appellant Epps alleged in his complaint that he was not in default. The defendant, Government Employees Exchange Corp., answered that Epps was in default in the amount of $311.25 as of August 9, 1970, that the entire sum due had been demanded in accordance with the relevant documents, and that Epps had failed and refused to pay that sum. The District Court did not resolve this factual

dispute. It did find that Epps earned in excess of $10,000 per year and that the agreements Epps and Parham entered into complied with the provisions of Pennsylvania's Uniform Commercial Code and its Services and Installment Sales Act.

As for appellant Rosa Washington, the District Court, based on the allegations of her complaint, entered a temporary restraining order requiring that the property seized from her be returned forthwith. At a subsequent hearing the order was dissolved, the court finding 'that the representations upon which the temporary restraining order of September 18, 1970, issued were incorrect, both as to allegations contained in the complaint and representations made by counsel.' (App. 29.)

It was stipulated between appellant Fuentes and defendants in the District Court that Mrs. Fuentes was in default at the time the replevin action was filed and that notices to this effect were sent to her over several months prior to institution of the suit. (App. 25-26.)

The Court relies on prior cases, particularly Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); an Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). But these cases provide no automatic test for determining whether and when due process of law requires adversary proceedings. Indeed, '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. . . .' '(W)hat procedures due process may require under any given set of circumstances must begin ***102** with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). See also Stanley v. Illinois, supra, 405 U.S., at 650, 92 S.Ct., at 1212; Goldberg v. Kelly, supra, 397 U.S., at 263, 90 S.Ct., at 1018. Viewing the issue before us in this light, I would not construe the Due Process Clause to require the creditors to do more than they have done in these cases to secure possession pending final hearing. Certainly, I would not ignore, as the Court does, the creditor's interest in preventing further use and deterioration of the property in which he has substantial interest. Surely under the Court's own definition, the creditor has a 'property' interest as deserving of protection as that of the debtor. At least the debtor, who is very likely uninterested in a speedy resolution that could terminate his use of the property, should be required to make those payments, into court or otherwise, upon which his right to possession is conditioned. Cf. Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972).

Third: The Court's rhetoric is seductive, but in end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. It would appear that creditors could withstand attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all. Alternatively, they need only give a few days' notice of a hearing, take possession if hearing is waived or if there is default; and if hearing is necessary merely establish probable cause for asserting that default has occurred. It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present laws provide.***103** On the contrary, the availability of credit may well be diminished or, in any event, the expense of securing it increased.

None of this seems worth the candle to me. The procedure that the Court strikes down is not some barbaric hangover from bygone days. The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. The Uniform Commercial Code, which now so pervasively governs the subject matter with ****2006** which it deals, provides in Art. 9, s 9-503, that:

'Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. . . .'

Recent studies have suggested no changes in Art. 9 in this respect. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9 of the Uniform Commercial Code, Final Report, s 9-503 (April 25, 1971). I am content to rest

on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions that contemplate precisely what has happened in these cases.

U.S.Fla.,1972.
Fuentes v. Shevin
407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, 10 UCC Rep.Serv. 913

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246 Cal.App.2d 553, 54 Cal.Rptr. 661
(Cite as: 246 Cal.App.2d 553)

C

In re ERIC HALKO on Habeas Corpus.

Crim. No. 12263.

Court of Appeal, Second District, Division 4, California.
Nov. 18, 1966.

HEADNOTES

(1a, 1b) Health § 17--Communicable Diseases--Quarantine.

Health & Saf. Code, § 3285, providing, *inter alia*, that a health officer may make an isolation or quarantine order whenever he shall determine in a particular tuberculosis case that quarantine or isolation is necessary for the protection of the public health, is a law for the suppression of a contagious disease and promotion of the public health, the provisions of which seem reasonable and necessary for the protection and preservation of the public health, and the statute is constitutional.

See **Cal.Jur.2d,** Health, § 22; **Am.Jur.,** Health (1st ed § 32).

(2) Health § 17--Communicable Diseases--Quarantine.

The Legislature is vested with broad discretion in determining what are contagious and infectious diseases and in adopting means for preventing the spread thereof.

(3) Health § 17--Communicable Diseases--Quarantine.

Consecutive orders for quarantine under Health & Saf. Code, § 3285, may issue so long as any person continues to be infected with tuberculosis and on reasonable grounds is believed by the health officer to be dangerous to the public health.

SUMMARY

PROCEEDING in habeas corpus to secure release from the security side of a hospital. Writ denied.

COUNSEL

Bertram H. Ross, under appointment by the Court of Appeal, for Petitioner. ***554**

Harold W. Kennedy, County Counsel, and Gordon W. Treharne, Deputy County Counsel, for Respondent.

CHANTRY, J. pro tem. [FN*]

FN* Assigned by the Chairman of the Judicial Council.

This is an application for a writ of habeas corpus by which petitioner, Eric Halko, seeks release from the Mira Loma Hospital, security side.

Petitioner has a diagnosis of pulmonary tuberculosis, minimal active. On July 1, 1964, he was served with a quarantine order of isolation confining him to Mira Loma Hospital. He deserted that institution on August 1, 1964, and was subsequently arrested, tried, and convicted of violating section 3351 [FN1] of the Health and Safety Code of California. [FN2] On August 20, 1964, he was sentenced to 180 days in jail by the judge of the municipal court, Antelope Judicial District. The sentence was suspended, and the petitioner was placed on probation for three years on condition he serve the first 179 days in jail. Prior to serving the jail sentence the petitioner was served with an order of isolation because of his tubercular condition and returned to the Mira Loma Hospital, security side. Thereafter, except for one interlude not pertinent to a determination of this case, a public health officer of this county served Halko with successive orders of isolation at Mira Loma Hospital for periods of approximately six months each. These orders are dated January, June, and December of 1965 and March 1966. The petitioner on May 5, 1966, sought a writ of habeas corpus from department 70 of the Superior Court of Los Angeles County. At the conclusion of the hearing in that court the application for writ of habeas corpus was denied.

FN1 "Inasmuch as the order provided for by Section 3285 is for the protection of the public health, any person who, after service upon him of an order of a health officer directing his isolation or examination as provided in Section 3285, violates or fails to comply with the same or any provision the-

reof, is guilty of a misdemeanor. ..."

FN2 All references are to the Health and Safety Code unless otherwise indicated.

(1a) Petitioner contends the right of the health officer to issue consecutive certificates of quarantine and isolation for periods of six months each, "without means of questioning and judicially determining" the conclusion of the health officer, results in "continually depriving one of his liberty." Therefore, section 3285 "is unconstitutional in that it deprives this petitioner of his liberty without due process of law." ***555**

We disagree with the petitioner's interpretation of the law and his assertion that section 3285 is unconstitutional.

Chapter 5 of the Health and Safety Code (sections 3279-3310) deals extensively with tuberculosis. Pulmonary tuberculosis is declared to be an infectious and communicable disease, dangerous to public health. Each city, county, or group of counties may establish and maintain tuberculosis wards, hospitals and sanitariums for the treatment of persons suffering from tuberculosis. Each person being cared for at public expense in a public or private hospital or sanitarium is subsidized by an allocation from state funds to the city, county or group of counties affected.

Section 3285 of the Health and Safety Code sets forth with some particularity the duties and powers of the public health officer in treating with the control of tuberculosis by inspection, examination, quarantine, or isolation. Each health officer is directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stage within his jurisdiction and to ascertain the sources of such infection. In carrying out such investigations each health officer is invested with full powers of inspection, examination, and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage.

The section also contains the following provisions:

(1) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of the public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to protect the public health. Any person served with an examination order may have such examination made by a physician of his own choice under such terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health. (3285, subd. (c).)

(2) The health officer may make an isolation or quarantine order whenever he shall determine in a particular case that quarantine or isolation is necessary for the protection of the public health. The isolation or quarantine order shall be in writing, setting forth the name of the person to be isolated, *the period of time during which the order shall remain effective*, the place of isolation or quarantine, and such other terms and ***556** conditions as may be necessary to protect the public health. (3285, subd. (d).)

Any person who, after service upon him of an order of a health officer directing his isolation or examination as provided in 3285, violates or fails to comply with said order is guilty of a misdemeanor. (3351.) The violator shall be prosecuted by the district attorney of the county in which the violation was committed upon the request of a health officer as provided in section 3355.

The duty of the state to protect the public from the danger of tuberculosis is prescribed by the Supreme Court of this state in the following statement: "It is a well-recognized principle that it is one of the first duties of a state to take all necessary steps for the promotion and protection of the health and comfort of its inhabitants. The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action. That tuberculosis is a dangerous and infectious disease which attacks both human beings and domestic animals; that it is prevalent throughout the state among both human beings and domestic animals; and that it is communicated to human beings, especially to children, by milk and other food products from infected animals, stand undisputed. ... In other words, health regulations enacted by the state under its

police power and providing even drastic measures for the elimination of disease, whether in human beings, crops or cattle, in a general way are not affected by constitutional provisions, either of the state or national government. (*Lausen v. Board of Supervisors*, 204 Iowa 30, 33 [214 N.W. 682, 684].)

".... In construing such an act, the courts must presume that the legislature has carefully investigated and has properly determined that the interests of the public require legislation that will insure the public safety and the public health against threatened danger from diseased animals ..." and human beings. "The determination of that fact is the province of the legislature, and not of the courts. It is also the province of the legislature, in the exercise of a sound discretion, to determine what measures are necessary for the protection of such interests. [Citations.]" (*Patrick v. Riley*, 209 Cal. 350, 354, 356 [287 P. 455].)

"The determination by the legislative body that a particular regulation is necessary for the protection or preservation of ***557** health is conclusive on the courts except only to the limitation that it must be a reasonable determination, not an abuse of discretion, and must not infringe rights secured by the Constitution. [Citations.]" (*DeAryan v. Butler*, 119 Cal.App.2d 674, 682 [260 P.2d 98].)

(2) The Legislature is vested with broad discretion in determining what are contagious and infectious diseases and in adopting means for preventing the spread thereof. (*In re Johnson*, 40 Cal.App. 242 [180 P. 644]; *Abeel v. Clark*, 84 Cal. 226 [24 P. 383].) In order to accomplish the purpose for which this law was enacted, the court should give it a broad and liberal construction. (39 C.J.S., p. 811, § 2.)

(1b) The act here in question was obviously passed by the Legislature for a public purpose. It is a law for the suppression of a contagious disease and the promotion of the public health. The provisions of section 3285 of the Health and Safety Code seem reasonable and necessary for the protection and preservation of the public health. It does not appear to us that the Legislature has abused its discretion or violated the terms of the federal or state Constitution by enactment of section 3285.

We now turn to the question of the public health officer's right to restrict the liberty of petitioner to the Mira Loma Hospital by successive isolation or quarantine orders. Petitioner does not dispute the finding of the health officer that he was, when subjected to quarantine regulations, and is now afflicted and suffering from pulmonary tuberculosis which is declared by section 3285 to be an infectious and communicable disease and dangerous to the public health. The petition filed here does not allege that he is free of the disease.

Subdivision (d) of section 3285 directs the health officer to make an isolation or quarantine order in writing, specifying the place of quarantine and other appropriate terms. *In re Culver*, 187 Cal. 437, 442 [202 P. 661], states that the verb "quarantine" means ' "to keep persons, when suspected of having contracted or been exposed to an infectious disease, out of a community, or to confine them to a given place therein, and to prevent intercourse between them and the people generally of such community." '

Under former Political Code section 2979a and former Health and Safety Code section 2554 [FN3] health officers were given the power to quarantine persons found to have a venereal disease. ***558**

FN3 See present sections 3053, 3194, 3195.

Persons who were confined in county hospitals or jails pursuant to quarantine orders issued by health officers under those statutes have been denied release on habeas corpus, where the evidence showed reasonable cause to believe that the person was infected. (*In re Martin*, 83 Cal.App.2d 164 [188 P.2d 287]; *In re King*, 128 Cal.App. 27 [16 P.2d 694]; *In re Fisher*, 74 Cal.App. 225 [239 P. 1100]; *In re Travers*, 48 Cal.App. 764 [192 P. 454].)

On the other hand, a person quarantined without reasonable grounds is entitled to relief by habeas corpus. (*In re Arata*, 52 Cal.App. 380 [198 P. 814].) But in that case the court was careful to point out that the issue is a factual one. The opinion states at page 383: "That the health authorities possess the power to place under quarantine restrictions persons whom they have reasonable cause to believe are afflicted with infectious or contagious diseases coming within the definition set forth in Political Code, section 2979a, as a general right, may not be questioned. It is equally true that in the exercise of this unusual power, which infringes upon the right of liberty of the individual,

personal restraint can only be imposed where, under the facts as brought within the knowledge of the health authorities, *reasonable ground exists to support the belief* that the person is afflicted as claimed; and as to whether such order is justified will depend upon the facts of each individual case."

Section 3285 does not contain any limitation or prohibition respecting the period of quarantine or the power of the health officer to issue consecutive certificates of isolation. (3) The law reasonably assumes that consecutive orders for quarantine may issue so long as any person continues to be infected with tuberculosis and on reasonable grounds is believed by the health officer to be dangerous to the public health. (*In re King,* 128 Cal.App. 27 [16 P.2d 694].)

There is nothing in this record to indicate the health officer issued any of the respective quarantine orders without probable cause or that petitioner does not at this time have an infectious and communicable disease which is dangerous to the public health.

The writ is denied.

Files, P. J., and Jefferson, J., concurred. ***559**

Cal.App.2.Dist.
Application of Halko
246 Cal.App.2d 553, 54 Cal.Rptr. 661

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Supreme Court of the United States.
HENNING JACOBSON, *Plff. in Err.*,
v.
COMMONWEALTH OF MASSACHUSETTS.

No. 70.
Argued December 6, 1904.
Decided February 20, 1905.

IN ERROR to the Superior Court of the State of Massachusetts for the County of Middlesex to review a judgment entered on a verdict of guilty in a prosecution under the compulsory vaccination law of that State, after defendant's exceptions were overruled by the Massachusetts Supreme Judicial Court. *Affirmed*.

See same case below, 183 Mass. 242, 66 N. E. 719.

The facts are stated in the opinion.

West Headnotes

Federal Courts 170B 386

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases
(Formerly 106k366(1), 106k363)

The scope and meaning of a state statute, as indicated by the exclusion of evidence on the ground of its incompetency or immateriality under that statute, are conclusive on the federal Supreme Court in determining, on writ of error to the state court, the question of the validity of the statute under the federal Constitution.

Health 198H 385

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk385 k. Vaccination and Immunization. Most Cited Cases
(Formerly 199k21 Health and Environment)

Rev.Laws, c. 75, § 137, authorizes the board of health of a city or town, if, in its discretion, it is necessary for the public health, to require the vaccination and revaccination of all of the inhabitants thereof, and requires them to provide means of free vaccination, and declares that whoever, being over 21 years of age, and not under guardianship, refuses or neglects to comply with such requirement, shall forfeit $5. Held, that such act was a valid exercise of police power as defined by M.G.L.A. Const. c. 1, § 1, art. 4, providing that the general court shall have power to establish all manner of wholesome orders, laws, statutes, etc., not repugnant to the Constitution, which they shall judge to be for the welfare of the commonwealth.

Health 198H 384

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk384 k. In General. Most Cited Cases
(Formerly 199k25 Health and Environment)

A state Legislature, in enacting a statute purporting to be for the protection of local communities against the spread of smallpox, is entitled to choose between the theory of those of the medical profession who think vaccination worthless for this purpose, and believe its effect to be injurious and dangerous, and the opposite theory, which is in accord with common belief and is maintained by high medical authority, and is not compelled to commit a matter of this character, involving the public health and safety, to the final decision of a court or jury.

****358 *14** *Messrs.* **George Fred Williams** and *James A. Halloran* for plaintiff in error.

****18** *Messrs.* **Frederick H. Nash** and *Herbert Parker* for defendant in error.

***22** Mr. Justice **Harlan** delivered the opinion of the court:

***12** This case involves the validity, under the Constitution of the United States, of certain provisions in the statutes of Massachusetts relating to vaccination.

The Revised Laws of that commonwealth, chap. 75, § 137, provide that 'the board of health of a city or town, if, in its opinion, it is necessary for the public health or safety, shall require and enforce the vaccination and revaccination of all the inhabitants thereof, and shall provide them with the means of free vaccination. Whoever, being over twenty-one years of age and not under guardianship, refuses or neglects to comply with such requirement shall forfeit $5.'

An exception is made in favor of 'children who present a certificate, signed by a ****359** registered physician, that they are unfit subjects for vaccination.' § 139.

Proceeding under the above statutes, the board of health of the city of Cambridge, Massachusetts, on the 27th day of February, 1902, adopted the following regulation: 'Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that ***13** all the inhabitants habitants of the city who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated.'

Subsequently, the board adopted an additional regulation empowering a named physician to enforce the vaccination of persons as directed by the board at its special meeting of February 27th.

The above regulations being in force, the plaintiff in error, Jacobson, was proceeded against by a criminal complaint in one of the inferior courts of Massachusetts. The complaint charged that on the 17th day of July, 1902, the board of health of Cambridge, being of the opinion that it was necessary for the public health and safety, required the vaccination and revaccination of all the inhabitants thereof who had not been successfully vaccinated since the 1st day of March, 1897, and provided them with the means of free vaccination; and that the defendant, being over twenty-one years of age and not under guardianship, refused and neglected to comply with such requirement.

The defendant, having been arraigned, pleaded not guilty. The government put in evidence the above regulations adopted by the board of health, and made proof tending to show that its chairman informed the defendant that, by refusing to be vaccinated, he would incur the penalty provided by the statute, and would be prosecuted therefor; that he offered to vaccinate the defendant without expense to him; and that the offer was declined, and defendant refused to be vaccinated.

The prosecution having introduced no other evidence, the defendant made numerous offers of proof. But the trial court ruled that each and all of the facts offered to be proved by the defendant were immaterial, and excluded all proof of them.

The defendant, standing upon his offers of proof, and introducing no evidence, asked numerous instructions to the jury, among which were the following:

That § 137 of chapter 75 of the Revised Laws of Massachusetts was in derogation of the rights secured to the defendant by the preamble to the Constitution of the United States, and tended to subvert and defeat the purposes of the Constitution as declared in its preamble;

That the section referred to was in derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States, and especially of the clauses of that amendment providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and

That said section was opposed to the spirit of the Constitution.

Each of defendant's prayers for instructions was rejected, and he duly excepted. The defendant re-

quested the court, but the court refused, to instruct the jury to return a verdict of not guilty. And the court instructed structed the jury, in substance, that, if they believed the evidence introduced by the commonwealth, and were satisfied beyond a reasonable doubt that the defendant was guilty of the offense charged in the complaint, they would be warranted in finding a verdict of guilty. A verdict of guilty was thereupon returned.

The case was then continued for the opinion of the supreme judicial court of Massachusetts. Santa Fé Pacific Railroad Company, the exceptions, sustained the action of the trial court, and thereafter, pursuant to the verdict of the jury, he was sentenced by the court to pay a fine of $5. And the court ordered that he stand committed until the fine was paid.

We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, chap. 75) is in derogation of rights secured by the preamble of the Constitution of the United States. Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power ****360** to be properly implied therefrom. 1 Story, Const. § 462.

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 202, 4 L. ed. 529, 550, 'the spirit of an instrument, especially of a constitution, is to be respected not less than its letter; yet the spirit is to be collected chiefly from its words.' We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, are the ***23** scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The supreme judicial court of Massachusetts said in the present case: 'Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. *Com.* v. *Connolly*, 163 Mass. 539, 40 N. E. 862; *Com.* v. *Has*, 122 Mass. 40; *Reynolds* v. *United States*, 98 U. S. 145, 25 L. ed. 244; *Reg.* v. *Downes*, 13 Cox, C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant 'offered to prove and show be competent evidence' these socalled facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Com.* v. *Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession ***24** have regarded vaccination, repeated after intervals, as a preventive of smallpox; that, while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to

be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to introduce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands.' *Com.* v. *Jacobson*, 183 Mass. 242, 66 N. E. 719.

While the mere rejection of defendant's offers of proof does not strictly present a Federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, are the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute,-and such is our duty. *Leffingwell* v. *Warren*, 2 Black, 599, 603, 17 L. ed. 261. 262; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 167, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54; *Tullis* v. *Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466, 45 L. ed. 619, 625, 21 Sup. Ct. Rep. 423,-we assume, for the purposes of the present inquiry, that its provisions require, at least as a general rule, that adults not under the guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the board of health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the state?

The authority of the state to enact this statute is to be ***25** referred to what is commonly called the police power,-a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained frained ****361** from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a state to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 6 L. ed. 23, 71; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 470, 24 L. ed. 527, 530; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; *Lawson* v. *Stecle*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499. It is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a state, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a state, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution, or with any right which that instrument gives or secures. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Sinnot* v. *Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488.

We come, then, to inquire whether any right given or secured by the Constitution is invaded by the statute as ***26** interpreted by the state court. The defendant insists that his liberty is invaded when the state subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary, and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is neces-

sarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned.' *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 471, 24 L. ed. 527, 530; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 628, 629, 42 L. ed. 878-883, 18 Sup. Ct. Rep. 488; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 148, 62 Am. Dec. 625. In *Crowley* v. *Christensen*, 137 U. S. 86, 89, 34 L. ed. 620, 621, 11 Sup. Ct. Rep. 13, we said: 'The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community. Even liberty ***27** itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.' In the Constitution of Massachusetts adopted in 1780 it was laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good,' and that government is instituted 'for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men.' The good and welfare of the commonwealth, of which the legislature is primarily the judge, is the basis on which the police power rests in Massachusetts. *Com.* v. *Alger*, 7 Cush. 84.

Applying these principles to the present case, it is to be observed that the legislature ****362** of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the board of health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a board of health composed of persons residing in the locality affected, and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual, nor an unreasonable or arbitrary, requirement. Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members. It is to be observed that when the regulation in question was adopted smallpox, according to the recitals in the regulation adopted by the board of health, was prevalent to some extent in the city of Cambridge, and the disease was increasing. If such was ***28** the situation,-and nothing is asserted or appears in the record to the contrary,-if we are to attach, any value whatever to the knowledge which, it is safe to affirm, in common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the board of health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case. We say necessities of the case, because it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons. *Wisconsin, M. & P. R. Co.* v. *Jacobson*, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; 1 Dill. Mun. Corp. 4th ed. §§ 319-325, and authorities in notes; Freurid, Police Power, §§ 63 *et seq.* In *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 471-473, 24 L. ed. 527, 530, 531, this court recognized the right of a state to pass sanitary laws, laws for the protection of life, liberty, health, or property within its limits, laws to prevent persons and animals suffering under contagious or infectious diseases, or convicts, from coming within its borders. But, as the laws there involved went beyond the necessity of the case, and,

under the guise of exerting a police power, invaded the domain of Federal authority, and violated rights secured by the Constitution, this court deemed it to be its duty to hold such laws invalid. If the mode adopted by the commonwealth of Massachusetts for the protection of its local communities against smallpox proved to be distressing, inconvenient, or objectionable to some,-if nothing more could be reasonably ***29** affirmed of the statute in question,-the answer is that it was the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many, and not permit the interests of the many to be subordinated to the wishes or convenience of the few. There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,-especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will' (*Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness ****363** to submit to reasonable regulations established by the constituted authorities, under the ***30** sanction of the state, for the purpose of protecting the public collectively against such danger.

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition, and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant's rejected offers of proof, it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority. We must assume that, when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective, if not the best-known, way in which to meet and suppress the ***31** evils of a smallpox epidemic that imperiled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain,

palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota* v. *Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin* v. *Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can anyone confidently assert that the means prescribed by the state to that end has no real or substantial relation to the protection of the public health and the public safety. Such an assertion would not be consistent with the experience of this and other countries whose authorities have dealt with the disease of smallpox.[FN†] And the principle of vaccination ****364** as a means to ***32** prevent the spread of smallpox has been enforced in many states by statutes making the vaccination of children a condition of their right to enter or remain in public schools. *Blue* v. *Beach*, 155 Ind. 121, 50 L. R. A. 64, 80 Am. St. Rep. 195, 56 N. E. 89; ***33***Morris* v. *Columbus*, 102 Ga. 792, 42 L. R. A. 175, 66 Am. St. Rep. 243, 30 S. E. 850; *State* v. *Hay*, 126 N. C. 999, 49 L. R. A. 588, 78 Am. St. Rep. 691, 35 S. E. 459; *Abeel* v. *Clark*, 84 Cal. 226, 24 Pac. 383; *Bissell* v. *Davison*, 65 Conn. 183, 29 L. R. A. 251, 32 Atl. 348; *Hazen* v. *Strong*, 2 Vt. 427; *Duffield* v. *Williamsport School District*, 162 Pa. 476, 25 L. R. A. 152, 29 Atl. 742.

FN† 'State-supported facilities for vaccination began in England in 1808 with the National Vaccine Establishment. In 1840 vaccination fees were made payable out of the rates. The first compulsory act was passed in 1853, the guardians of the poor being intrusted with the carrying out of the law; in 1854 the public vacinations under one year of age were 408,824 as against an average of 180,960 for several years before. In 1867 a new act was passed, rather to remove some technical difficulties than to enlarge the scope of the former act; and in 1871 the act was passed which compelled the boards of guardians to appoint vaccination officers. The guardians also appoint a public vaccinator, who must be duly qualified to practise medicine, and whose duty it is to vaccinate (for a fee of one shilling and sixpence) any child resident within his district brought to him for that purpose, to examine the same a week after, to give a certificate, and to certify to the vaccination officer the fact of vaccination or of insusceptibility. . . . Vaccination was made compulsory in Bavarla in 1807, and subsequently in the following countries: Denmark (1810), Sweden (1814), Württemberg, Hesse, and other German states (1818), Prussia (1835), Roumania (1874), Hungary (1876), and Servia (1881). It is compulsory by cantonal law in 10 out of the 22 Swiss cantons; an attempt to pass a Federal compulsory law was defeated by a plebiscite in 1881. In the following countries there is no compulsory law, but governmental facilities and compulsion on various classes more or less directly under governmental control, such as soldiers, state employees, apprentices, school pupils, etc.: France, Italy, Spain, Portugal, Belgium. Norway, Austria, Turkey. . . . Vaccination has been compulsory in South Australia since 1872, in Victoria since 1874, and in Western Australia since 1878. In Tasmania a compulsory act was passed in 1882. In New South Wales there is no compulsion, but free facilities for vaccination. Compulsion was adopted at Calcutta in 1880, and since then at 80 other towns of Bengal, at Madras in 1884, and at Bombay and elsewhere in the presidency a few years earlier. Revaccination was made compulsory in Denmark in 1871, and in Roumania in 1874; in Holland it was enacted for all school pupils in 1872. The various laws and administrative orders which had been for many years in force as to vaccination and revaccination in the several German states were consolidated in an imperial statute of 1874.' 24 Encyclopaedia Britannica (1894), *Vaccination*.

'In 1857 the British Parliament received answers from 552 physicians to questions which were asked them in reference to the utility of vaccination, and only two of these spoke against it. Nothing proves this utility more clearly than the statistics obtained. Especially instructive are those which Flinzer compiled respecting the epidemic in Chemnitz which prevailed in 1870-71. At this time

in the town there were 64,255 inhabitants, of whom 53,891, or 83.87 per cent, were vaccinated, 5,712, or 8.89 per cent were unvaccinated, and 4,652, or 7.24 per cent, had had the smallpox before. Of those vaccinated 953, or 1.77 per cent, became affected with smallpox, and of the uninocculated 2,643, or 46.3 per cent, had the disease. In the vaccinated the mortality from the disease was 0.73 per cent, and in the unprotected it was 9.16 per cent. In general, the danger of infection is six times as great, and the mortality 68 times as great, in the unvaccinated, as in the vaccinated. Statistics derived from the civil population are in general not so instructive as those derived from armies, where vaccination is usually more carefully performed, and where statistics can be more accurately collected. During the Franco-German war (1870-71) there was in France a widespread epidemic of smallpox, but the German army lost during the campaign only 450 cases, or 58 men to the 100,000; in the French army, however, where vaccination was not carefully carried out, the number of deaths from smallpox was 23,400.' , Johnson's Universal Cyclopaedia (1897), *Vaccination*.

'The degree of protection afforded by vaccination thus became a question of great interest. Its extreme value was easily demonstrated by statistical researches. In England, in the last half of the eighteenth century, out of every 1,000 deaths, 96 occurred from smallpox; in the first half of the present century, out of every 1,000 deaths, but 35 were caused by that disease. The amount of mortality in a country by smallpox seems to bear a fixed relation to the extent to which vaccination is carried out In all England and Wales, for some years previous to 1853, the proportional mortality by smallpox was 21.9 to 1,000 deaths from all causes; in London it was but 16 to 1,000; in Ireland, where vaccination was much less general, it was 49 to 1,000, while in Connaught it was 60 to 1,000. On the other hand, in a number of European countries where vaccination was more or less compulsory, the proportionate number of deaths from smallpox about the same time varied from 2 per 1,000 of all causes in Bohemia, Lombardy, Venice, and Sweden, to 8.33 per 1,000 in Saxony. Although in many instances persons who had been vaccinated were attacked with smallpox in a more or less modified form, it was noticed that the persons so attacked had been commonly vaccinated many years previously. 16 American Cyclopedia, *Vaccination* (1883).

'Dr Buchanan, the medical officer of the London Government Board, reported [1881] as the result of statistics that the smallpox death rate among adult persons vaccinated was 90 to a million; whereas among those unvaccinated it was 3,350 to a million; whereas among vaccinated children under five years of age, 42 1/2 per million; whereas among unvaccinated children of the same age it was 5,950 per million.' Hardway, Essentials of Vaccination (1882). The same author reports that, among other conclusions reached by the Académie de Médicine of France, was one that, 'without vaccination, hygienic measures (isolation, disinfection, etc.) are of themselves insufficient for preservation from smallpox.' *Ibid*.

The Belgian Academy of Medicine appointed a committee to make an exhaustive examination of the whole subject, and among the conclusions reported by them were: 1. 'Without vaccination, hygienic measures and means, whether public or private, are powerless in preserving mankind from smallpox. . . . 3. Vaccination is always an inoffensive operation when practised with proper care on healthy subjects. . . . 4. It is highly desirable, in the interests of the health and lives of our countrymen, that vaccination should be rendered compulsory.' Edwards, *Vaccination* (1882.)

The English Royal Commission, appointed with Lord Herschell, the Lord Chancellor of England, at its head, to inquire, among other things, as to the effect of vaccination in reducing the prevalence of, and mortality from, smallpox, reported, after several years of investigation: 'We think that it diminishes the liability to be attacked by the disease; that it modifies the character of the disease and renders it less fatal,-of a milder and less se-

> vere type; that the protection it affords against attacks of the disease is greatest during the years immediately succeeding the operation of vaccination.'

***34** The latest case upon the subject of which we are aware is *Viemester* v. *White*, decided very recently by the court of appeals of New York. That case involved the validity of a statute excluding from the public schools all children who had not been vaccinated. One contention was that the statute and the regulation adopted in exercise ****365** of its provisions was inconsistent with the rights, privileges, and liberties of the citizen. The contention was overruled, the court saying, among other things: 'Smallpox is known of all to be a dangerous and contagious disease. If vaccination strongly tends to prevent the transmission or spread of this disease, it logically follows that children may be refused admission to the public schools until they have been vaccinated. The appellant claims that vaccination does not tend to prevent smallpox, but tends to bring about other diseases, and that it does much harm, with no good. It must be conceded that some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox. The common belief, however, is that it has a decided tendency to prevent the spread of this fearful disease, and to render it less dangerous to those who contract it. While not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is ***35** generally accepted in theory, and generally applied in practice, both by the voluntary action of the people, and in obedience to the command of law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations of Europe. . . . A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts.. . . The fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases. In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action, for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. Any other basis would conflict with the spirit of the Constitution, and would sanction measures opposed to a Republican form of government. While we do not decide, and cannot decide, that vaccination is a preventive of smallpox, we take judicial notice of the fact that this is the common belief of the people of the state, and, with this fact as a foundation, we hold that the statute in question is a health law, enacted in a reasonable and proper exercise of the police power.' 179 N. Y. 235, 72 N. E. 97.

Since, then, vaccination, as a means of protecting a community against smallpox, finds strong support in the experience of this and other countries, no court, much less a jury, is justified in disregarding the action of the legislature simply because in its or their opinion that particular method was-perhaps, or possibly-not the best either for children or adults.

Did the offers of proof made by the defendant present a case which entitled him, while remaining in Cambridge, to ***36** claim exemption from the operation of the statute and of the regulation adopted by the board of health? We have already said that his rejected offers, in the main, only set forth the theory of those who had no faith in vaccination as a means of preventing the spread of smallpox, or who thought that vaccination, without benefiting the public, put in peril the health of the person vaccinated. But there were some offers which it is contended embodied distinct facts that might properly have been considered. Let us see how this is.

The defendant offered to prove that vaccination 'quite often' caused serious and permanent injury to the health of the person vaccinated; that the operation 'occasionally' resulted in death; that it was 'impossible' to tell 'in any particular case' what the results of vaccination would be, or whether it would injure the health or result in death; that 'quite often' one's blood is in a certain condition of impurity when it is not prudent or safe to vaccinate him; that there is no practical test by which to determine 'with any degree of certainty' whether one's blood is in such condition of impurity as to render vaccination necessarily unsafe or dangerous; that vaccine matter is 'quite often' impure and dangerous to be used, but whether impure or not cannot be ascertained by any known practical test;

that the defendant refused to submit to vaccination for the reason that he had, 'when a child,' been caused great and extreme suffering for a long period by a disease produced by vaccination; and that he had witnessed a similar result of vaccination, not only in the case of his son, but in the cases of others.

These offers, in effect, invited the court and jury to go over the whole ground gone over by the legislature when it enacted the statute in question. The legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination; and it is suggested-and we will not say without reason-that such is the case with some adults. But the defendant did not offer to prove that, by ****366** reason of his then condition, he was in fact not a fit subject of vaccination ***37** at the time he was informed of the requirement of the regulation adopted by the board of health. It is entirely consistent with his offer of proof that, after reaching full age, he had become, so far as medical skill could discover, and when informed of the regulation of the board of health was, a fit subject of vaccination, and that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used. The matured opinions of medical men everywhere, and the experience of mankind, as all must know, negative the suggestion that it is not possible in any case to determine whether vaccination is safe. Was defendant exempted from the operation of the statute simply because of his dread of the same evil results experienced by him when a child, and which he had observed in the cases of his son and other children? Could he reasonably claim such an exemption because 'quite often,' or 'occasionally,' injury had resulted from vaccination, or because it was impossible, in the opinion of some, by any practical test, to determine with absolute certainty whether a particular person could be safely vaccinated?

It seems to the court that an affirmative answer to these questions would practically strip the legislative department of its function to care for the public health and the public safety when endangered by epidemics of disease. Such an answer would mean that compulsory vaccination could not, in any conceivable case, be legally enforced in a community, even at the command of the legislature, however widespread the epidemic of smallpox, and however deep and universal was the belief of the community and of its medical advisers that a system of general vaccination was vital to the safety of all.

We are not prepared to hold that a minority, residing or remaining in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, ***38** then a like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who chooses to remain a part of that population. We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the state. While this court should guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that commonwealth to guard and protect. They are matters that do not ordinarily concern the national government. So far as they can be reached by any government, they depend, primarily, upon such action as the state, in its wisdom, may take; and we do not perceive that this legislation has invaded any right secured by the Federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe-perhaps to repeat a thought already sufficiently expressed, namely-that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health ***39**

or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable ****367** certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissent.

U.S. 1905
Jacobson v. Commonwealth of Massachusetts
197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Am.Ann.Cas. 765

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548 F.2d 1277, 44 A.L.R. Fed. 131
(Cite as: 548 F.2d 1277)

United States Court of Appeals,
Seventh Circuit.
George A. LLOYD and Janet B. Wolfe, etc., Plaintiffs-Appellants,
v.
The REGIONAL TRANSPORTATION AUTHORITY and the Chicago Transit Authority, Defendants-Appellees.

No. 76-1524.
Argued Dec. 1, 1976.
Decided Jan. 18, 1977.

Class action was brought on behalf of the class of all mobility-disabled persons in the northeastern region of Illinois, alleging that the plaintiff class was unable to use public transportation system operated by the two municipal defendants because of physical disabilities. Defendants were alleged to have violated the Urban Mass Transportation Act of 1964, the Rehabilitation Act of 1973, the Architectural Barriers Act of 1968 and the equal protection clause of the Fourteenth Amendment. The United States District Court for the Northern District of Illinois, Eastern Division, Joel M. Flaum, J., granted defendants' motion to dismiss on the ground that none of the three statutes conferred a private right of action and that the equal protection clause did not apply. Plaintiffs appealed, and the Court of Appeals, Cummings, Circuit Judge, held that the section of the Rehabilitation Act of 1973 which forbids discrimination against otherwise qualified handicapped individuals in programs or activities receiving federal financial assistance established affirmative rights; that a private cause of action could be implied to vindicate those rights; and that because no administrative remedy was open to plaintiffs, neither the exhaustion of remedies doctrine nor the primary jurisdiction doctrine applied.

Vacated and remanded.

West Headnotes

[1] Civil Rights 78 1343

78 Civil Rights
78III Federal Remedies in General
78k1342 Liability of Municipalities and Other Governmental Bodies
78k1343 k. In General. Most Cited Cases
(Formerly 78k206(1), 78k13.7)

Municipal corporations are outside the scope of the Civil Rights Act of 1871. 42 U.S.C.A. § 1983.

[2] Federal Civil Procedure 170A 1829

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1827 Determination
170Ak1829 k. Construction of Pleadings. Most Cited Cases

On motion to dismiss, complaint must be read liberally.

[3] United States 393 82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
(Formerly 393k82)

Section of Rehabilitation Act of 1973 which prohibits discrimination against otherwise qualified handicapped individuals in programs or activities receiving federal financial assistance, when considered together with regulations which implement the section, establishes affirmative rights. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[4] Action 13 3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases

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Four factors relevant to determining whether a private remedy is implicit in statute which does not expressly provide such remedy are: whether plaintiff is one of the class for whose special benefit the statute was enacted; whether there is any indication of legislative intent, explicit or implicit, either to create or to deny such a remedy; whether such remedy is consistent with the underlying purposes of the legislative scheme; and whether it would be inappropriate to infer a cause of action based solely on federal law because such cause of action would be within an area traditionally relegated to state law.

[5] United States 393 82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
(Formerly 393k82)

A principal purpose of the 1974 Rehabilitation Act amendments was to include within scope of section which prohibits discrimination against otherwise qualified handicapped individuals in programs or activities receiving federal financial assistance individuals who may have been unintentionally excluded from the protection of the section by the original definition of handicapped individuals which overemphasized employability. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[6] Action 13 1

13 Action
13I Grounds and Conditions Precedent
13k1 k. Nature and Elements of Cause of Action and Suspension of Remedies. Most Cited Cases

When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts.

[7] Civil Rights 78 1308

78 Civil Rights
78III Federal Remedies in General
78k1306 Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies
78k1308 k. Administrative Remedies in General. Most Cited Cases
(Formerly 78k194, 78k12.4, 393k82(1), 393k82)

Until effective enforcement regulations are promulgated, section of the Rehabilitation Act of 1973 which establishes an implied private cause of action to vindicate affirmative right of otherwise qualified handicapped individuals to nondiscrimination in programs or activities receiving federal financial assistance should not be subjugated to the doctrine of exhaustion of remedies; however, assuming a meaningful administrative enforcement mechanism, the private cause of action implied under the section should be limited to a posteriori judicial review. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[8] United States 393 82(1)

393 United States
393VI Fiscal Matters
393k82 Disbursements in General
393k82(1) k. In General. Most Cited Cases
(Formerly 393k82)

In view of fact that “mobility-disabled” persons, who alleged that they were unable to use municipal defendants' public transportation system because of physical disabilities, were among the class for whose special benefit the legislature enacted that section of the Rehabilitation Act of 1973 which prohibits discrimination against otherwise qualified handicapped individuals in programs receiving federal financial assistance and because there were indications that legislature intended to create independent federal cause of action to vindicate affirmative rights established by the section and it was consistent with underlying purpose of Act and would not intrude upon area traditionally relegated to state law to imply private remedy, section implicitly provided a private remedy. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

[9] Civil Rights 78 1313

78 Civil Rights
78III Federal Remedies in General
78k1306 Availability, Adequacy, Exclusivity, and Exhaustion of Other Remedies
78k1313 k. Other Particular Cases and

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(Cite as: 548 F.2d 1277)

Contexts. Most Cited Cases
(Formerly 78k194, 78k12.4, 393k82(3), 393k82)

Because no administrative remedy was open to "mobility-disabled" persons who brought class action to challenge municipal public transportation facilities as violative of, inter alia, the Rehabilitation Act of 1973, neither the exhaustion nor primary jurisdiction doctrine was applicable. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

***1278** Neil K. Quinn, Walter J. Kendall, Chicago, Ill., for plaintiffs-appellants.

Norman J. Barry, Joseph P. Della Maria, Jr., and Ronald F. Bartkowicz, Chicago, Ill., for Chicago Transit Authority.

Don H. Reuben, James C. Munson, Chicago, Ill., for Regional Transportation Authority.

Before CUMMINGS and TONE, Circuit Judges, and GRANT, Senior District Judge. [FN*]

FN* Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

CUMMINGS, Circuit Judge.

[1] This class action was filed under the Civil Rights Act of 1871 (42 U.S.C. s 1983),[FN1] the Rehabilitation Act of 1973 (29 U.S.C. ss 701 et seq.), the Architectural Barriers Act of 1968 (42 U.S.C. ss 4151 and 4152). and unspecified regulations promulgated under the statutes.[FN2] Plaintiffs also relied on various sections of the Constitution but now rest their constitutional argument only on the Equal Protection Clause of the Fourteenth Amendment.

FN1. Plaintiffs no longer rely on 42 U.S.C. s 1983 (see reply br. 7), apparently because municipal corporations like defendants are outside its ambit. City of Kenosha v. Bruno, 412 U.S. 507, 513, 93 S.Ct. 2222, 37 L.Ed.2d 109.

FN2. In their appellate brief (at 11-13) plaintiffs also rely on a 1975 amendment to Section 165 of the Federal-Aid Highway Act of 1973, providing that the Secretary of Transportation "shall not approve any program or project * * * (not) requiring access to public mass transportation facilities, equipment and services for elderly or handicapped persons" which is funded under certain specified sections of Title 23 of the United States Code (23 U.S.C.A. s 142 note; 88 Stat. 2283). The 1975 amendment defined the handicapped to "includ(e) those who are nonambulatory wheelchair-bound and those with semiambulatory capabilities." Id. However, since this provision was not cited in the complaint and barely mentioned in the district court's opinion, we will not consider it.

***1279** [2] The named plaintiffs are George A. Lloyd, a quadriplegic who has been confined to a wheelchair since 1953, and Janet B. Wolfe, who is "mobility-disabled" because of a chronic pulmonary dysfunction. They sued on behalf of a class of all mobility-disabled persons in the northeastern region of Illinois. The two defendants are the Regional Transportation Authority (RTA),[FN3] which provides public transportation and assists in the public mass transportation system in that region, and the Chicago Transit Authority (CTA), [FN4] which operates a mass transportation system in the Chicago metropolitan area. The complaint alleges that the suing class is unable to use defendants' public transportation system because of physical disabilities. Plaintiffs aver on information and belief that defendants are in the process of planning for the purchase of new transportation equipment utilizing federal funds [FN5] and that, unless defendants are compelled to take affirmative action, the transportation system will continue to be inaccessible to the mobility-disabled.

FN3. The RTA is a municipal corporation established pursuant to Ill.Rev.Stat.1975, ch. 111 2/3, ss 701.01 et seq.

FN4. The CTA is a municipal corporation established pursuant to Ill.Rev.Stat.1975, ch. 111 2/3, ss 301 et seq.

FN5. Reading the complaint liberally as we must on a motion to dismiss, we deem it possible that plans for the purchase of new equipment on June 5, 1975, the date of the complaint, were not all consummated at the level of final approval of federal funding

before the effective date of the Urban Mass Transportation Administrator's regulations on May 31, 1976. See also note 30 infra.

The complaint sets out four causes of action. First, plaintiffs assert that defendants have violated Section 16 of the Urban Mass Transportation Act of 1964 (49 U.S.C. s 1612) because they have not met the transportation needs of handicapped persons. Secondly, plaintiffs charge that defendants have violated Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. s 794) because, by reason of their handicaps, plaintiffs have been denied the meaningful usage of defendants' federally financed mass transportation facilities. Thirdly, plaintiffs claim that defendants have not complied with Sections 1 and 2 of the Architectural Barriers Act of 1968 (42 U.S.C. ss 4151 and 4152) because they have not designed vehicular facilities permitting ready access to physically handicapped persons. Finally, defendants' denial of public transportation system access to plaintiffs and their class is said to violate the Fourteenth Amendment's Equal Protection Clause.

The plaintiffs sought a preliminary injunction to prevent the defendants from designing or placing into operation any new federally funded facilities unless the facilities were accessible to all mobility-disabled persons. Plaintiffs also prayed for a mandatory injunction compelling the defendants to make the existing transportation system accessible to the mobility-disabled.

The district court filed a memorandum opinion granting the defendants' motions to dismiss on the ground that the three statutes in question do not confer a private right of action. The opinion stated that the only substantial constitutional claim of plaintiffs was founded on the Equal Protection Clause but that it was inapplicable because

"(d)efendants have not created any inequalities of treatment. They are not alleged to be providing handicapped persons with any lesser facilities than other persons." [FN6]

FN6. The district judge found it unnecessary to decide whether the Secretary of Transportation or his delegates were indispensable parties. Similarly, he did not pass on whether the Secretary of Health, Education and Welfare and the Urban Mass Transportation Administrator had to be named as defendants, as urged by the Urban Mass Transportation Administrator (who filed an amicus curiae brief with us) and by the CTA.

***1280** We vacate and remand.

SECTION 504 CONFERS AFFIRMATIVE RIGHTS

[3] Plaintiffs and two amici curiae [FN7] rely on Section 504 of the Rehabilitation Act of 1973 as giving plaintiffs the right to file a private action to enforce compliance with the statutes relied upon in the complaint and the recent regulations of the Urban Mass Transportation Administration.[FN8] Section 504 provides:

FN7. They are the National Center for Law and the Handicapped, Inc. of South Bend, Indiana, and a group of eight organizations representing disabled persons, whose counsel was the Public Interest Law Center of Philadelphia.

FN8. Those regulations were issued on April 27, 1976, and made effective May 31, 1976. They appear in 49 C.F.R. ss 609.1-609.25 and 613.204 and in 41 F.R. 18239-18241 and 18234 (April 30, 1976). Two appendices were also added. 49 C.F.R. ss 609.15(a), (b) and (c) were revised effective October 12, 1976. 41 F.R. 45842 (October 18, 1976).

"No otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (29 U.S.C. s 794).

This provision closely tracks [FN9] Section 601 of the Civil Rights Act of 1964,[FN10] which was construed in Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1. There a unanimous Supreme Court held that Section 601 provided a private cause of action. See also Bossier Parish School Board v. Lemon, 370 F.2d 847, 852 (5th Cir. 1969), certiorari denied, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350. While adverting to regulations and guidelines issued by the Department of Health, Education and Welfare (HEW) pursuant to Section 602 of the Act [FN11] and the

respondent school district's contractual agreement to comply with Title VI of the Civil Rights Act of 1964 and the regulations thereunder,[FN12] Justice Douglas (speaking for himself and Justices Brennan, Marshall, Powell and Rehnquist) stated, in reversing the court of appeals, that "(w)e do not reach the Equal Protection Clause argument which has been advanced but rely solely on s 601." 414 U.S. at 566, 94 S.Ct. at 788. The concurring opinion of Justice Stewart (with whom the Chief Justice and Justice Blackmun joined) relied on Section 601 and the HEW regulations and guidelines and mentioned that plaintiffs there could concededly sue as third-party beneficiaries of said contract. Finally, Justice Blackmun (with whom the Chief Justice joined) stated that because the plaintiff class involved 2800 school children, he concurred in the holding that the San Francisco School District could not continue to teach students in English without teaching English to Chinese-speaking children or giving their classes in the Chinese language. [FN13] ***1281** Because of the near identity of language in Section 504 of the Rehabilitation Act of 1973 and Section 601 of the Civil Rights Act of 1964, Lau is dispositive. Therefore, we hold that Section 504 of the Rehabilitation Act, at least when considered with the regulations which now implement it, establishes affirmative rights and permits this action to proceed.[FN14]

FN9. Indeed, Section 504 had its genesis in an abortive attempt by Congressman Vanik to include the handicapped within the strictures of the Civil Rights Act of 1964 itself. In floor debate on the Rehabilitation Act of 1973, he expressed pleasure that his language was included in what was to become Section 504. 119 Cong. Rec. 7114 (1973).

FN10. Section 601 of the Civil Rights Act of 1964 provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (42 U.S.C. s 2000d).

FN11. Section 602 provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken * * * " (42 U.S.C. s 2000d-1).

FN12. 45 C.F.R. pt. 80.

FN13. A perceived importance in the number of discriminatees seeking relief has caused one court to consider the numerosity of the plaintiff class as a limitation of Lau. Serna v. Portakes Municipal Schools, 499 F.2d 1147, 1154 (10th Cir. 1974).

FN14. Accord: Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D.Pa.1976); Hairston v. Drosick, 423 F.Supp. 180 (S.D.W.Va.1976); Rhode Island Society for Autistic Children v. Board of Regents, Civil Action No. 5081 (D.R.I. August 1, 1975); Cherry v. Mathews, 419 F.Supp. 922 (D.D.C.1976); Sites v. McKenzie, 423 F.Supp. 1190, (N.D.W.Va.1976). See also Bartels v. Biernat, 405 F.Supp. 1012 (E.D.Wis.1975). To the extent that Young v. Coleman, Civil Action No. H-76-201 (D.Conn. Dec. 17, 1976), may be contra, we disagree therewith. The district judge did not realize that the Urban Mass Transportation Administrator's regulations had been issued in part under Section 504 (mem. op. 9), which was his reason for distinguishing Lau v. Nichols, supra. He left open the question whether Section 504 authorizes a private right of action in circumstances like these (mem. op. 9, 10). Also, the defendants there satisfied him that they were making good faith efforts to comply with the Urban Mass Transportation Act (mem. op. 8), and the State of Connecticut Department of Transportation represented that it would comply with the April and October require-

ments of the Urban Mass Transportation Administrator (n. 5).

Judge Flaum held that Lau was not controlling because this case was devoid of analogs to the HEW guidelines there involved. In the district court's view, the "obligation to provide special programs did not flow from the cited statutory language (Section 601 of the Civil Rights Act of 1964), but rather from Health, Education and Welfare guidelines which were enacted pursuant to the additional statutory section, s 2000d-1 (Section 602 of the Civil Rights Act of 1964)." Even though the opinion of the Court in Lau can be read as authority for allowing this action to proceed under Section 504 of the Rehabilitation Act alone, developments subsequent to the district court's opinion have provided a virtual one-to-one correspondence between the conceptual props supporting the concurring opinions in Lau and the elements of the instant case.

Here the conceptual analog of Section 602 of the Civil Rights Act of 1964 came into being on April 28, 1976, in the form of Executive Order 11914, 41 F.R. 17871 (April 29, 1976). The Executive Order authorizes HEW and other federal agencies dispensing financial assistance to adopt rules, regulations and orders to ensure that recipients of federal aid are in compliance with Section 504. If compliance cannot be secured voluntarily, it may be compelled by suspension or termination of federal assistance after a hearing or by "other appropriate means authorized by law." HEW is given the responsibility of establishing standards for who are "handicapped individuals" and for determining what are "discriminatory practices" as well as coordinating the implementation of Section 504 by all federal agencies. While the Rehabilitation Act itself contains no express directive to issue regulations,[FN15] ***1282** the 1974 Amendments to the Act generated a legislative history which indicates that Congress contemplated speedy implementation of Section 504 through regulations. See S.Rep. No. 93-1139, 93d Cong., 2d Sess. 24-25 (1974); H.R.Rep. No. 32-1457, 93d Cong., 2d Sess. 27-28 (1974); S.Rep. No. 32-1297, 93d Cong., 2d Sess. 39-40 (1974). "In review of the foregoing, (it can be concluded) that the (HEW) Secretary is required to promulgate regulations effectuating s 504." Cherry v. Mathews, 419 F.Supp. 922 (D.D.C., 1976). [FN16]

FN15. However, the legislative history of the 1974 Rehabilitation Act Amendments explicitly contemplates an Executive Order such as 11914 which would consolidate in HEW the government-wide responsibility of issuing regulations to implement Section 504:

"It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result. Thus, Federal agencies and departments should cooperate in developing standards and policies so that there is a uniform, consistent Federal approach to these sections. The Secretary of the Department of Health, Education and Welfare, because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the section 504 enforcement effort and for establishing a coordinating mechanism with the Secretary of the Department of Labor to ensure a consistent approach to the implementation of sections 503 and 504. The conferees fully expect that H.E.W.'s section 504 regulations should be completed by the close of this year. Delay beyond this point would be most unfortunate since the Act (P.L. 93-112) was enacted over one year ago September 26, 1973.

"The conferees noted, and the Committee reiterates, that Executive Order No. 11758, section 2, delegates to the Secretary of Labor the responsibility for carrying out the responsibilities embodied in section 503 of the Rehabilitation Act of 1973, and a similar delegation of responsibility to the Secretary of HEW is urged to carry out on a Government-wide basis those responsibilities embodied in section 504." 4 U.S.Code Cong. & Admin.News, p. 6391 (1974).

FN16. The district court in Cherry chose not to set a date when the final 504 regulations must issue but did retain jurisdiction to ensure that "no further unreasonable delays affect the promulgation of regulations under s 504." No appeal was taken from the July 19 memorandum opinion.

Forty days after the district court's opinion was issued, the Urban Mass Transportation Administrator promulgated final regulations, in part under the authority of Section 504. These regulations and various accompanying guidelines are squarely couched in affirmative language. Thus new regulation 49 CFR s 613.204 provides:

"Additional criteria for Urban Mass Transportation Administrator's approvals under 23 CFR 450.320.

"The Urban Mass Transportation Administrator will grant project approvals pursuant to 23 CFR 450.320(a)(3) only if:

"(a) The urban transportation planning process exhibits satisfactory special efforts in planning public mass transportation facilities and services that can be utilized by elderly and handicapped persons ; and

"(b) The annual element of the transportation improvement program developed pursuant to 23 CFR 450.118 and submitted after September 30, 1976, contains projects or project elements designed to benefit elderly and handicapped persons, specifically including wheelchair users and those with semi-ambulatory capabilities ; and

(c) After September 30, 1977, reasonable progress has been demonstrated in implementing previously programmed projects." (Emphasis supplied.)

Advisory information issued simultaneously, to be added to the appendix to 23 CFR Part 450, Subpart A, sets forth general guidance on the meaning of "special efforts" in planning:

"The urban transportation planning process must include special efforts to plan public mass transportation facilities and service that can effectively be utilized by elderly and handicapped persons. As used in this guidance, the term 'special efforts' refers both to service for elderly and handicapped persons in general and specifically to service for wheelchair users and semiambulatory persons. With regard to transportation for wheelchair users and others who cannot negotiate steps, 'special efforts' in planning means genuine, good-faith progress in planning service for wheelchair users and semiambulatory handicapped persons that is reasonable by comparison with the service provided to the general public and that meets a significant fraction of the actual transportation needs of such persons within a reasonable time period." (Emphasis supplied.)

Further advisory information published as an appendix to 49 CFR Part 613, Subpart B, gives several examples of a level of effort that will be deemed to satisfy the special efforts requirement.[FN17] While the guidelines ***1283** do not purport to be regulatory standards or minimums,[FN18] they do suggest a commitment to an affirmative remedial program of substantial scope. The most recently issued Urban Mass Transportation Administrator's regulation (49 CFR s 609.15(b), 41 F.R. 45842 (October 18, 1976)) provides in pertinent part that:

FN17. The examples given are the following:

"1. A program for wheelchair users and semiambulatory handicapped persons that will involve the expenditure of an average annual dollar amount equivalent to a minimum of five percent of the section 5 (49 U.S.C. s 1604) apportionment to the urbanized area. These 'five percent funds' may be derived from sources other than section 5. The term 'average' permits lower expenditure years to be balanced by higher expenditure years but does not permit an initial delay in implementing projects. The term 'section 5 apportionment' refers to UMTA's formula apportionment for areas with a population of 200,000 or more and to the Governor's apportionment for areas with a population of 200,000 or more and to the Governor's apportionment for areas with a population under 200,000. Projects that qualify as local 'special efforts' for wheelchair users and other semiambulatory persons under the initial paragraphs of this advisory information would be counted in computing the five percent.

"2. Purchase of only wheelchair-accessible new fixed route equipment until one-half of the fleet is accessible, or in the alternative, provision of a substitute service that would provide comparable coverage and service levels.

"3. A system, of any design, that would as-

sure that every wheelchair user or semiambulatory person in the urbanized area would have public transportation available is requested for 10 round-trips per week at fares comparable to those which are charged on standard transit buses for trips of similar length, within the service area of the public transportation authority. The system could, for example, provide trip coupons to individuals who would then purchase the needed service." 41 F.R. 18234 (April 30, 1976).

FN18. 41 F.R. 18234 (April 30, 1976). However, the same appended material does describe some qualitative boundaries to the special efforts concept:

"Projects funded by UMTA under section 16(b)(2) (49 U.S.C. s 1612(b)(2)) may be identified as deriving from local special efforts to meet the needs of wheelchair users and semiambulatory persons only to the extent that the following four conditions are met: (1) the service and vehicles serve wheelchair users and semiambulatory persons; (2) the service meets a priority need identified in this planning process; (3) the service is not restricted to a particularized organizational or institutional clientele; and (4) any fares charged are comparable to those which are charged on standard transit buses for trips of similar length." Id.

"procurement solicitations shall provide for a bus design which permits the addition of a wheelchair accessibility option and shall require an assurance from each bidder that it offers a wheelchair accessibility option for its buses. The term 'wheelchair accessibility option' means a level change mechanism (e. g., lift or ramp), sufficient clearances to permit a wheelchair user to reach a securement location, and at least one wheelchair securement device."

Indeed, in oral argument the CTA conceded that the regulations created an affirmative duty on federal grant recipients.

Four months after the district judge's opinion, HEW issued proposed regulations implementing Section 504.[FN19] Paralleling 45 CFR s 80.3(b)(1) (ii) and (iv), the provisions explicitly mentioned by eight Justices in Lau, proposed regulations 49 CFR ss 84.4(b)(1)(ii) and (iv) specify that recipients of federal financial assistance may not

FN19. HEW's proposed regulations appear at 41 F.R. 29560-29567 (July 16, 1976) and are intended to become 45 CFR ss 84.1-84.54. Notice of Proposed Rulemaking was published at 41 F.R. 20296 (May 17, 1976). Even this early in the rulemaking process, the HEW Secretary conceded that Section 504 created individual rights:

"Thus, while we recognize that the statute creates individual rights, the statute is ambiguous as to the specific scope of these rights." Id.

"(ii) Provide a qualified handicapped person with aid, benefit, or service which is not as effective as that provided to others ;

"(iv) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage or opportunity enjoyed by others receiving an aid, benefit or service." (Emphasis supplied.)

Moreover s 84.4(b)(2) establishes that

"A recipient may not provide different or separate aid, benefits or services to handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services which are as effective as those provided to others." (Emphasis supplied.) [FN20]

FN20. Sections 84.4(b)(i) and (b)(2) were redrafted from the language appearing in the Nature of Intent of Proposed Rulemaking of May 17, 1976, because the commentators objected to the draft regulations' emphasis on different treatment. Thus "as effective as" was substituted for "comparable" in the May 17 draft. The accompanying advisory information outlined the intent of this change:

"(The new terminology) is intended to encompass the concept of equivalent as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of

> nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See ' Lau v. Nichols ', 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). The rewording of this provision is intended to emphasize that, although separate services may be required in some instances, the provision of unnecessarily separate or different services is discriminatory." 41 F.R. 29551 (July 16, 1976).

***1284** Finally, pending the adoption of a new procedural regulation consolidating all of the enforcement procedures implementing the civil rights statutes for which HEW has enforcement responsibilities,[FN21] the "procedural provisions of the title VI regulation, which may be found at 45 CFR Part 80, will be incorporated by reference into the section 504 regulations for use during the interim." 41 F.R. 29548 (July 16, 1976). The regulations thus reduce to concrete terms the abstract words of section 504.

> FN21. On April 22, 1976, HEW released an Intent to Issue Notice of Proposed Rulemaking styled "Consolidated Procedural Rules for Administration and Enforcement of Certain Civil Rights Laws and Authorities." 41 F.R. 18394 (May 3, 1976).

Taken together with the numerosity of the class,[FN22] every element of the two [FN23] concurring opinions in Lau is also satisfied under the statutory and administrative framework of the instant case. The existence of affirmative rights under Section 504 necessarily follows, for, to paraphrase Justice Douglas in Lau :

> FN22. The complaint alleges that there may be hundreds of thousands of mobility-disabled persons in the northeastern region of Illinois.

> FN23. Justice White concurred without comment in the Lau result without joining either in the opinion of the Court or in the concurring opinions authored by Justices Stewart and Blackmun.

"Under these (federal) standards there is no equality of treatment merely by providing (the handicapped) with the same facilities (as ambulatory persons) * * *; for (handicapped persons) who (can) not (gain access to such facilities) are effectively foreclosed from any meaningful (public transportation)." 414 U.S. at 566, 94 S.Ct. at 788.[FN24]

> FN24. HEW's May 17, 1976, statement of policy on interpreting Section 504 acknowledges as much:
>
> "Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination." 41 F.R. 20296 (May 17, 1976).

Cf. Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158.

PRIVATE RIGHT OF ACTION

[4][5] Having demonstrated that Lau v. Nichols is conclusive on the question of the existence of affirmative rights under Section 504 and the regulations, we now turn to a consideration whether a private cause of action may be implied to vindicate these rights. As the parties have acknowledged, Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26, sets out the four factors relevant to determining whether a private remedy is implicit in a statute not expressly providing one. They are:

"First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' (emphasis supplied) that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would ***1285** be inappropriate to

infer a cause of action based solely on federal law?" (Citations omitted.)

Applying the Cort factors here leads to the conclusion that a private cause of action must be implied from Section 504.

(1) Plaintiffs of course are among the class specifically benefited by the enactment of the statute. As demonstrated above, Section 504 establishes affirmative private rights. In particular, these rights apply to transportation barriers impeding handicapped individuals.[FN25] 29 U.S.C. s 701(11).

> FN25. Indeed, one of the principal purposes of the 1974 Rehabilitation Act Amendments was to include within Section 504 individuals who may have been unintentionally excluded from its protection by the original definition of handicapped individuals which over-emphasized employability. In the Senate Report, it was made plain that inter alia :
>
> "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in * * * transportation * * * programs." 4 U.S.Code Cong. & Admin.News, p. 6388 (1974).

[6][7] (2) While the 1973 legislative history of Section 504 is bereft of much explanation,[FN26] the legislative history of the Rehabilitation Act Amendments of 1974 [FN27] casts light on the original Congressional intent. These amendments, inter alia, redefined the term "handicapped individual" as used in Section 504 and, as clarifying amendments, have cogent significance in construing Section 504. See Red Lion Broadcasting Co., Inc. v. Federal Trade Commission, 395 U.S. 367, 380-381, 89 S.Ct. 1794, 23 L.Ed.2d 371. It is noteworthy that the Senate Report was submitted on November 26, 1974, and the Lau opinion construing Section 601 of the Civil Rights Act of 1964 was handed down on January 21 of that year and certainly known by the Senate Committee. [FN28] Indeed, the report of the Senate Labor and Public Welfare Committee notes that the

> FN26. The 1973 legislative history leaves ambiguous whether or not Section 504 is a mandatory provision. See 2 U.S.Code Cong. & Admin.News, pp. 2123, 2143 (1973).
>
> FN27. Pub.L. 93-516, 88 Stat. 1617.
>
> FN28. Lau is also referred to in the introduction to HEW's proposed regulations (41 F.R. 29551, July 16, 1976). See note 20 supra. The third-party beneficiary theory advanced by Justice Stewart in Lau (414 U.S. at 571 n. 2, 94 S.Ct. 786) and by the Fifth Circuit in Bossier Parish School Board, supra, 370 F.2d at 852, is likewise mentioned there (41 F.R. 29552, July 16, 1976).

"new definition applies to section 503, as well as to section 504, in order to avoid limiting the affirmative action obligation of a Federal contractor to only that class of persons who are eligible for vocational rehabilitation services. * * * Where applicable, section 504 is intended to include a requirement of affirmative action as well as a prohibition against discrimination." 4 U.S.Code Cong. & Admin.News, p. 6390 (1974).

The Committee continues by stating that Section 504's similarity to Section 601 of the Civil Rights Act of 1964 was not accidental:

"Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex). The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended." (4 U.S.Code Cong. & Admin.News, p. 6390 (1974)).

Further, the scope of the enforcement mechanism to result from such conscious parallelism did not escape comment:

"The language of section 504, in followig (sic) the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of ***1286** recipients of

Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of Federal financial assistance to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that Federal funds are not initially provided to those who discriminate against handicapped individuals. Such analysis would include pre-grant review procedures and a requirement for assurances of compliance with section 504. This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action." Id. at pp. 6390-6391. (Emphasis supplied.)

While the above language contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court, still it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative remedial machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts.[FN29] See Steele v. Louisville & N. R. Co., 323 U.S. 192, 206-207, 65 S.Ct. 226, 89 L.Ed. 173. In any event, under the second prong of the Cort test, there is surely an indication of legislative intent to create such a remedy and none to deny it.

> FN29. We expressly leave open as premature the question whether, after consolidated procedural enforcement regulations are issued to implement Section 504, the judicial remedy available must be limited to post-administrative remedy judicial review. In any event, the private cause of action we imply today must continue at least in the form of judicial review of administrative action. And until effective enforcement regulations are promulgated, Section 504 in its present incarnation as an independent cause of action should not be subjugated to the doctrine of exhaustion. Cf. Hardy v. Leonard, 377 F.Supp. 831 (N.D.Cal.1974); Southern Christian Leadership Conference, Inc. v. Connolly, 331 F.Supp. 940 (E.D.Mich.1971). See also Albert, Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief, 83 Yale L.J. 425, 451-456 (1974). But assuming a meaningful administrative enforcement mechanism, the private cause of action under Section 504 should be limited to a posteriori judicial review.

[8] (3) It is certainly consistent with the underlying purposes of the legislative scheme to imply such a remedy. Indeed, one of the explicitly detailed purposes of the Rehabilitation Act of 1973 was to "enforce statutory and regulatory standards and requirements regarding barrier-free construction of public facilities and study and develop solutions to existing architectural and transportation barriers impeding handicapped individuals." 29 U.S.C. s 701(11). Moreover, since a private cause of action in this case serves to enforce the uniform substantive standards laid down by the UMTA and HEW regulations, the unseemly vista of a spotty application of ad hoc remedies in lawsuits in various regions of the country is not presented here. And no objection to local implementation of these substantive standards can prevail since the nationwide Urban Mass Transportation Administrator's regulations which set out standards for meeting the needs of the handicapped in transportation only serve as a guide for the local implementation of transportation opportunities for the mobility-disabled. 41 F.R. 18234 (April 30, 1976).

(4) Affording a private remedy under Section 504 of the Rehabilitation Act of 1973 would not be the kind of suit traditionally relegated to state law in an area basically the concern of the States. In fact, both the RTA and CTA conceded below that it was the intent of Congress to deal ***1287** with the transportation needs of the handicapped on a national basis.

Because all four Cort tests are satisfied, we are reinforced in our holding that Section 504 implicitly provides a private remedy. Therefore, we need not and do not consider whether the Equal Protection Clause (together with 28 U.S.C. s 1343) and the other statutes

cited in the complaint also confer jurisdiction on the district court.

Defendants rely principally on Cannon v. University of Chicago Nos. 76-1238 and 1239, decided August 27, (7th Cir. 1976), in arguing that Section 504 does not provide for a private right of action. There a panel of this Court held that Title IX of the Education Amendments of 1972 (20 U.S.C. s 1681) does not permit a private cause of action. However, the Court noted that in contradistinction to Lau, Cannon involved only an individual plaintiff who had not exhausted her administrative remedies (slip op. 11 - 16). Here we have a huge class, and plaintiffs and amicus Urban Mass Transportation Administrator have not persuaded us that any administrative remedy is yet available to plaintiffs and their class, nor has Congress provided other means of enforcement. Furthermore, it should be noted that the Cannon opinion is not final, for the panel granted the petition for rehearing in part on November 30, 1976, and now again has the case sub judice. There HEW's most recent brief quotes legislative history of Section 504 to show that a private right of action should be inferred (Br. 15-16).

[9] Defendants and the amicus Urban Mass Transportation Administrator also rely on Bradford School Bus Transit, Inc. v. Chicago Transit Authority, 537 F.2d 943, 948 (7th Cir. 1976), in claiming that here plaintiffs must exhaust their administrative remedies before seeking judicial relief. There we applied the primary jurisdiction doctrine because the regulations specifically provided "for judicial review of administrative actions regarding school bus operations after certain procedures have been exhausted." No comparable regulations presently exist with respect to the problem at hand. There being no administrative remedy open to these plaintiffs, neither the exhaustion nor primary jurisdiction doctrine applies. Rosado v. Wyman, 397 U.S. 397, 405-406, 90 S.Ct. 1207, 25 L.Ed.2d 442.

Upon remand, defendants may of course be able to show that they are in compliance with the statutes on which plaintiffs rely and the regulations thereunder.[FN30] The affidavit filed in the district court by defendant CTA's general operations manager tends in that direction although it may already be partly obsolete in view of the Transbus developments (41 F.R. 15735, 32286-32287, 45842 (April 14, 1976; August 2, 1976; October 18, 1976)). See also notes 17-18 and accompanying text supra. Our opinion expresses no view on the ultimate merits of plaintiffs' case because the undeveloped record does not show whether RTA and CTA are following the statutes and regulations. [FN31]

FN30. Since the Urban Mass Transportation Administrator's regulations became effective on May 31, 1976, plaintiffs now challenge only projects whose funding was approved after that date. On remand, leave should be granted to plaintiffs to make post-May 31 allegations. Cf. note 5 supra.

FN31. In Lau, the opinion of the Court adverted to a contract between HEW and the San Francisco Unified School District compelling it to comply with Title VI of the Civil Rights Act of 1964 and HEW's regulations thereunder and to take any necessary measures to effectuate the contract (414 U.S. at 568-569, 94 S.Ct. 786). Through discovery on remand, plaintiffs will be able to ascertain whether any agreements between defendants and federal agencies contain equivalent terms.

In concluding, we cannot fault the district court for its dismissal order. Without the benefit of any regulations, it is difficult to perceive what relief could have been afforded at that stage. However, the Urban Mass Transportation Administrator's regulations were issued before this appeal was briefed and argued and of course apply to our deliberations. Thorpe v. Housing Authority, 393 U.S. 268, 281-282, 89 S.Ct. 518, 21 L.Ed.2d 474; United States v. Fitzgerald, 545 F.2d 578, 581 (7th Cir. 1976). Since the plaintiffs may now be able to ***1288** show that they are entitled to remedial action, the case must be returned to the district court for appropriate further proceedings. If effective by then, consideration will also have to be given to HEW's proposed regulations (note 19 supra).

Vacated and remanded.[FN32]

FN32. On remand, leave should be granted to amend the complaint to add the HEW Secretary, the Secretary of Transportation and the Urban Mass Transportation Administrator as defendants and Section 165 of the Federal-Aid Highway Act of 1973, as

> amended (88 Stat. 2283) as one of the statutes relied upon, as prayed in plaintiffs' briefs (Br. 12 and Reply Br. 6) Such amendments will not unfairly surprise the litigants, for the CTA below and the district court discussed the federal official point, as did the amicus Urban Mass Transportation Administrator, and the Federal-Aid Highway Act was first discussed in RTA's briefs below and again in the district court's opinion.

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Lloyd v. Regional Transp. Authority
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Supreme Court of the United States.
MEYER
v.
STATE OF NEBRASKA.

No. 325.
Argued Feb. 23, 1923.
Decided June 4, 1923.

In Error to the Supreme Court of the State of Nebraska.

Robert T. Meyer was convicted of an offense, and his conviction was affirmed by the Supreme Court of Nebraska (107 Neb. 657, 187 N. W. 100), and he brings error. Reversed and remanded.

West Headnotes

[1] Constitutional Law 92 3873

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3873 k. Liberties and Liberty Interests. Most Cited Cases
(Formerly 92k255(1))

Under U.S.C.A. Const.Amend. 14, providing that no state shall deprive any person of liberty without due process of law, "liberty" denotes, not merely freedom from bodily restraint, but also the right of the individual to contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

[2] Constitutional Law 92 3876

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3876 k. Arbitrariness. Most Cited Cases
(Formerly 92k255(1))

Constitutional Law 92 3877

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3877 k. Reasonableness, Rationality, and Relationship to Object. Most Cited Cases
(Formerly 92k255(1))

The liberty protected by U.S.C.A. Const.Amend. 14, may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.

[3] Constitutional Law 92 2484

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2484 k. Police Power Questions. Most Cited Cases
(Formerly 92k70.3(8))

Determination by the Legislature of what constitutes a proper exercise of the police power is not final or conclusive, but subject to supervision by the courts.

[4] Constitutional Law 92 4207

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications

92XXVII(G)8 Education
92k4204 Students
92k4207 k. Academics, Curriculum, and Instruction. Most Cited Cases
(Formerly 92k255(2))

Constitutional Law 92 4391

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)18 Families and Children
92k4390 Parent and Child Relationship
92k4391 k. In General. Most Cited Cases
(Formerly 92k255(2))

Act Neb. April 9, 1919, Laws 1919, c. 249, prohibiting the teaching of any subject in any language other than the English language in any school, or the teaching of languages other than the English language below the eighth grade, is unconstitutional, as arbitrary and without reasonable relation to any end within the competency of the state, and as depriving teachers and parents of liberty without due process of law, in violation of U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 4207

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)8 Education
92k4204 Students
92k4207 k. Academics, Curriculum, and Instruction. Most Cited Cases
(Formerly 92k278.5(1))

Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. Most Cited Cases
(Formerly 92k278.5(1))

Act Neb. April 9, 1919, Laws 1919, c. 249, prohibiting the teaching of any subject in any language other than the English language, or the teaching of languages other than the English language to pupils who have not passed the eighth grade, cannot be sustained as designed to protect the health of children, by limiting their mental activities, as it leaves complete freedom as to matters other than modern languages.

Schools 345 164

345 Schools
345II Public Schools
345II(L) Pupils
345k164 k. Curriculum and Courses of Study. Most Cited Cases

Act Neb. April 9, 1919, Laws 1919, c. 249, prohibiting the teaching of any subject in any language other than the English language in any school, or the teaching of languages other than the English language below the eighth grade, is unconstitutional.

****625 *391** Messrs. A. F. Mullen, of Omaha, Neb., C. E. Sandall, of York, Neb., and I. L. Albert, of Columbus, Neb., for plaintiff in error.

***393** Messrs. Mason Wheeler, of Lincoln, Neb., and O. S. Spillman, of Pierce, Neb., for the State of Nebraska.

****626 *396** Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained ***397** and successfully passed the eighth grade. The information is based upon 'An act relating to the teaching of foreign languages in the state of Nebraska,' approved April 9, 1919 (Laws 1919, c. 249), which follows:

'Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

'Sec. 2. Languages, other than the English lan-

guage, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

'Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100), or be confined in the county jail for any period not exceeding thirty days for each offense.

'Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval.'

The Supreme Court of the state affirmed the judgment of conviction. 107 Neb. 657, 187 N. W. 100. It declared the offense charged and established was 'the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade,' in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

'The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting for ***398** eigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. Pohl v. State, 102 Ohio St. 474, 132 N. E. 20; State v. Bartels, 191 Iowa, 1060, 181 N. W. 508.

'It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The Legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage. ***399** Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence.'

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment:

'No state * * * shall deprive any person of life, liberty or property without due process of law.'

[1][2][3] While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as

essential to the orderly pursuit of happiness by free men. Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394; Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; ****627**Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455; Allegeyer v. Louisiana, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; Lochner v. New York, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133; Twining v. New Jersey 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97; Chicago, B. & Q. R. R. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973; New York Life Ins. Co. v. Dodge, 246 U. S. 357, 38 Sup. Ct. 337, 62 L. Ed. 772, Ann. Cas. 1918E, 593; Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254; Adkins v. Children's Hospital (April 9, 1923), 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785; Wyeth v. Cambridge Board of Health, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, 23 L. R. A. (N. S.) 147. The established doctrine is that this liberty may not be interfered ***400** with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 385.

[4] The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares:

'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of ***401** the act.' Nebraska District of Evangelical Lutheran Synod, etc., v. McKelvie et al. (Neb.) 187 N. W. 927 (April 19, 1922). Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it

would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution-a desirable end cannot be promoted by prohibited means.

For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide:

'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, ***402** nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.'

In order to submerge the individual and develop ideal citizens, Sparta assembled the ****628** males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any Legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. ***403**Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336, L. R. A. 1917F, 1163, Ann. Cas. 1917D, 973, pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

[5] As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes and Mr. Justice Sutherland, dissent.

U.S. 1923
Meyer v. Nebraska
262 U.S. 390, 43 S.Ct. 625, 29 A.L.R. 1446, 67 L.Ed. 1042

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Supreme Court of the United States
Tommy OLMSTEAD, Commissioner, Georgia Department of Human Resources, et al., Petitioners,
v.
L.C., by Jonathan ZIMRING, Guardian Ad Litem and Next Friend, et al.

No. 98-536.
Argued April 21, 1999.
Decided June 22, 1999.

Mentally disabled patients brought suit against state, challenging their confinement in segregated environment. The United States District Court for the Northern District of Georgia, Marvin H. Shoob, J., 1997 WL 148674, granted partial summary judgment to patients. State appealed. The United States Court of Appeals for the Eleventh Circuit, 138 F.3d 893, affirmed and remanded. Certiorari was granted. The Supreme Court, Justice Ginsburg, held that: (1) patients were qualified for community-based treatment, but (2) state could take into account the available resources in determining whether patients were entitled to immediate community placement.

Affirmed in part, vacated in part, and remanded.

Justice Stevens filed opinion concurring in part and concurring in the judgment.

Justice Kennedy filed opinion concurring in the judgment in which Justice Breyer joined in part.

Justice Thomas filed dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

West Headnotes

[1] Federal Courts 170B 13.10

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.10 k. Civil Rights. Most Cited Cases

Challenge brought by mentally disabled individuals under public services portion of ADA, in which they sought placement in community care residential programs, was not moot when case was considered by Supreme Court, even though both individuals were receiving treatment in community-based programs at that time; in view of multiple institutional placements the individuals had received, controversy was capable of repetition, yet evading review. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[2] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))

Mental Health 257A 51.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.1 k. In General. Most Cited Cases

Under public services portion of ADA, states are required to provide community-based treatment for persons with mental disabilities when state's treatment professionals determine that such placement is appropriate, affected persons do not oppose such treatment, and placement can be reasonably accommodated, taking into account the resources available to state and the needs of others with mental disabilities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[3] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))

Undue institutionalization of persons with mental disabilities qualifies as "discrimination" by reason of disability under public services portion of ADA. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[4] Statutes 361 219(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(1) k. In General. Most Cited Cases

Well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

[5] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))

Mental Health 257A 51.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.1 k. In General. Most Cited Cases

State generally may rely on the reasonable assessments of its own professionals in determining whether an individual with mental disabilities meets the essential eligibility requirements for habilitation in a community-based program under public services portion of ADA; absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(d).

[6] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))

Mental Health 257A 51.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.1 k. In General. Most Cited Cases

Public services portion of ADA does not impose a federal requirement that community-based treatment be imposed on mentally disabled patients who do not desire it. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(e)(1).

[7] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))

Mental Health 257A 51.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.1 k. In General. Most Cited Cases

Under public services portion of ADA, mentally disabled individuals were "qualified" for noninstitutional care, where state's own professionals determined that community-based treatment would be appropriate, and neither individual opposed such treatment. Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132.

[8] Civil Rights 78 1448

78 Civil Rights
78III Federal Remedies in General
78k1448 k. Judgment and Relief in General. Most Cited Cases
(Formerly 78k261)

Mental Health 257A 51.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.1 k. In General. Most Cited Cases

In determining whether individual with mental disabilities is entitled to immediate placement in community-based treatment program under public services portion of ADA, state may show that, in allocation of available resources, immediate relief for individual would be inequitable, given responsibility the state has undertaken for care and treatment of large and diverse population of persons with mental disabilities. (Per Justice Ginsburg, with three Justices concurring and two Justices concurring in the judgment.) Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

[9] Civil Rights 78 1053

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1051 Public Services, Programs, and Benefits
78k1053 k. Discrimination by Reason of Handicap, Disability, or Illness. Most Cited Cases
(Formerly 78k107(1))

Civil Rights 78 1054

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1054 k. Public Facilities. Most Cited Cases
(Formerly 78k107(1))

Mental Health 257A 51.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.1 k. In General. Most Cited Cases

If state were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by state's endeavors to keep its institutions fully populated, state would meet the reasonable-modifications standard of regulations promulgated under public services portion of ADA. (Per Justice Ginsburg, with three Justices concurring and two Justices concurring in the judgment.) Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132; 28 C.F.R. § 35.130(b)(7).

*****2177 *581** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In the Americans with Disabilities Act of 1990(ADA), Congress described the isolation and segregation of individuals with disabilities as a serious and pervasive form of discrimination. 42 U.S.C. §§ 12101(a)(2), (5). Title II of the ADA, which proscribes discrimination in the provision of public services, specifies, *inter alia*, that no qualified individual with a disability shall, "by reason of such disability," be excluded from participation in, or be denied the benefits of, a public entity's services, programs, or activities. § 12132. Congress instructed the Attorney General to issue regulations implementing Title II's discrimination proscription. See § 12134(a). One such regulation, known as the "integration regulation," requires a "public entity [to] administer ... programs ... in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d). A further prescription, here called the "reasonable-modifications regulation," requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," but does not require measures that would "fundamentally alter" the nature of the entity's programs. § 35.130(b)(7).

Respondents L.C. and E.W. are mentally retarded women; L.C. has also been diagnosed with schizophrenia, and E. W., with a personality disorder. Both women were voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where they were confined for treatment in a psychiatric unit. Although their treatment professionals eventually concluded that each of the women could be cared for appropriately in a community-based****2178** program, the women remained institutionalized at GRH. Seeking placement in community care, L.C. filed this suit against petitioner state officials (collectively, the State) under 42 U.S.C. § 1983 and Title II. She alleged that the State violated Title II in failing to place her in a community-based program once her treating professionals determined that such placement was appropriate. E.W. intervened, stating an identical claim. The District Court granted partial summary judgment for the women, ordering their ***582** placement in an appropriate community-based treatment program. The court rejected the State's argument that inadequate funding, not discrimination against L.C. and E.W. "by reason of [their] disabilit[ies]," accounted for their retention at GRH. Under Title II, the court concluded, unnecessary institutional segregation constitutes discrimination *per se*, which cannot be justified by a lack of funding. The court also rejected the State's defense that requiring immediate transfers in such cases would "fundamentally alter" the State's programs. The Eleventh Circuit affirmed the District Court's judgment, but remanded for reassessment of the State's cost-based defense. The District Court had left virtually no room for such a defense. The appeals court read the statute and regulations to allow the defense, but only in tightly limited circumstances. Accordingly, the Eleventh Circuit instructed the District Court to consider, as a key factor, whether the additional cost for treatment of L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget.

Held: The judgment is affirmed in part and vacated in part, and the case is remanded.

138 F.3d 893, affirmed in part, vacated in part, and remanded.

Justice GINSBURG delivered the opinion of the Court with respect to Parts I, II, and III-A, concluding that, under Title II of the ADA, States are required to place persons with mental disabilities in community settings rather than in institutions when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. Pp. 2185-2188.

(a) The integration and reasonable-modifications regulations issued by the Attorney General rest on two key determinations: (1) Unjustified placement or retention of persons in institutions severely limits their exposure to the outside community, and therefore constitutes a form of discrimination based on disability prohibited by Title II, and (2) qualifying their obligation to avoid unjustified isolation of individuals with disabilities, States can resist modifications that would fundamentally alter the nature of their services and programs. The Eleventh Circuit essentially upheld the Attorney General's construction of the ADA. This Court affirms the Court of Appeals decision in substantial part. P. 2185.

(b) Undue institutionalization qualifies as dis-

crimination "by reason of ... disability." The Department of Justice has consistently advocated that it does. Because the Department is the agency directed ***583** by Congress to issue Title II regulations, its views warrant respect. This Court need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694, is in order; the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *E.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540. According to the State, L.C. and E.W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities, nor were they subjected to "discrimination," for they identified no comparison class of similarly situated individuals given preferential treatment. In rejecting these positions, the Court recognizes that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA. The ADA stepped up ****2179** earlier efforts in the Developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973 to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The ADA both requires all public entities to refrain from discrimination, see § 12132, and specifically identifies unjustified "segregation" of persons with disabilities as a "for[m] of discrimination," see §§ 12101(a)(2), 12101(a)(5). The identification of unjustified segregation as discrimination reflects two evident judgments: Institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life, cf., *e.g.*, *Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556; and institutional confinement severely diminishes individuals' everyday life activities. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. The State correctly uses the past tense to frame its argument that, despite Congress' ADA findings, the Medicaid statute "reflected" a congressional policy preference for institutional treatment over treatment in the community. Since 1981, Medicaid has in fact provided funding for state-run home and community-based care through a waiver program. This Court emphasizes that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community settings. Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. In this case, however, it is not genuinely disputed that L.C. and E.W. are individuals "qualified" ***584** for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L.C. and E. W., and neither woman opposed such treatment. Pp. 2185-2188.

Justice GINSBURG, joined by Justice O'CONNOR, Justice SOUTER, and Justice BREYER, concluded in Part III-B that the State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. If, as the Eleventh Circuit indicated, the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities. The ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E.W. Some individuals, like L.C. and E.W. in prior years, may need institutional care from time to time to stabilize acute psychiatric symptoms. For others, no placement outside the institution may ever be appropriate. To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the funda-

mental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications ****2180** standard would be met. In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions. The case is remanded for further consideration of the appropriate relief, given the range of the State's facilities for the care of persons with diverse mental disabilities, and its obligation to administer services with an even hand. Pp. 2188-2190.

***585** Justice STEVENS would affirm the judgment of the Court of Appeals, but because there are not five votes for that disposition, joined the Court's judgment and Parts I, II, and III-A of its opinion. P. 2190.

Justice KENNEDY concluded that the case must be remanded for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U.S.C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed. On the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. Thus, respondents could demonstrate discrimination by showing that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities). This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. Thus far, respondents have identified no class of similarly situated individuals, let alone shown them to have been given preferential treatment. Without additional information, the Court cannot address the issue in the way the statute demands. As a consequence, the partial summary judgment granted respondents ought not to be sustained. In addition, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. The lower courts should determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be given leave to replead and to introduce evidence and argument along the lines suggested. Pp. 2192-2194.

GINSBURG, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-A, in which STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined, and an opinion***586** with respect to Part III-B, in which O'CONNOR, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 2190. KENNEDY, J., filed an opinion concurring in the judgment, in which BREYER, J., joined as to Part I, *post,* p. 2190. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post,* p. 2194.
Beverly P. Downing, for petitioners.

Michael Gottesman, for respondent.

Irving L. Gornstein, Washington, DC, for United States as *amicus curiae,* by special leave of the Court.

For U.S. Supreme Court briefs, see:1999 WL 54623 (Pet.Brief)1999 WL 144128 (Resp.Brief)1999 WL 220130 (Reply.Brief)

****2181 *587** Justice GINSBURG announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-A, and an opinion with respect to Part III-B, in which Justice O'CONNOR, Justice SOUTER, and Justice BREYER join.

This case concerns the proper construction of the

anti-discrimination provision contained in the public services portion (Title II) of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U.S.C. § 12132. Specifically, we confront the question whether the proscription of discrimination may require placement of persons with mental disabilities in community settings rather than in institutions. The answer, we hold, is a qualified yes. Such action is in order when the State's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. In so ruling, we affirm the decision of the Eleventh Circuit in substantial part. We remand the case, however, for further consideration of the appropriate relief, given the range of facilities the State maintains for the care and treatment of persons with diverse mental disabilities, and its obligation to administer services with an even hand.

***588** I

This case, as it comes to us, presents no constitutional question. The complaints filed by plaintiffs-respondents L.C. and E.W. did include such an issue; L.C. and E.W. alleged that defendants-petitioners, Georgia health care officials, failed to afford them minimally adequate care and freedom from undue restraint, in violation of their rights under the Due Process Clause of the Fourteenth Amendment. See Complaint ¶¶ 87-91; Intervenor's Complaint ¶¶ 30-34. But neither the District Court nor the Court of Appeals reached those Fourteenth Amendment claims. See Civ. No. 1:95-cv-1210-MHS (ND Ga., Mar. 26, 1997), pp. 5-6, 11-13, App. to Pet. for Cert. 34a-35a, 40a-41a; 138 F.3d 893, 895, and n. 3 (C.A.11 1998). Instead, the courts below resolved the case solely on statutory grounds. Our review is similarly confined. Cf. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Texas city's requirement of special use permit for operation of group home for mentally retarded, when other care and multiple-dwelling facilities were freely permitted, lacked rational basis and therefore violated Equal Protection Clause of Fourteenth Amendment). Mindful that it is a statute we are construing, we set out first the legislative and regulatory prescriptions on which the case turns.

In the opening provisions of the ADA, Congress stated findings applicable to the statute in all its parts. Most relevant to this case, Congress determined that

> "(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> "(3) discrimination against individuals with disabilities persists in such critical areas as ... institutionalization ...;
>
> . . . . .
>
> ***589** "(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, ... failure to make modifications to existing facilities and practices, ... [and] segregation...." 42 U.S.C. §§ 12101(a)(2), (3), (5).[FN1]

FN1. The ADA, enacted in 1990, is the Federal Government's most recent and extensive endeavor to address discrimination against persons with disabilities. Earlier legislative efforts included the Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. § 701 *et seq.* (1976 ed.), and the Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 486, 42 U.S.C. § 6001 *et seq.* (1976 ed.), enacted in 1975. In the ADA, Congress for the first time referred expressly to "segregation" of persons with disabilities as a "for[m] of discrimination," and to discrimination that persists in the area of "institutionalization." §§ 12101(a)(2), (3), (5).

Congress then set forth prohibitions against discrimination in employment (Title I, §§ 12111-12117), public services furnished by governmental entities (Title II, §§ 12131-****2182** 12165), and public accommodations provided by private entities (Title III, §§ 12181-12189). The statute as a whole is intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." § 12101(b)(1).[FN2]

FN2. The ADA defines "disability," "with

respect to an individual," as

> "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> "(B) a record of such an impairment; or
>
> "(C) being regarded as having such an impairment." § 12102(2).

There is no dispute that L.C. and E.W. are disabled within the meaning of the ADA.

This case concerns Title II, the public services portion of the ADA.[FN3] The provision of Title II centrally at issue reads:

> FN3. In addition to the provisions set out in Part A governing public services generally, see §§ 12131-12134, Title II contains in Part B a host of provisions governing public transportation services, see §§ 12141-12165.

"Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such ***590** disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." § 201, as set forth in 42 U.S.C. § 12132.

Title II's definition section states that "public entity" includes "any State or local government," and "any department, agency, [or] special purpose district." §§ 12131(1)(A), (B). The same section defines "qualified individual with a disability" as

"an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

On redress for violations of § 12132's discrimination prohibition, Congress referred to remedies available under § 505 of the Rehabilitation Act of 1973, 92 Stat. 2982, 29 U.S.C. § 794a. See § 203, as set forth in 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [§ 505 of the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").[FN4]

> FN4. Section 505 of the Rehabilitation Act incorporates the remedies, rights, and procedures set forth in Title VI of the Civil Rights Act of 1964 for violations of § 504 of the Rehabilitation Act. See 29 U.S.C. § 794a(a)(2). Title VI, in turn, directs each federal department authorized to extend financial assistance to any department or agency of a State to issue rules and regulations consistent with achievement of the objectives of the statute authorizing financial assistance. See 78 Stat. 252, 42 U.S.C. § 2000d-1. Compliance with such requirements may be effected by the termination or denial of federal funds, or "by any other means authorized by law." *Ibid.* Remedies both at law and in equity are available for violations of the statute. See § 2000d-7(a)(2).

591** Congress instructed the Attorney General to issue regulations implementing provisions of Title II, including § 12132's discrimination proscription. See § 204, as set forth in § 12134(a) ("[T]he Attorney General shall promulgate regulations in an accessible format that implement this part.").[FN5] The Attorney*2183** General's regulations, Congress further directed, "shall be consistent with this chapter and with the coordination regulations ... applicable to recipients of Federal financial assistance under [§ 504 of the Rehabilitation Act]." § 204, as set forth in 42 U.S.C. § 12134(b). One of the § 504 regulations requires recipients of federal funds to "administer programs and activities in the most integrated ***592** setting appropriate to the needs of qualified handicapped persons." 28 CFR § 41.51(d) (1998).

> FN5. Congress directed the Secretary of Transportation to issue regulations implementing the portion of Title II concerning public transportation. See 42 U.S.C. §§ 12143(b), 12149, 12164. As stated in the regulations, a person alleging discrimination on the basis of disability in violation of Title II may seek to enforce its provisions by

commencing a private lawsuit, or by filing a complaint with (a) a federal agency that provides funding to the public entity that is the subject of the complaint, (b) the Department of Justice for referral to an appropriate agency, or (c) one of eight federal agencies responsible for investigating complaints arising under Title II: the Department of Agriculture, the Department of Education, the Department of Health and Human Services, the Department of Housing and Urban Development, the Department of the Interior, the Department of Justice, the Department of Labor, and the Department of Transportation. See 28 CFR §§ 35.170(c), 35.172(b), 35.190(b) (1998).

The ADA contains several other provisions allocating regulatory and enforcement responsibility. Congress instructed the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing Title I, see 42 U.S.C. § 12116; the EEOC, the Attorney General, and persons alleging discrimination on the basis of disability in violation of Title I may enforce its provisions, see § 12117(a). Congress similarly instructed the Secretary of Transportation and the Attorney General to issue regulations implementing provisions of Title III, see §§ 12186(a)(1), (b); the Attorney General and persons alleging discrimination on the basis of disability in violation of Title III may enforce its provisions, see §§ 12188(a)(1), (b). Each federal agency responsible for ADA implementation may render technical assistance to affected individuals and institutions with respect to provisions of the ADA for which the agency has responsibility. See § 12206(c)(1).

As Congress instructed, the Attorney General issued Title II regulations, see 28 CFR pt. 35 (1998), including one modeled on the § 504 regulation just quoted; called the "integration regulation," it reads:

"A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 CFR § 35.130(d) (1998).

The preamble to the Attorney General's Title II regulations defines "the most integrated setting appropriate to the needs of qualified individuals with disabilities" to mean "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 CFR pt. 35, App. A, p. 450 (1998). Another regulation requires public entities to "make reasonable modifications" to avoid "discrimination on the basis of disability," unless those modifications would entail a "fundamenta[l] alter [ation]"; called here the "reasonable-modifications regulation," it provides:

"A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998).

We recite these regulations with the caveat that we do not here determine their validity. While the parties differ on the proper construction and enforcement of the regulations, we do not understand petitioners to challenge the regulatory formulations themselves as outside the congressional authorization. See Brief for Petitioners 16-17, 36, 40-41; ***593** Reply Brief 15-16 (challenging the Attorney General's interpretation of the integration regulation).

II

With the key legislative provisions in full view, we summarize the facts underlying this dispute. Respondents L.C. and E.W. are mentally retarded women; L.C. has also been diagnosed with schizophrenia, and E.W. with a personality disorder. Both women have a history of treatment in institutional settings. In May 1992, L.C. was voluntarily admitted to Georgia Regional Hospital at Atlanta (GRH), where she was confined for treatment in a psychiatric unit. By May 1993, her psychiatric condition had stabilized, and L. C.'s treatment team at GRH agreed that her needs could be met appropriately in one of the community-based programs the State supported. Despite this evaluation, L.C. remained institutionalized until February 1996, when the State placed her in a community-based treatment program.

E.W. was voluntarily admitted to GRH in Feb-

ruary 1995; like L.C., E.W. was confined for treatment in a psychiatric unit. In March 1995, GRH sought to discharge E.W. to a homeless shelter, but abandoned that plan after her attorney filed an administrative complaint. By 1996, E.W.'s treating psychiatrist concluded that she could be treated appropriately in a community-based setting. She nonetheless remained institutionalized until a few months after the District Court issued its judgment in this case in 1997.

[1] In May 1995, when she was still institutionalized at GRH, L.C. filed suit in the United States District Court for the Northern District of Georgia, challenging her continued confinement in a segregated environment.****2184** Her complaint invoked 42 U.S.C. § 1983 and provisions of the ADA, §§ 12131-12134, and named as defendants, now petitioners, the Commissioner of the Georgia Department of Human Resources, the Superintendent of GRH, and the Executive Director of the Fulton County Regional Board (collectively, ***594** the State). L.C. alleged that the State's failure to place her in a community-based program, once her treating professionals determined that such placement was appropriate, violated, *inter alia*, Title II of the ADA. L. C.'s pleading requested, among other things, that the State place her in a community care residential program, and that she receive treatment with the ultimate goal of integrating her into the mainstream of society. E.W. intervened in the action, stating an identical claim. [FN6]

> FN6. L.C. and E.W. are currently receiving treatment in community-based programs. Nevertheless, the case is not moot. As the District Court and Court of Appeals explained, in view of the multiple institutional placements L.C. and E.W. have experienced, the controversy they brought to court is "capable of repetition, yet evading review." No. 1:95-cv-1210-MHS (ND Ga., Mar. 26, 1997), p. 6, App. to Pet. for Cert. 35a (internal quotation marks omitted); see 138 F.3d 893, 895, n. 2 (C.A.11 1998) (citing *Honig v. Doe*, 484 U.S. 305, 318-323, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988), and *Vitek v. Jones*, 445 U.S. 480, 486-487, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980)).

The District Court granted partial summary judgment in favor of L.C. and E.W. See App. to Pet. for Cert. 31a-42a. The court held that the State's failure to place L.C. and E.W. in an appropriate community-based treatment program violated Title II of the ADA. See *id.*, at 39a, 41a. In so ruling, the court rejected the State's argument that inadequate funding, not discrimination against L.C. and E.W. "by reason of" their disabilities, accounted for their retention at GRH. Under Title II, the court concluded, "unnecessary institutional segregation of the disabled constitutes discrimination *per se*, which cannot be justified by a lack of funding." *Id.*, at 37a.

In addition to contending that L.C. and E.W. had not shown discrimination "by reason of [their] disabilit[ies]," the State resisted court intervention on the ground that requiring immediate transfers in cases of this order would "fundamentally alter" the State's activity. The State reasserted that it was already using all available funds to provide services to other persons with disabilities. See *id.*, at 38a. Rejecting***595** the State's "fundamental alteration" defense, the court observed that existing state programs provided community-based treatment of the kind for which L.C. and E.W. qualified, and that the State could "provide services to plaintiffs in the community at considerably *less* cost than is required to maintain them in an institution." *Id.*, at 39a.

The Court of Appeals for the Eleventh Circuit affirmed the judgment of the District Court, but remanded for reassessment of the State's cost-based defense. See 138 F.3d, at 905. As the appeals court read the statute and regulations: When "a disabled individual's treating professionals find that a community-based placement is appropriate for that individual, the ADA imposes a duty to provide treatment in a community setting-the most integrated setting appropriate to that patient's needs"; "[w]here there is no such finding [by the treating professionals], nothing in the ADA requires the deinstitutionalization of th[e] patient." *Id.*, at 902.

The Court of Appeals recognized that the State's duty to provide integrated services "is not absolute"; under the Attorney General's Title II regulation, "reasonable modifications" were required of the State, but fundamental alterations were not demanded. *Id.*, at 904. The appeals court thought it clear, however, that "Congress wanted to permit a cost defense only in the most limited of circumstances." *Id.*, at 902. In conclusion, the court stated that a cost justification would fail "[u]nless the State can prove that requiring it to

[expend additional funds in order to provide L.C. and E.W. with integrated services] would be so unreasonable given the demands of the State's mental health budget that it would fundamentally alter the service [the State] provides." *Id.*, at 905. Because it appeared that the District Court had entirely ruled out a "lack of funding" justification, see App. to Pet. for Cert. 37a, the appeals court remanded, repeating that the District Court should consider, among other ****2185** things, "whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable***596** given the demands of the State's mental health budget." 138 F.3d, at 905.[FN7]

FN7. After this Court granted certiorari, the District Court issued a decision on remand rejecting the State's fundamental-alteration defense. See 1:95-cv-1210-MHS (ND Ga., Jan. 29, 1999), p. 1. The court concluded that the annual cost to the State of providing community-based treatment to L.C. and E.W. was not unreasonable in relation to the State's overall mental health budget. See *id.*, at 5. In reaching that judgment, the District Court first declared "irrelevant" the potential impact of its decision beyond L.C. and E.W. 1:95-cv-1210-MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177. The District Court's decision on remand is now pending appeal before the Eleventh Circuit.

We granted certiorari in view of the importance of the question presented to the States and affected individuals. See 525 U.S. 1054, 119 S.Ct. 617, 142 L.Ed.2d 556 (1998).[FN8]

FN8. Twenty-two States and the Territory of Guam joined a brief urging that certiorari be granted. Ten of those States joined a brief in support of petitioners on the merits.

III

Endeavoring to carry out Congress' instruction to issue regulations implementing Title II, the Attorney General, in the integration and reasonable-modifications regulations, see *supra*, at 2182-2183, made two key determinations. The first concerned the scope of the ADA's discrimination proscription, 42 U.S.C. § 12132; the second concerned the obligation of the States to counter discrimination. As to the first, the Attorney General concluded that unjustified placement or retention of persons in institutions, severely limiting their exposure to the outside community, constitutes a form of discrimination based on disability prohibited by Title II. See 28 CFR § 35.130(d) (1998) ("A public entity shall administer services ... in the most integrated setting appropriate to the needs of qualified individuals with disabilities."); Brief for United States as *Amicus Curiae* in *Helen L. v. DiDario*, No. 94-1243 (C.A.3 1994), pp. 8, 15-16 (unnecessary segregation of persons with disabilities constitutes a form of discrimination prohibited by the ADA and the integration ***597** regulation). Regarding the States' obligation to avoid unjustified isolation of individuals with disabilities, the Attorney General provided that States could resist modifications that "would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998).

The Court of Appeals essentially upheld the Attorney General's construction of the ADA. As just recounted, see *supra*, at 2184-2185, the appeals court ruled that the unjustified institutionalization of persons with mental disabilities violated Title II; the court then remanded with instructions to measure the cost of caring for L.C. and E.W. in a community-based facility against the State's mental health budget.

[2] We affirm the Court of Appeals' decision in substantial part. Unjustified isolation, we hold, is properly regarded as discrimination based on disability. But we recognize, as well, the States' need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States' obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals' remand instruction was unduly restrictive. In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.

A

[3][4] We examine first whether, as the Eleventh Circuit held, undue institutionalization qualifies as discrimination "by reason of ... disability." The Department of Justice has consistently advocated that it does.[FN9] Because****2186** the Department ***598** is the agency directed by Congress to issue regulations im-

plementing Title II, see *supra,* at 2182-2183, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is in order; "[i]t is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *Bragdon v. Abbott*, 524 U.S. 624, 642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)).

> FN9. See Brief for United States in *Halderman v. Pennhurst State School and Hospital*, Nos. 78-1490, 78-1564, 78-1602 (CA3 1978), p. 45 ("[I]nstitutionalization result[ing] in separation of mentally retarded persons for no permissible reason ... is 'discrimination,' and a violation of Section 504 [of the Rehabilitation Act] if it is supported by federal funds."); Brief for United States in *Halderman v. Pennhurst State School and Hospital*, Nos. 78-1490, 78-1564, 78-1602 (CA3 1981), p. 27 ("Pennsylvania violates Section 504 by indiscriminately subjecting handicapped persons to [an institution] without first making an individual reasoned professional judgment as to the appropriate placement for each such person among all available alternatives."); Brief for United States as *Amicus Curiae* in *Helen L. v. DiDario*, 46 F.3d 325, 335 (C.A.3 1994), ("Both the Section 504 coordination regulations and the rest of the ADA make clear that the unnecessary segregation of individuals with disabilities in the provision of public services is itself a form of discrimination within the meaning of those statutes."); *id.*, at 337-339.

The State argues that L.C. and E.W. encountered no discrimination "by reason of" their disabilities because they were not denied community placement on account of those disabilities. See Brief for Petitioners 20. Nor were they subjected to "discrimination," the State contends, because " 'discrimination' necessarily requires uneven treatment of similarly situated individuals," and L.C. and E.W. had identified no comparison class, *i.e.*, no similarly situated individuals given preferential treatment. *Id.*, at 21. We are satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA.[FN10]

> FN10. The dissent is driven by the notion that "this Court has never endorsed an interpretation of the term 'discrimination' that encompassed disparate treatment among members of the *same* protected class," *post,* at 2194 (opinion of THOMAS, J.), that "[o]ur decisions construing various statutory prohibitions against 'discrimination' have not wavered from this path," *post,* at 2194, and that "a plaintiff cannot prove 'discrimination' by demonstrating that one member of a particular protected group has been favored over another member of that same group," *post,* at 2195. The dissent is incorrect as a matter of precedent and logic. See *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996) (The Age Discrimination in Employment Act of 1967 "does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older. The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*."); cf. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 76, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) ("[W]orkplace harassment can violate Title VII's prohibition against 'discriminat[ion] ... because of ... sex,' 42 U.S.C. § 2000e-2(a)(1), when the harasser and the harassed employee are of the same sex."); *Jefferies v. Harris County Community Action Assn.*, 615 F.2d 1025, 1032 (C.A.5 1980) ("[D]iscrimination against black females can exist even in the absence of discrimination against black men or white women.").

***599** The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living. The Developmentally Disabled Assistance and Bill of Rights Act, a 1975 measure, stated in aspirational terms that "[t]he treatment, services, and habilitation

for a person with developmental disabilities ... *should be* provided in the setting that is least restrictive of the person's personal liberty." 89 Stat. 502, 42 U.S.C. § 6010(2) (1976 ed.) (emphasis added); see also *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 24, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) (concluding that the § 6010 provisions "were intended to be hortatory, not mandatory"). In a related legislative endeavor, the Rehabilitation Act of 1973, Congress used mandatory language to proscribe discrimination against persons with disabilities. See 87 Stat. 394, as amended, 29 U.S.C. § 794 (1976 ed.) ("No otherwise qualified individual with a disability in the United States ... *shall*, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or ****2187** be subjected to discrimination under any program or activity receiving Federal financial***600** assistance." (Emphasis added.)) Ultimately, in the ADA, enacted in 1990, Congress not only required all public entities to refrain from discrimination, see 42 U.S.C. § 12132; additionally, in findings applicable to the entire statute, Congress explicitly identified unjustified "segregation" of persons with disabilities as a "for[m] of discrimination." See § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including ... segregation").[FN11]

FN11. Unlike the ADA, § 504 of the Rehabilitation Act contains no express recognition that isolation or segregation of persons with disabilities is a form of discrimination. Section 504's discrimination proscription, a single sentence attached to vocational rehabilitation legislation, has yielded divergent court interpretations. See Brief for United States as *Amicus Curiae* 23-25.

Recognition that unjustified institutional isolation of persons with disabilities is a form of discrimination reflects two evident judgments. First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life. Cf. *Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) ("There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action."); *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (" 'In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' ") (quoting ***601***Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (C.A.7 1971)). Second, confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. See Brief for American Psychiatric Association et al. as *Amici Curiae* 20-22. Dissimilar treatment correspondingly exists in this key respect: In order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice. See Brief for United States as *Amicus Curiae* 6-7, 17.

The State urges that, whatever Congress may have stated as its findings in the ADA, the Medicaid statute "reflected a congressional policy preference for treatment in the institution over treatment in the community." Brief for Petitioners 31. The State correctly used the past tense. Since 1981, Medicaid has provided funding for state-run home and community-based care through a waiver program. See 95 Stat. 812-813, as amended, 42 U.S.C. § 1396n(c); Brief for United States as *Amicus Curiae* 20-21.[FN12] Indeed, the United States points out that the Department of Health and Human Services (HHS) "has a policy of encouraging States to take advantage of the waiver program, and often approves more waiver slots than a State ultimately uses." *Id.*, at 25-26 (further observing that, by 1996, "HHS approved up to 2109 waiver slots for Georgia, but Georgia used only 700").

FN12. The waiver program provides Medicaid reimbursement to States for the provision of community-based services to individuals who would otherwise require institutional care, upon a showing that the average annual cost of such services is not more than

the annual cost of institutional services. See § 1396n(c).

We emphasize that nothing in the ADA or its implementing regulations condones termination of institutional settings for persons unable to handle or benefit from community ***602** settings. Title II provides only that "qualified individual[s] with a disability" may ****2188** not "be subjected to discrimination." 42 U.S.C. § 12132. "Qualified individuals," the ADA further explains, are persons with disabilities who, "with or without reasonable modifications to rules, policies, or practices, ... mee[t] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." § 12131(2).

[5][6][7] Consistent with these provisions, the State generally may rely on the reasonable assessments of its own professionals in determining whether an individual "meets the essential eligibility requirements" for habilitation in a community-based program. Absent such qualification, it would be inappropriate to remove a patient from the more restrictive setting. See 28 CFR § 35.130(d) (1998) (public entity shall administer services and programs in "the most integrated setting *appropriate* to the needs of qualified individuals with disabilities" (emphasis added)); cf. *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 288, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) ("[C]ourts normally should defer to the reasonable medical judgments of public health officials.").[FN13] Nor is there any federal requirement that community-based treatment be imposed on patients who do not desire it. See 28 CFR § 35.130(e)(1) (1998) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation ... which such individual chooses not to accept."); 28 CFR pt. 35, App. A, p. 450 (1998) ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation."). In this case, however, there is no genuine dispute concerning the status of L.C. and E.W. as individuals "qualified"***603** for noninstitutional care: The State's own professionals determined that community-based treatment would be appropriate for L.C. and E.W., and neither woman opposed such treatment. See *supra,* at 2183. [FN14]

FN13. Georgia law also expresses a preference for treatment in the most integrated setting appropriate. See Ga.Code Ann. § 37-4-121 (1995) ("It is the policy of the state that the least restrictive alternative placement be secured for every client at every stage of his habilitation. It shall be the duty of the facility to assist the client in securing placement in noninstitutional community facilities and programs.").

FN14. We do not in this opinion hold that the ADA imposes on the States a "standard of care" for whatever medical services they render, or that the ADA requires States to "provide a certain level of benefits to individuals with disabilities." Cf. *post,* at 2198 (THOMAS, J., dissenting). We do hold, however, that States must adhere to the ADA's nondiscrimination requirement with regard to the services they in fact provide.

B

The State's responsibility, once it provides community-based treatment to qualified persons with disabilities, is not boundless. The reasonable-modifications regulation speaks of "reasonable modifications" to avoid discrimination, and allows States to resist modifications that entail a "fundamenta[l] alter[ation]" of the States' services and programs. 28 CFR § 35.130(b)(7) (1998). The Court of Appeals construed this regulation to permit a cost-based defense "only in the most limited of circumstances," 138 F.3d, at 902, and remanded to the District Court to consider, among other things, "whether the additional expenditures necessary to treat L.C. and E.W. in community-based care would be unreasonable given the demands of the State's mental health budget," *id.*, at 905.

[8] The Court of Appeals' construction of the reasonable-modifications regulation is unacceptable for it would leave the State virtually defenseless once it is shown that the plaintiff is qualified for the service or program she seeks. If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail. See Tr. of Oral Arg. 27 (State's attorney argues that Court of Appeals' understanding of the ***604** fundamental-alteration defense, as expressed in its order to the District Court, "will always preclude the State from a

meaningful defense"); cf. Brief for Petitioners 37-38 (Court of Appeals' remand order "mistakenly****2189** asks the district court to examine [the fundamental-alteration] defense based on the cost of providing community care to just two individuals, not all Georgia citizens who desire community care"); 1:95-cv-1210-MHS (ND Ga., Oct. 20, 1998), p. 3, App. 177 (District Court, on remand, declares the impact of its decision beyond L.C. and E.W. "irrelevant"). Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

When it granted summary judgment for plaintiffs in this case, the District Court compared the cost of caring for the plaintiffs in a community-based setting with the cost of caring for them in an institution. That simple comparison showed that community placements cost less than institutional confinements. See App. to Pet. for Cert. 39a. As the United States recognizes, however, a comparison so simple overlooks costs the State cannot avoid; most notably, a "State ... may experience increased overall expenses by funding community placements without being able to take advantage of the savings associated with the closure of institutions." Brief for United States as *Amicus Curiae* 21.[FN15]

> FN15. Even if States eventually were able to close some institutions in response to an increase in the number of community placements, the States would still incur the cost of running partially full institutions in the interim. See Brief for United States as *Amicus Curiae* 21.

As already observed, see *supra*, at 2187-2188, the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk. Cf. *post*, at ***605** 2191-2192 (KENNEDY, J., concurring in judgment). Nor is it the ADA's mission to drive States to move institutionalized patients into an inappropriate setting, such as a homeless shelter, a placement the State proposed, then retracted, for E.W. See *supra*, at 2183. Some individuals, like L.C. and E.W. in prior years, may need institutional care from time to time "to stabilize acute psychiatric symptoms." App. 98 (affidavit of Dr. Richard L. Elliott); see 138 F.3d, at 903 ("[T]here may be times [when] a patient can be treated in the community, and others whe[n] an institutional placement is necessary."); Reply Brief 19 (placement in a community-based treatment program does not mean the State will no longer need to retain hospital accommodations for the person so placed). For other individuals, no placement outside the institution may ever be appropriate. See Brief for American Psychiatric Association et al. as *Amici Curiae* 22-23 ("Some individuals, whether mentally retarded or mentally ill, are not prepared at particular times-perhaps in the short run, perhaps in the long run-for the risks and exposure of the less protective environment of community settings"; for these persons, "institutional settings are needed and must remain available."); Brief for Voice of the Retarded et al. as *Amici Curiae* 11 ("Each disabled person is entitled to treatment in the most integrated setting possible for that person-recognizing that, on a case-by-case basis, that setting may be in an institution."); *Youngberg v. Romeo*, 457 U.S. 307, 327, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (Blackmun, J., concurring) ("For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total dependence on the institution for all of their needs is as much liberty as they ever will know.").

[9] To maintain a range of facilities and to administer services with an even hand, the State must have more leeway than the courts below understood the fundamental-alteration defense to allow. If, for example, the State were to demonstrate that it had a comprehensive, effectively working plan ***606** for placing qualified persons with mental disabilities in less restrictive settings, and a waiting list that moved at a reasonable pace not controlled by the State's endeavors to keep its institutions fully populated, the reasonable-modifications standard would be met. See Tr. of Oral Arg. 5 (State's attorney urges that, "by asking [a] person to wait a short time until a community bed is available, Georgia does not exclude [that] person by ****2190** reason of disability, neither does Georgia discriminate against her by reason of disability"); see also *id.*, at 25 ("[I]t is reasonable for the State to ask someone to wait until a community placement is available."). In such circumstances, a court would have no warrant effectively to order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who com-

menced civil actions.[FN16]

FN16. We reject the Court of Appeals' construction of the reasonable-modifications regulation for another reason. The Attorney General's Title II regulations, Congress ordered, "shall be consistent with" the regulations in part 41 of Title 28 of the Code of Federal Regulations implementing § 504 of the Rehabilitation Act. 42 U.S.C. § 12134(b). The § 504 regulation upon which the reasonable-modifications regulation is based provides now, as it did at the time the ADA was enacted:

> "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 28 CFR § 41.53 (1990 and 1998 eds.).

While the part 41 regulations do not define "undue hardship," other § 504 regulations make clear that the "undue hardship" inquiry requires not simply an assessment of the cost of the accommodation in relation to the recipient's overall budget, but a "case-by-case analysis weighing factors that include: (1)[t]he overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2)[t]he type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3)[t]he nature and cost of the accommodation needed." 28 CFR § 42.511(c) (1998); see 45 CFR § 84.12(c) (1998) (same).

Under the Court of Appeals' restrictive reading, the reasonable-modifications regulation would impose a standard substantially more difficult for the State to meet than the "undue burden" standard imposed by the corresponding § 504 regulation.

***607** * * *

For the reasons stated, we conclude that, under Title II of the ADA, States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities. The judgment of the Eleventh Circuit is therefore affirmed in part and vacated in part, and the case is remanded for further proceedings.

It is so ordered.

Justice STEVENS, concurring in part and concurring in the judgment.

Unjustified disparate treatment, in this case, "unjustified institutional isolation," constitutes discrimination under the Americans with Disabilities Act of 1990. See *ante,* at 2187. If a plaintiff requests relief that requires modification of a State's services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State's services and programs. In this case, the Court of Appeals appropriately remanded for consideration of the State's affirmative defense. On remand, the District Court rejected the State's "fundamental-alteration defense." See *ante,* at 2185, n. 7. If the District Court was wrong in concluding that costs unrelated to the treatment of L.C. and E.W. do not support such a defense in this case, that arguable error should be corrected either by the Court of Appeals or by this Court in review of that decision. In my opinion, therefore, we should simply affirm the judgment of the Court of Appeals. ***608** But because there are not five votes for that disposition, I join the Court's judgment and Parts I, II, and III-A of its opinion. Cf. *Bragdon v. Abbott,* 524 U.S. 624, 655-656, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) (STEVENS, J., concurring); *Screws v. United States,* 325 U.S. 91, 134, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945) (Rutledge, J., concurring in result).

Justice KENNEDY, with whom Justice BREYER joins as to Part I, concurring in the judgment.

I

Despite remarkable advances and achievements by medical science, and agreement ****2191** among many professionals that even severe mental illness is often treatable, the extent of public resources to devote

to this cause remains controversial. Knowledgeable professionals tell us that our society, and the governments which reflect its attitudes and preferences, have yet to grasp the potential for treating mental disorders, especially severe mental illness. As a result, necessary resources for the endeavor often are not forthcoming. During the course of a year, about 5.6 million Americans will suffer from severe mental illness. E. Torrey, Out of the Shadows 4 (1997). Some 2.2 million of these persons receive no treatment. *Id.*, at 6. Millions of other Americans suffer from mental disabilities of less serious degree, such as mild depression. These facts are part of the background against which this case arises. In addition, of course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility. See, *e.g.*, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 461-464, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in judgment in part and dissenting in part) (discussing treatment of the mentally retarded).

Despite these obstacles, the States have acknowledged that the care of the mentally disabled is their special obligation. They operate and support facilities and programs, sometimes elaborate ones, to provide care. It is a continuing***609** challenge, though, to provide the care in an effective and humane way, particularly because societal attitudes and the responses of public authorities have changed from time to time.

Beginning in the 1950's, many victims of severe mental illness were moved out of state-run hospitals, often with benign objectives. According to one estimate, when adjusted for population growth, "the actual decrease in the numbers of people with severe mental illnesses in public psychiatric hospitals between 1955 and 1994 was 92 percent." Brief for American Psychiatric Association et al. as *Amici Curiae* 21, n. 5 (citing Torrey, *supra*, at 8-9). This was not without benefit or justification. The so-called "deinstitutionalization" has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity. It may be, moreover, that those who remain institutionalized are indeed the most severe cases. With reference to this case, as the Court points out, *ante*, at 2183-2184, 2187-2188, it is undisputed that the State's own treating professionals determined that community-based care was medically appropriate for respondents. Nevertheless, the depopulation of state mental hospitals has its dark side. According to one expert:

> "For a substantial minority ... deinstitutionalization has been a psychiatric *Titanic*. Their lives are virtually devoid of 'dignity' or 'integrity of body, mind, and spirit.' 'Self-determination' often means merely that the person has a choice of soup kitchens. The 'least restrictive setting' frequently turns out to be a cardboard box, a jail cell, or a terror-filled existence plagued by both real and imaginary enemies." Torrey, *supra*, at 11.

It must be remembered that for the person with severe mental illness who has no treatment the most dreaded of confinements can be the imprisonment inflicted by his own mind, ***610** which shuts reality out and subjects him to the torment of voices and images beyond our own powers to describe.

It would be unreasonable, it would be a tragic event, then, were the Americans with Disabilities Act of 1990 (ADA) to be interpreted so that States had some incentive, for fear of litigation, to drive those in need of medical care and treatment out of appropriate care and into settings with too little assistance and supervision. The opinion of a responsible treating physician in determining the appropriate conditions for treatment ought to be given the greatest of deference. It is a common phenomenon that a patient functions well with medication, yet, because of the mental illness itself, lacks the discipline or capacity to follow the regime the medication requires. This is illustrative of the factors a responsible physician will consider in recommending the appropriate setting or facility for treatment. Justice GINSBURG's opinion takes account of this background. It is careful, and quite correct, to say that it is not "the ADA's mission to drive States to move institutionalized patients****2192** into an inappropriate setting, such as a homeless shelter...." *Ante*, at 2189.

In light of these concerns, if the principle of liability announced by the Court is not applied with caution and circumspection, States may be pressured into attempting compliance on the cheap, placing marginal patients into integrated settings devoid of the services and attention necessary for their condition. This danger is in addition to the federalism costs inherent in referring state decisions regarding the ad-

ministration of treatment programs and the allocation of resources to the reviewing authority of the federal courts. It is of central importance, then, that courts apply today's decision with great deference to the medical decisions of the responsible, treating physicians and, as the Court makes clear, with appropriate deference to the program funding decisions of state policymakers.

***611** II

With these reservations made explicit, in my view we must remand the case for a determination of the questions the Court poses and for a determination whether respondents can show a violation of 42 U.S.C. § 12132's ban on discrimination based on the summary judgment materials on file or any further pleadings and materials properly allowed.

At the outset it should be noted there is no allegation that Georgia officials acted on the basis of animus or unfair stereotypes regarding the disabled. Underlying much discrimination law is the notion that animus can lead to false and unjustified stereotypes, and vice versa. Of course, the line between animus and stereotype is often indistinct, and it is not always necessary to distinguish between them. Section 12132 can be understood to deem as irrational, and so to prohibit, distinctions by which a class of disabled persons, or some within that class, are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group in the provision of services or the administration of existing programs, or indeed entirely excluded from state programs or facilities. Discrimination under this statute might in principle be shown in the case before us, though further proceedings should be required.

Putting aside issues of animus or unfair stereotype, I agree with Justice THOMAS that on the ordinary interpretation and meaning of the term, one who alleges discrimination must show that she "received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic." *Post,* at 2194 (dissenting opinion). In my view, however, discrimination so defined might be shown here. Although the Court seems to reject Justice THOMAS' definition of discrimination, *ante,* at 2186, it asserts that unnecessary institutional care does lead to "[d]issimilar treatment," *ante,* at 2187. According to the Court, "[i]n order to receive needed medical services, persons with mental disabilities612 must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without mental disabilities can receive the medical services they need without similar sacrifice." *Ibid.*

Although this point is not discussed at length by the Court, it does serve to suggest the theory under which respondents might be subject to discrimination in violation of § 12132. If they could show that persons needing psychiatric or other medical services to treat a mental disability are subject to a more onerous condition than are persons eligible for other existing state medical services, and if removal of the condition would not be a fundamental alteration of a program or require the creation of a new one, then the beginnings of a discrimination case would be established. In terms more specific to this case, if respondents could show that Georgia (i) provides treatment to individuals suffering from medical problems of comparable seriousness, (ii) as a general matter, does so in the most integrated setting appropriate for the treatment of those problems (taking medical and other practical considerations into account), but (iii) without adequate justification, fails to do so for a group of mentally disabled persons (treating them instead in separate, locked institutional facilities), I believe****2193** it would demonstrate discrimination on the basis of mental disability.

Of course, it is a quite different matter to say that a State without a program in place is required to create one. No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. If, for example, funds for care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment, however, is a political one and not within the reach of the statute. Grave constitutional concerns are raised when a federal court is given the authority***613** to review the State's choices in basic matters such as establishing or declining to establish new programs. It is not reasonable to read the ADA to permit court intervention in these decisions. In addition, as the Court notes, *ante,* at 2183, by regulation a public entity is required only to make "reasonable modifications in policies, practices, or procedures" when necessary to avoid discrimination and is not

even required to make those if "the modifications would fundamentally alter the nature of the service, program, or activity." 28 CFR § 35.130(b)(7) (1998). It follows that a State may not be forced to create a community-treatment program where none exists. See Brief for United States as *Amicus Curiae* 19-20, and n. 3. Whether a different statutory scheme would exceed constitutional limits need not be addressed.

Discrimination, of course, tends to be an expansive concept and, as legal category, it must be applied with care and prudence. On any reasonable reading of the statute, § 12132 cannot cover all types of differential treatment of disabled and nondisabled persons, no matter how minimal or innocuous. To establish discrimination in the context of this case, and absent a showing of policies motivated by improper animus or stereotypes, it would be necessary to show that a comparable or similarly situated group received differential treatment. Regulations are an important tool in identifying the kinds of contexts, policies, and practices that raise concerns under the ADA. The congressional findings in 42 U.S.C. § 12101 also serve as a useful aid for courts to discern the sorts of discrimination with which Congress was concerned. Indeed, those findings have clear bearing on the issues raised in this case, and support the conclusion that unnecessary institutionalization may be the evidence or the result of the discrimination the ADA prohibits.

Unlike Justice THOMAS, I deem it relevant and instructive that Congress in express terms identified the "isolat[ion] and segregat[ion]" of disabled persons by society as a "for[m] ***614** of discrimination," §§ 12101(a)(2), (5), and noted that discrimination against the disabled "persists in such critical areas as ... institutionalization," § 12101(a)(3). These findings do not show that segregation and institutionalization are always discriminatory or that segregation or institutionalization are, by their nature, forms of prohibited discrimination. Nor do they necessitate a regime in which individual treatment plans are required, as distinguished from broad and reasonable classifications for the provision of health care services. Instead, they underscore Congress' concern that discrimination has been a frequent and pervasive problem in institutional settings and policies and its concern that segregating disabled persons from others can be discriminatory. Both of those concerns are consistent with the normal definition of discrimination-differential treatment of similarly situated groups. The findings inform application of that definition in specific cases, but absent guidance to the contrary, there is no reason to think they displace it. The issue whether respondents have been discriminated against under § 12132 by institutionalized treatment cannot be decided in the abstract, divorced from the facts surrounding treatment programs in their State.

The possibility therefore remains that, on the facts of this case, respondents would be able to support a claim under § 12132 by showing that they have been subject to discrimination by Georgia officials on the basis ****2194** of their disability. This inquiry would not be simple. Comparisons of different medical conditions and the corresponding treatment regimens might be difficult, as would be assessments of the degree of integration of various settings in which medical treatment is offered. For example, the evidence might show that, apart from services for the mentally disabled, medical treatment is rarely offered in a community setting but also is rarely offered in facilities comparable to state mental hospitals. Determining the relevance of that type of evidence would require considerable judgment and analysis.***615** However, as petitioners observe, "[i]n this case, no class of similarly situated individuals was even identified, let alone shown to be given preferential treatment." Brief for Petitioners 21. Without additional information regarding the details of state-provided medical services in Georgia, we cannot address the issue in the way the statute demands. As a consequence, the judgment of the courts below, granting partial summary judgment to respondents, ought not to be sustained. In addition, as Justice GINSBURG's opinion is careful to note, *ante*, at 2189, it was error in the earlier proceedings to restrict the relevance and force of the State's evidence regarding the comparative costs of treatment. The State is entitled to wide discretion in adopting its own systems of cost analysis, and, if it chooses, to allocate health care resources based on fixed and overhead costs for whole institutions and programs. We must be cautious when we seek to infer specific rules limiting States' choices when Congress has used only general language in the controlling statute.

I would remand the case to the Court of Appeals or the District Court for it to determine in the first instance whether a statutory violation is sufficiently alleged and supported in respondents' summary judgment materials and, if not, whether they should be

given leave to replead and to introduce evidence and argument along the lines suggested above.

For these reasons, I concur in the judgment of the Court.

Justice THOMAS, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, as set forth in 42 U.S.C. § 12132, provides:

> "Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of such disability*, be excluded from participation in or be denied the benefits of the services, programs, or activities ***616** of a public entity, *or be subjected to discrimination* by any such entity." (Emphasis added.)

The majority concludes that petitioners "discriminated" against respondents-as a matter of law-by continuing to treat them in an institutional setting after they became eligible for community placement. I disagree. Temporary exclusion from community placement does not amount to "discrimination" in the traditional sense of the word, nor have respondents shown that petitioners "discriminated" against them "by reason of" their disabilities.

Until today, this Court has never endorsed an interpretation of the term "discrimination" that encompassed disparate treatment among members of the *same* protected class. Discrimination, as typically understood, requires a showing that a claimant received differential treatment vis-à-vis members of a different group on the basis of a statutorily described characteristic. This interpretation comports with dictionary definitions of the term discrimination, which means to "distinguish," to "differentiate," or to make a "distinction in favor of or against, a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit." Random House Dictionary 564 (2d ed.1987); see also Webster's Third New International Dictionary 648 (1981) (defining "discrimination" as "the making or perceiving of a distinction or difference" or as "the act, practice, or an instance of discriminating categorically rather than individually").

Our decisions construing various statutory prohibitions against "discrimination" have not wavered from this path. The best place to begin is with Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, the ****2195** paradigmatic anti-discrimination law.[FN1] Title VII makes it "an unlawful employment***617** practice for an employer ... to *discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). We have explained that this language is designed "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).[FN2]

FN1. We have incorporated Title VII standards of discrimination when interpreting statutes prohibiting other forms of discrimination. For example, Rev. Stat. § 1977, as amended, 42 U.S.C. § 1981, has been interpreted to forbid all racial discrimination in the making of private and public contracts. See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 609, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987). This Court has applied the "framework" developed in Title VII cases to claims brought under this statute. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). Also, the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. § 623(a)(1), prohibits discrimination on the basis of an employee's age. This Court has noted that its "interpretation of Title VII ... applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.' " *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985) (quoting *Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)). This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended, 20 U.S.C. § 1681 *et seq.*, which prohibits discrimination under any federally funded education program or activity. See

Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (relying on *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), a Title VII case, in determining that sexual harassment constitutes discrimination).

FN2. This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact. See *Griggs*, 401 U.S., at 431, 91 S.Ct. 849 ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). Both forms of "discrimination" require a comparison among classes of employees.

Under Title VII, a finding of discrimination requires a comparison of otherwise similarly situated persons who are in different groups by reason of certain characteristics provided by statute. See, *e.g.*, *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 683, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) (explaining***618** that Title VII discrimination occurs when an employee is treated " 'in a manner which but for that person's sex would be different' ") (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). For this reason, we have described as "nonsensical" the comparison of the racial composition of different classes of job categories in determining whether there existed disparate impact discrimination with respect to a particular job category. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 651, 109 S.Ct. 2115, 104 L.Ed.2d 733 (1989).[FN3] Courts interpreting Title VII have held that a plaintiff cannot prove "discrimination" by demonstrating that one member of a particular protected group has been favored over another member of that same group. See, *e.g.*, *Bush v. Commonwealth Edison Co.*, 990 F.2d 928, 931 (C.A.7 1993), cert. denied, 511 U.S. 1071, 114 S.Ct. 1648, 128 L.Ed.2d 367 (1994) (explaining that under Title VII, a fired black employee "had to show that although he was not a good employee, equally bad employees were treated more leniently by [his employer] if they happened not to be black").

FN3. Following *Wards Cove*, Congress enacted the Civil Rights Act of 1991, Pub.L. 102-166, 105 Stat. 1071, as amended, which, *inter alia*, altered the burden of proof with respect to a disparate impact discrimination claim. See *id.*, § 105 (codified at 42 U.S.C. § 2000e-2(k)). This change highlights the principle that a departure from the traditional understanding of discrimination requires congressional action. Cf. *Field v. Mans*, 516 U.S. 59, 69-70, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995) (Congress legislates against the background rule of the common law and traditional notions of lawful conduct).

Our cases interpreting § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, which prohibits "discrimination" against ****2196** certain individuals with disabilities, have applied this commonly understood meaning of discrimination. Section 504 provides:

> "No otherwise qualified handicapped individual ... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected***619** to discrimination under any program or activity receiving Federal financial assistance."

In keeping with the traditional paradigm, we have always limited the application of the term "discrimination" in the Rehabilitation Act to a person who is a member of a protected group and faces discrimination "by reason of his handicap." Indeed, we previously rejected the argument that § 504 requires the type of "affirmative efforts to overcome the disabilities caused by handicaps," *Southeastern Community College v. Davis*, 442 U.S. 397, 410, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), that the majority appears to endorse today. Instead, we found that § 504 required merely "the evenhanded treatment of handicapped persons" relative to those persons who do not have disabilities. *Ibid.* Our conclusion was informed by the fact that some provisions of the Rehabilitation Act envision "affirmative action" on behalf of those individuals with disabilities, but § 504 itself "does not refer at all" to such action. *Ibid.* Therefore, "[a] comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so." *Id.*, at 411, 99 S.Ct. 2361.

Similarly, in *Alexander v. Choate*, 469 U.S. 287,

302, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), we found no discrimination under § 504 with respect to a limit on inpatient hospital care that was "neutral on its face" and did not "distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having," *id.*, at 302, 105 S.Ct. 712. We said that § 504 does "not ... guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed." *Id.*, at 304, 105 S.Ct. 712.

Likewise, in *Traynor v. Turnage*, 485 U.S. 535, 548, 108 S.Ct. 1372, 99 L.Ed.2d 618 (1988), we reiterated that the purpose of § 504 is to guarantee that individuals with disabilities receive "evenhanded treatment" ***620** relative to those persons without disabilities. In *Traynor*, the Court upheld a Veterans' Administration regulation that excluded "primary alcoholics" from a benefit that was extended to persons disabled by alcoholism related to a mental disorder. *Id.*, at 551, 108 S.Ct. 1372. In so doing, the Court noted that "[t]his litigation does not involve a program or activity that is alleged to treat handicapped persons less favorably than nonhandicapped persons." *Id.*, at 548, 108 S.Ct. 1372. Given the theory of the case, the Court explicitly held: "There is nothing in the Rehabilitation Act that requires that any benefit extended to one category of handicapped persons also be extended to all other categories of handicapped persons." *Id.*, at 549, 108 S.Ct. 1372.

This same understanding of discrimination also informs this Court's constitutional interpretation of the term. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 298, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (noting with respect to interpreting the Commerce Clause, "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities"); *Yick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) (condemning under the Fourteenth Amendment "illegal discriminations between persons in similar circumstances"); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223-224, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-494, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion).

Despite this traditional understanding, the majority derives a more "comprehensive" definition of "discrimination," as that term is used in Title II of the ADA, one that includes "institutional isolation of persons with disabilities." *Ante*, at 2187. It chiefly relies on certain congressional findings contained ****2197** within the ADA. To be sure, those findings appear to equate institutional isolation with segregation, and thereby discrimination. See *ibid.* (quoting §§ 12101(a)(2) and 12101(a)(5), both of which explicitly identify "segregation" of persons with disabilities as a form of "discrimination"); see also *ante*, at 2181-2182. The congressional findings, however, are written in general, hortatory terms and provide***621** little guidance to the interpretation of the specific language of § 12132. See *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) ("We also think that the quoted statement of congressional findings is a rather thin reed upon which to base a requirement"). In my view, the vague congressional findings upon which the majority relies simply do not suffice to show that Congress sought to overturn a well-established understanding of a statutory term (here, "discrimination").[FN4] Moreover, the majority fails to explain why terms in the findings should be given a medical content, pertaining to the place where a mentally retarded person is treated. When read in context, the findings instead suggest that terms such as "segregation" were used in a more general sense, pertaining to matters such as access to employment, facilities, and transportation. Absent a clear directive to the contrary, we must read "discrimination" in light of the common understanding of the term. We cannot expand the meaning of the term "discrimination" in order to invalidate policies we may find unfortunate. Cf. *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322, 325, 71 S.Ct. 758, 95 L.Ed. 969 (1951) (explaining that if Congress intended statutory terms "to have other than their ordinarily accepted meaning, ***622** it would and should have given them a special meaning by definition"). [FN5]

FN4. If such general hortatory language is sufficient, it is puzzling that this or any other court did not reach the same conclusion long ago by reference to the general purpose language of the Rehabilitation Act itself. See 29 U.S.C. § 701 (1988 ed.) (describing the statute's purpose as "to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational

rehabilitation and independent living, for individuals with handicaps *in order to maximize their employability, independence, and integration* into the workplace and the community" (emphasis added)). Further, this section has since been amended to proclaim in even more aspirational terms that the policy under the statute is driven by, *inter alia*, "respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities," "respect for the privacy, rights, and equal access," and "inclusion, integration, and full participation of the individuals." 29 U.S.C. §§ 701(c)(1)-(3).

FN5. Given my conclusion, the Court need not review the integration regulation promulgated by the Attorney General. See 28 CFR § 35.130(d) (1998). Deference to a regulation is appropriate only " 'if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable.' " *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 483, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (quoting *Presley v. Etowah County Comm'n*, 502 U.S. 491, 508, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)). Here, Congress has expressed its intent in § 12132, and the Attorney General's regulation-insofar as it contradicts the settled meaning of the statutory term-cannot prevail against it. See *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995) (explaining that courts interpreting a term within a statute "must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of that term" (internal quotation marks omitted).

Elsewhere in the ADA, Congress chose to alter the traditional definition of discrimination. Title I of the ADA, § 12112(b)(1), defines discrimination to include "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee." Notably, however, Congress did not provide that this definition of discrimination, unlike other aspects of the ADA, applies to Title II. Ordinary canons of construction require that we respect the limited applicability of this definition of "discrimination" and not import it into other parts of the law where Congress did not see fit. See, *e.g.*, *Bates v. United States*, 522 U.S. 23, 29-30, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997) (" 'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion' ") (quoting ****2198***Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). The majority's definition of discrimination-although not specifically delineated-substantially imports the definition of Title I into Title II by necessarily assuming that it is sufficient to focus exclusively on members of one particular ***623** group. Under this view, discrimination occurs when some members of a protected group are treated differently from other members of that same group. As the preceding discussion emphasizes, absent a special definition supplied by Congress, this conclusion is a remarkable and novel proposition that finds no support in our decisions in analogous areas. For example, the majority's conclusion that petitioners "discriminated" against respondents is the equivalent to finding discrimination under Title VII where a black employee with deficient management skills is denied in-house training by his employer (allegedly because of lack of funding) because other similarly situated black employees are given the in-house training. Such a claim would fly in the face of our prior case law, which requires more than the assertion that a person belongs to a protected group and did not receive some benefit. See, *e.g.*, *Griggs*, 401 U.S., at 430-431, 91 S.Ct. 849 ("Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group").

At bottom, the type of claim approved of by the majority does not concern a prohibition against certain conduct (the traditional understanding of discrimination), but rather concerns imposition of a standard of care. FN6 As such, the majority***624** can offer no principle limiting this new species of "discrimination" claim apart from an affirmative defense because it looks merely to an individual in isolation, without comparing him to otherwise similarly situated persons, and determines that discrimination occurs

merely because that individual does not receive the treatment he wishes to receive. By adopting such a broad view of discrimination, the majority drains the term of any meaning other than as a proxy for decisions disapproved of by this Court.

> FN6. In mandating that government agencies minimize the institutional isolation of disabled individuals, the majority appears to appropriate the concept of "mainstreaming" from the Individuals with Disabilities Education Act (IDEA), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.* But IDEA is not an antidiscrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a "free appropriate public education" and to establish "procedures to assure that, to the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled." §§ 1412(1), (5). Ironically, even under this broad affirmative mandate, we previously rejected a claim that IDEA required the "standard of care" analysis adopted by the majority today. See *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 198, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) ("We think ... that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children" (internal quotation marks omitted)).

Further, I fear that the majority's approach imposes significant federalism costs, directing States how to make decisions about their delivery of public services. We previously have recognized that constitutional principles of federalism erect limits on the Federal Government's ability to direct state officers or to interfere with the functions of state governments. See, *e.g.*, *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997); *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). We have suggested that these principles specifically apply to whether States are required to provide a certain level of benefits to individuals with disabilities. As noted in *Alexander*, in rejecting a similar theory under § 504 of the Rehabilitation Act: "[N]othing ... suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services ...." 469 U.S., at 307, 105 S.Ct. 712. See also *Bowen v. American Hospital Assn.*, 476 U.S. 610, 642, 106 S.Ct. 2101, 90 L.Ed.2d 584 (1986) (plurality opinion) ("[N]othing in [§ 504] authorizes [the Secretary****2199** of Health and Human Services (HHS)] to commandeer state agencies .... [These] agencies are ***625** not field offices of the HHS bureaucracy, and they may not be conscripted against their will as the foot soldiers in a federal crusade"). The majority's affirmative defense will likely come as cold comfort to the States that will now be forced to defend themselves in federal court every time resources prevent the immediate placement of a qualified individual. In keeping with our traditional deference in this area, see *Alexander*, *supra*, the appropriate course would be to respect the States' historical role as the dominant authority responsible for providing services to individuals with disabilities.

The majority may remark that it actually does properly compare members of different groups. Indeed, the majority mentions in passing the "[d]issimilar treatment" of persons with and without disabilities. *Ante*, at 2187. It does so in the context of supporting its conclusion that institutional isolation is a form of discrimination. It cites two cases as standing for the unremarkable proposition that discrimination leads to deleterious stereotyping, *ibid.* (citing *Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Manhart*, 435 U.S., at 707, n. 13, 98 S.Ct. 1370), and an *amicus* brief which indicates that confinement diminishes certain everyday life activities, *ante*, at 2187 (citing Brief for American Psychiatric Association et al. as *Amici Curiae* 20-22). The majority then observes that persons without disabilities "can receive the services they need without" institutionalization and thereby avoid these twin deleterious effects. *Ante*, at 2187. I do not quarrel with the two general propositions, but I fail to see how they assist in resolving the issue before the Court. Further, the majority neither specifies what services persons with disabilities might need nor contends that persons without disabilities need the same services as those with disabilities, leading to the inference that the dissimilar treatment the majority observes results merely from the fact that different classes of persons receive different services-not from "discrimination" as tradi-

tionally defined.

***626** Finally, it is also clear petitioners did not "discriminate" against respondents "by reason of [their] disabili[ties]," as § 12132 requires. We have previously interpreted the phrase "by reason of" as requiring proximate causation. See, *e.g.*, *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 265-266, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); see also *id.*, at 266, n. 11, 112 S.Ct. 1311 (citation of cases). Such an interpretation is in keeping with the vernacular understanding of the phrase. See American Heritage Dictionary 1506 (3d ed.1992) (defining "by reason of" as "because of"). This statute should be read as requiring proximate causation as well. Respondents do not contend that their disabilities constituted the proximate cause for their exclusion. Nor could they-community placement simply is not available to those without disabilities. Continued institutional treatment of persons who, though now deemed treatable in a community placement, must wait their turn for placement does not establish that the denial of community placement occurred "by reason of" their disability. Rather, it establishes no more than the fact that petitioners have limited resources.

* * *

For the foregoing reasons, I respectfully dissent.

U.S.Ga.,1999.
Olmstead v. L.C. ex rel. Zimring
527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540, 67 USLW 3683, 67 USLW 4567, 9 A.D. Cases 705, 15 NDLR P 130, 99 Cal. Daily Op. Serv. 4859, 1999 Daily Journal D.A.R. 6263, 1999 CJ C.A.R. 3627

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Supreme Court of the United States
PRINCE
v.
COMMONWEALTH OF MASSACHUSETTS.

No. 98.
Argued Dec. 14, 1943.
Decided Jan. 31, 1944.
Rehearing Denied Mar. 27, 1944. See 321 U.S. 804, 64 S.Ct. 784.

Sarah Prince was convicted of furnishing an infant with magazines knowing she would sell them unlawfully on the street and of permitting such infant to work contrary to law, 313 Mass. 223, 46 N.E.2d 755, and she appeals.

Affirmed.

Mr. Justice JACKSON, Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, and Mr. Justice MURPHY, dissenting.

West Headnotes

[1] Federal Courts 170B 506

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk504 Nature of Decisions or Questions Involved
170Bk506 k. Criminal Matters; Habeas Corpus. Most Cited Cases
(Formerly 106k394(10))

On appeal to Federal Supreme Court from conviction in state court for furnishing infant with magazines knowing she would sell them unlawfully and for permitting infant to work contrary to law on ground that the statute abridged appellant's freedom of religion and denied appellant equal protection of the laws, whether what the infant did was a sale or an offer to sell or was work within state statute was not open to review. G.L.(Ter.Ed.) Mass. c. 149, s 69, as amended by St.1939, c. 461, s 7; s 81; U.S.C.A.Const. Amends. 1, 14.

[2] Child Custody 76D 22

76D Child Custody
76DII Grounds and Factors in General
76DII(A) In General
76Dk22 k. Persons Entitled in General. Most Cited Cases
(Formerly 285k2(1))

The custody, care, and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

[3] Constitutional Law 92 1405

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1404 Family Law
92k1405 k. In General. Most Cited Cases
(Formerly 92k84.1, 92k84(1), 92k84)

The family is not beyond regulation in the public interest as against a claim of religious liberty.

[4] Constitutional Law 92 1290

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(A) In General
92k1290 k. In General. Most Cited Cases
(Formerly 92k84.1, 92k84(1), 92k84)

Constitutional Law 92 1408

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1404 Family Law

92k1408 k. Parental Rights in General. Most Cited Cases
(Formerly 92k84.1, 92k84(1), 92k84)

Parent and Child 285 1

285 Parent and Child
285k1 k. The Relation in General. Most Cited Cases

Neither rights of religion nor rights of parenthood are beyond limitation.

[5] Constitutional Law 92 1408

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1404 Family Law
92k1408 k. Parental Rights in General. Most Cited Cases
(Formerly 92k84.1, 92k84(1), 92k84)

The authority of the State as parens partriae is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.

[6] Constitutional Law 92 1395

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1394 Health Care
92k1395 k. In General. Most Cited Cases
(Formerly 92k84.5(17), 92k84)

The right to practice religion does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.

[7] Constitutional Law 92 1408

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1404 Family Law
92k1408 k. Parental Rights in General. Most Cited Cases
(Formerly 92k84.1, 92k84(1), 92k84)

Parent and Child 285 1

285 Parent and Child
285k1 k. The Relation in General. Most Cited Cases

The state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare, and such power includes to some extent matters of conscience and religious conviction.

[8] Infants 211 11

211 Infants
211I Disabilities in General
211k11 k. Removal of Disabilities. Most Cited Cases
(Formerly 211k12)

The state's authority over children's activities is broader than over like actions of adults.

[9] Infants 211 13

211 Infants
211II Protection
211k13 k. Protection of Health and Morals. Most Cited Cases

A democratic society rests for its continuance upon the healthy, well-rounded growth of young people into full maturity as citizens with all that implies, and state may secure it against impeding restraints and dangers within a broad range of selection.

[10] Infants 211 65

211 Infants
211VI Crimes
211k65 k. Responsibility in General. Most Cited Cases

What may be wholly permissible for adults may not be so for children either with or without their parents' presence.

[11] Highways 200 ⚿165

200 Highways
200IX Regulation and Use for Travel
200IX(B) Use of Highway and Law of the Road
200k165 k. Power to Control and Regulate. Most Cited Cases

Highways 200 ⚿167

200 Highways
200IX Regulation and Use for Travel
200IX(B) Use of Highway and Law of the Road
200k167 k. Right to Use. Most Cited Cases
(Formerly 200k168)

Street preaching, whether oral or by handing out literature, is not the primary use of the highway even for adults, and, within reasonable limits, use of highway can be regulated in accommodation to the primary and other incidental uses.

[12] Constitutional Law 92 ⚿1320

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1319 Labor and Employment
92k1320 k. In General. Most Cited Cases
(Formerly 92k84.5(12))

Constitutional Law 92 ⚿1389

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1389 k. Solicitation; Distribution of Literature. Most Cited Cases
(Formerly 92k84.5(12))

Constitutional Law 92 ⚿3104

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)1 Age
92k3104 k. Juvenile Justice. Most Cited Cases
(Formerly 92k242.1(4), 92k238(1))

Infants 211 ⚿12(6)

211 Infants
211II Protection
211k12 Constitutional and Statutory Provisions
211k12(3) Validity
211k12(6) k. Labor and Employment. Most Cited Cases
(Formerly 211k12)

A state statute forbidding boys under 12 and girls under 18 to sell magazines, etc., in street or public places and penalizing the furnishing of such minors magazines, etc., with knowledge of minor's intent to sell them in street or public place, and penalizing parent, custodian, etc., who permits such minors to sell magazines, etc., in street or public place, is not unconstitutional as denying or abridging "freedom of religion" or denying "equal protection of the laws" as applied to member of a religious sect who furnished religious periodicals to minor girl who was under custody of member, and permitted girl to sell and distribute periodicals on the streets. G.L.(Ter.Ed.) Mass. c. 149, § 69 as amended by St.1939, c. 461, § 7; §§ 80, 81; U.S.C.A.Const. Amends. 1, 14.

****438 *159** Appeal from the Superior Court of Massachusetts, Plymouth County.****439** Mr. Hayden C. Covington, of Brooklyn, N.Y., for appellant.

Mr. R. T. Bushnell, of Boston, Mass., for appellee.

Mr. Justice RUTLEDGE delivered the opinion of the Court.

The case brings for review another episode in the conflict between Jehovah's Witnesses and state authority. This time Sarah Prince appeals from convictions for violating Massachusetts' child labor laws, by acts said to be a rightful exercise of her religious convictions.

When the offenses were committed she was the aunt and custodian of Betty M. Simmons, a girl nine years of age. Originally there were three separate complaints. They ***160** were, shortly, for (1) refusal to

disclose Betty's identity and age to a public officer whose duty was to enforce the statutes; (2) furnishing her with magazines, knowing she was to sell them unlawfully, that is, on the street; and (3) as Betty's custodian, permitting her to work contrary to law. The complaints were made, respectively, pursuant to Sections 79, 80 and 81 of Chapter 149, Gen.Laws of Mass. (Ter.Ed.). The Supreme Judicial Court reversed the conviction under the first complaint on state grounds;[FN1] but sustained the judgments founded on the other two. [FN2] 313 Mass. 223, 46 N.E.2d 755. They present the only questions for our decision. These are whether Sections 80 and 81, as applied, contravene the Fourteenth Amendment by denying or abridging appellant's freedom of religion and by denying to her the equal protection of the laws.

FN1 The court found there was no evidence that appellant was asked Betty's age. It then held that conviction for refusal to disclose the child's name, based on the charge under Section 79, would violate Article 12 of the Declaration of Rights of the Commonwealth, which provides in part: 'No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself.'

FN2 Appellant received moderate fines on each complaint, first in the District Court of Brockton, then on pleas of not guilty by trial de novo without a jury in the Superior Court for Plymouth County. Motions to dismiss and quash the complaints, for directed findings, and for rulings, were made seasonably and denied by the Superior Court.

Sections 80 and 81 form parts of Massachusetts' comprehensive child labor law. [FN3] They provide methods for enforcing the prohibitions of Section 69, which is as follows:

FN3 Mass.Gen. Laws, Ter.Ed., c. 149, as amended by Acts and Resolves of 1939, c. 461.

'No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any ***161** description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place.'

Section 80 and 81, so far as pertinent, read:

'Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of sections sixty-nine to seventy-three, inclusive, or after having received written notice to this effect from any officer charged with the enforcement thereof, or knowingly procures or encourages any minor to violate any provisions of said sections, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both.' (Section 80)

'Any parent, guardian or custodian having a minor under his control who compels or permits such minor to work in violation of any provision of sections sixty to seventy-four, inclusive, * * * shall for a first offence be punished by a fine of not less than two nor more than ten dollars or by imprisonment for not more than ****440** five days, or both; * * *.' (Section 81)

The story told by the evidence has become familiar. It hardly needs repeating, except to give setting to the variations introduced through the part played by a child of tender years. Mrs. Prince, living in Brockton, is the mother of two young sons. She also has legal custody of Betty Simmons who lives with them. The children too are Jehovah's Witnesses and both Mrs. Prince and Betty testified they were ordained ministers. The former was accustomed to go each week on the streets of Brockton to distribute 'Watchtower' and 'Consolation,' according to the usual plan.[FN4] She had permitted the children to ***162** engage in this activity previously, and had been warned against doing so by the school attendance officer, Mr. Perkins. But, until December 18, 1941, she generally did not take them with her at night.

FN4 Cf. the facts as set forth in Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669; Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667; Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 82; Busey v. District of Columbia, 75 U.S.App.D.C. 352, 129 F.2d 24. A common feature is that specified small sums are generally asked and

received but the publications may be had without the payment if so desired.

That evening, as Mrs. Prince was preparing to leave her home, the children asked to go. She at first refused. Childlike, they resorted to tears and, motherlike, she yielded. Arriving downtown, Mrs. Prince permitted the children 'to engage in the preaching work with her upon the sidewalks.' That is, with specific reference to Betty, she and Mrs. Prince took positions about twenty feet apart near a street intersection. Betty held up in her hand, for passersby to see, copies of 'Watch Tower' and 'Consolation.' From her shoulder hung the usual canvas magazine bag, on which was printed 'Watchtower and Consolation 5¢ per copy.' No one accepted a copy from Betty that evening and she received no money. Nor did her aunt. But on other occasions, Betty had received funds and given out copies.

Mrs. Prince and Betty remained until 8:45 p.m. A few minutes before this Mr. Perkins approached Mrs. Prince. A discussion ensued. He inquired and she refused to give Betty's name. However, she stated the child attended the Shaw School. Mr. Perkins referred to his previous warnings and said he would allow five minutes for them to get off the street. Mrs. Prince admitted she supplied Betty with the magazines and said, '(N)either you nor anybody else can stop me * * *. This child is exercising her God-given right and her constitutional right to preach the gospel, and no creature has a right to interfere with God's commands.' However, Mrs. Prince and Betty departed. She remarked as she went, 'I'm not going through this any more. We've been through it time and time again. I'm going home and put the little girl to bed.' It may be added that testimony, by Betty, her aunt and others, was offered at the trials, and was excluded,***163** to show that Betty believed it was her religious duty to perform this work and failure would bring condemnation 'to everlasting destruction at Armageddon.'

[1] As the case reaches us, the questions are no longer open whether what the child did was a 'sale' or an 'offer to sell' within Section 69[FN5] or was 'work' within Section 81. The state court's decision has foreclosed them adversely to appellant as a matter of state law.[FN6] The only question ****441** remaining therefore is whether, as construed and applied, the statute is valid. Upon this the court said: 'We think that freedom of the press and of religion is subject to incidental regulation to the slight degree involved in the prohibition of the selling of religious literature in streets and public places by boys under twelve and girls under eighteen and in the further statutory provisions herein considered, which have been adopted as a means of enforcing ***164** that prohibition.' 313 Mass. 223, 229, 46 N.E.2d 755, 758.

FN5 In this respect the Massachusetts decision is contrary to the trend in other states. Compare State v. Mead, 230 Iowa 1217, 300 N.W. 523; State v. Meredith, 197 S.C. 351, 15 S.E.2d 678; State ex rel. Semansky v. Stark, 196 La. 307, 199 So. 129; City of Shreveport v. Teague, 200 La. 679, 8 So.2d 640; People v. Barber, 289 N.Y. 378, 46 N.E.2d 329; Thomas v. City of Atlanta, 59 Ga.App. 520, 1 S.E.2d 598; City of Cincinnati v. Mosier, 61 Ohio App. 81, 22 N.E.2d 418. Contra: McSparran v. City of Portland (Circuit Court, Multnomah County, Oregon, June 8, 1942), appeal dismissed, 169 Or. 377, 129 P.2d 65, certiorari denied, 318 U.S. 768, 63 S.Ct. 759.

FN6 The court's opinion said: 'The judge could find that if a passerby should hand over five cents in accordance with the sign on the bag and should receive a magazine in return, a sale would be effected. The judge was not required to accept the defendant's characterization of that transaction as a 'contribution.' He could believe that selling the literature played a more prominent part in the enterprise than giving it way. He could find that the defendant furnished the magazines to Betty, knowing that the latter intended to sell them, if she could, in violation of section 69. * * * The judge could find that the defendant permitted Betty to 'work' in violation of section 81. * * * (W)e cannot say that the evils at which the statutes were directed attendant upon the selling by children of newspapers, magazines, periodicals, and other merchandise in streets and public places do not exist where the publications are of a religious nature.' 313 Mass. 223, 227, 228, 46 N.E.2d 755, 757.

Appellant does not stand on freedom of the press. Regarding it as secular, she concedes it may be re-

stricted as Massachusetts has done.[FN7] Hence, she rests squarely on freedom of religion under the First Amendment, applied by the Fourteenth to the states. She buttresses this foundation, however, with a claim of parental right as secured by the due process clause of the latter Amendment.[FN8] Cf. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446. These guaranties, she thinks, guard alike herself and the child in what they have done. Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these; and among them is 'to preach the gospel * * * by public distribution' of 'Watchtower' and 'Consolation,' in conformity with the scripture: 'A little child shall lead them.'

FN7 Appellant's brief says: 'The purpose of the legislation is to protect children from economic exploitation and keep them from the evils of such enterprises that contribute to the degradation of children.' And at the argument counsel stated the prohibition would be valid as against a claim of freedom of the press as a nonreligious activity.

FN8 The due process claim, as made and perhaps necessarily, extends no further than that to freedom of religion, since in the circumstances all that is comprehended in the former is included in the latter.

If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and ***165** functionings. Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.

To make accommodation between these freedoms and an exercise of state authority always is delicate. It hardly could be more so than in such a clash as this case presents. On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner ****442** conceded valid if only secular things were involved. The last is no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. Between contrary pulls of such weight, the safest and most objective recourse is to the lines already marked out, not precisely but for guides, in narrowing the no man's land where this battle has gone on.

[2] The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in ***166**West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178. Previously in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family

life which the state cannot enter.

[3][4][5][6][7] But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244; Davis v. Beason, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637. And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance,[FN9] regulating or prohibiting the child's labor,[FN10] and in many other ways.[FN11] Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds.[FN12] The right to practice religion freely does not include liberty to expose the community or the child ***167** to communicable disease or the latter to ill health or death. People v. Pierson, 176 N.Y. 201, 68 N.E. 243, 63 L.R.A. 187, 98 Am.St.Rep. 666.[FN13] The catalogue need not be lengthened. It is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

FN9 State v. Bailey, 157 Ind. 324, 61 N.E. 730, 59 L.R.A. 435; compare Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468; West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178.

FN10 Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320, 34 S.Ct. 60, 58 L.Ed. 245, L.R.A.1915A, 1196; compare Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551, 13 Ann.Cas. 957.

FN11 Cf. People v. Ewer, 141 N.Y. 129, 36 N.E. 4, 25 L.R.A. 794, 38 Am.St.Rep. 788.

FN12 Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765.

FN13 See also State v. Chenoweth, 163 Ind. 94, 71 N.E. 197; Owens v. State, 6 Okl.Cr. 110, 116 P. 345, 36 L.R.A.,N.S., 633, Ann.Cas.1913B, 1218.

But it is said the state cannot do so here. This, first, because when state action impinges upon a claimed religious freedom, it must fall unless shown to be necessary for or conducive to the child's protection against some clear and present danger, cf. Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; and, it is added, there was no such showing here. The child's presence on the street, with her ****443** guardian, distributing or offering to distribute the magazines, it is urged, was in no way harmful to her, nor in any event more so than the presence of many other children at the same time and place, engaged in shopping and other activities not prohibited. Accordingly, in view of the preferred position the freedoms of the First Article occupy, the statute in its present application must fall. It cannot be sustained by any presumption of validity. Cf. Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155. And, finally, it is said, the statute is, as to children, an absolute prohibition, not merely a reasonable regulation, of the denounced activity.

Concededly a statute or ordinance identical in terms with Section 69, except that it is applicable to adults or all persons generally, would be invalid. Young v. California, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Nichols v. Massachusetts, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669; Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 82; Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313.[FN14] ***168** But the mere fact a state could not wholly prohibit this form of adult activity, whether characterized locally as a ‘sale’ or otherwise, does not mean it cannot do so for children. Such a conclusion granted would mean that a state could impose no greater limitation upon child labor than upon adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions and objectives, if not alone then in the parent's company, against the state's command.

FN14 Pertinent also are the decisions in-

volving license features: Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423.

[8][9] The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and an matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment,[FN15] more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street.[FN16] It is too late now to doubt ***169** that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action.

FN15 See, e.g., Volumes 1-4, 6-8, 14, 18, Report on Condition of Woman and Child Wage Earners in the United States, Sen. Doc. No. 645, 61st Cong., 2d Sess.; The Working Children of Boston, U.S. Dept. of Labor, Children's Bureau Publication No. 89 (1922); Fuller, The Meaning of Child Labor (1922); Fuller and Strong, Child Labor in Massachusetts (1926).

FN16 See, e.g., Clopper, Child Labor in City Streets (1912); Children in Street Work, U.S. Dept. of Labor, Children's Bureau Publication No. 183 (1928); Children Engaged in Newspaper and Magazine Selling and Delivering, U.S. Dept. of Labor, Children's Bureau Publication No. 227 (1935).

[10] It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. And in other uses, whether in work or in other things, this difference may be magnified. This is so not only when children are unaccompanied but certainly to some extent when they are with their parents. What may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence.

[11][12] Street preaching, whether oral or by handing out literature, is not the primary use of the highway, even for adults. ****444** While for them it cannot be wholly prohibited, it can be regulated within reasonable limits in accommodation to the primary and other incidental uses.[FN17] But, for obvious reasons, notwithstanding appellant's contrary view,[FN18] the validity of such a prohibition applied to children not accompanied by an older person hardly would seem open to question. The case reduces itself therefore to the question whether the presence of the child's guardian puts a limit to the state's power. That fact may lessen the likelihood that some evils the legislation seeks to avert will occur. But it cannot forestall all of them. The zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political or other matters, may and at times does create situations***170** difficult enough for adults to cope with and wholly inappropriate for children, especially of tender years, to face. Other harmful possibilities could be stated, of emotional excitement and psychological or physical injury. Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves. Massachusetts has determined that an absolute prohibition, though one limited to streets and public places and to the incidental uses proscribed, is necessary to accomplish its legitimate objectives. Its power to attain them is broad enough to reach these peripheral instances in which the parent's supervision may reduce but cannot eliminate entirely the ill effects of the prohibited conduct. We think that with reference to the public proclaiming of religion, upon the streets and in other similar public places, the power of the state to control the conduct of children reaches beyond the scope of its authority over adults, as is true in the case of other freedoms, and the rightful boundary of its power has not been crossed in this case.

FN17 Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049, 133 A.L.R. 1396; Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031.

FN18 Although the argument points to the

> guardian's presence as showing the child's activities here were not harmful, it is nowhere conceded in the briefs that the statute could be applied, consistently with the guaranty of religious freedom, if the facts had been altered only by the guardian's absence.

In so ruling we dispose also of appellant's argument founded upon denial of equal protection. It falls with that based on denial of religious freedom, since in this instance the one is but another phrasing of the other. Shortly, the contention is that the street, for Jehovah's Witnesses and their children, is their church, since their conviction makes it so; and to deny them access to it for religious purposes as was done here has the same effect as excluding altar boys, youthful choristers, and other children from the edifices in which they practice their religious beliefs and worship. The argument hardly needs more than statement, after what has been said, to refute it. However Jehovah's Witnesses may conceive them, the public highways have not become their religious property***171** merely by their assertion. And there is no denial of equal protection in excluding their children from doing there what no other children may do.

Our ruling does not extend beyond the facts the case presents. We neither lay the foundation 'for any (that is, every) state intervention in the indoctrination and participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious training and activities.' The religious training and indoctrination of children may be accomplished in many ways, some of which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision.

The judgment is affirmed.

Affirmed.

Mr. Justice JACKSON.

***176** The novel feature of this decision is this: the Court holds that a state may apply child ****445** labor laws to restrict or prohibit an activity of which, as recently as last term, it held: 'This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion.' '* * * the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken ***177** and printed word are not to be gauged by standards governing retailers or wholesalers of books.' Murdock v. Pennsylvania, 319 U.S. 105, 109, 111, 63 S.Ct. 870, 873, 874, 87 L.Ed. 1292, 146 A.L.R. 82.

It is difficult for me to believe that going upon the streets to accost the public is the same thing for application of public law as withdrawing to a private structure for religious worship. But if worship in the churches and the activity of Jehovah's Witnesses on the streets 'occupy the same high estate' and have the 'same claim to protection' it would seem that child labor laws may be applied to both if to either. If the Murdock doctrine stands along with today's decision, a foundation is laid for any state intervention in the indoctrination and participation of children in religion, provided it is done in the name of their health or welfare.

This case brings to the surface the real basis of disagreement among members of this Court in previous Jehovah's Witness cases. Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, 146 A.L.R. 82; Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; Jones v. Opelika, 316 U.S. 584, 86 L.Ed. 1691, 141 A.L.R. 514; Id., 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290; Douglas v. Jeannette, 319 U.S. 157, 63 S.Ct. 877, 882, 87 L.Ed. 1324. Our basic difference seems to be as to the method of establishing limitations which of necessity bound religious freedom.

My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free-as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral

and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds ***178** of sales and Bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution.

The Court in the Murdock case rejected this principle of separating immune religious activities from secular ones in declaring the disabilities which the Constitution imposed on local authorities. Instead, the Court now draws a line based on age that cuts across both true exercise of religion and auxiliary secular activities. I think this is not a correct principle for defining the activities immune from regulation on grounds of religion, and Murdock overrules the grounds on which I think affirmance should rest. I have no alternative but to dissent from the grounds of affirmance of a judgment which I think was rightly decided, and upon right grounds, by the Supreme Judicial Court of Massachusetts. 313 Mass. 223, 46 N.E.2d 755.

Mr. Justice ROBERTS and Mr. Justice FRANKFURTER join in this opinion.

Mr. Justice MURPHY, dissenting.

This attempt by the state of Massachusetts to prohibit a child from exercising her constitutional right to practice her religion on the public streets cannot, in my opinion, be sustained.

The record makes clear the basic fact that Betty Simmons, the nine-year old child in question, was engaged in a genuine religious, rather than commercial, activity. ****446** She was a member of Jehovah's Witnesses and had been taught the tenets of that sect by her guardian, the appellant. Such tenets included the duty of publicly distributing religious tracts on the street and from door to door. Pursuant to this religious duty and in the company of the appellant, Betty Simmons on the night of December 18, 1941, was standing on a public street corner and offering to distribute Jehovah's Witness literature to passersby. There was no expectation of pecuniary profit to ***172** herself or to appellant. It is undisputed, furthermore, that she did this of her own desire and with appellant's consent. She testified that she was motivated by her love of the Lord and that He commanded her to distribute this literature; this was, she declared, her way of worshipping God. She was occupied, in other words, in 'an age-old form of missionary evangelism' with a purpose 'as evangelical as the revival meeting.' Murdock v. Pennsylvania, 319 U.S. 105, 108, 109, 63 S.Ct. 870, 872, 873, 87 L.Ed. 1292, 146 A.L.R. 82.

Religious training and activity, whether performed by adult or child, are protected by the Fourteenth Amendment against interference by state action, except insofar as they violate reasonable regulations adopted for the protection of the public health, morals and welfare. Our problem here is whether a state, under the guise of enforcing its child labor laws, can lawfully prohibit girls under the age of eighteen and boys under the age of twelve from practicing their religious faith insofar as it involves the distribution or sale of religious tracts on the public streets. No question of freedom of speech or freedom of press is present and we are not called upon to determine the permissible restraints on those rights. Nor are any truancy or curfew restrictions in issue. The statutes in question prohibit all children within the specified age limits from selling or offering to sell 'any newspapers, magazines, periodicals or any other articles of merchandise of any description * * * in any street or public place.' Criminal sanctions are imposed on the parents and guardians who compel or permit minors in their control to engage in the prohibited transactions. The state court has construed these statutes to cover the activities here involved, cf. State v. Richardson, 92 N.H. 178, 27 A.2d 94, thereby imposing an indirect restraint through the parents and guardians on the free exercise by minors of their religious beliefs. This indirect restraint is no less effective than a direct one. A square conflict between the constitutional***173** guarantee of religious freedom and the state's legitimate interest in protecting the welfare of its children is thus presented.

As the opinion of the Court demonstrates, the power of the state lawfully to control the religious and other activities of children is greater than its power over similar activities of adults. But that fact is no

more decisive of the issue posed by this case than is the obvious fact that the family itself is subject to reasonable regulation in the public interest. We are concerned solely with the reasonableness of this particular prohibition of religious activity by children.

In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. United States v. Carolene Products Co., 304 U.S. 144, 152, 58 S.Ct. 778, 783, 82 L.Ed. 1234, note 4. On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the state of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case.

The burden in this instance, however, is not met by vague references to the reasonableness underlying child labor legislation in general. The great interest of the state in shielding minors from the evil vicissitudes of early life does not warrant every limitation on their religious training and activities. The reasonableness that justifies the prohibition of the ordinary distribution of literature in the public streets by children is not necessarily the rea***174** sonableness****447** that justifies such a drastic restriction when the distribution is part of their religious faith. Murdock v. Pennsylvania, supra, 319 U.S. 111, 63 S.Ct. 874, 87 L.Ed. 1292, 146 A.L.R. 82. If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186. The vital freedom of religion, which is 'of the very essence of a scheme of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, cannot be erased by slender references to the state's power to restrict the more secular activities of children.

The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect. There is no proof that Betty Simmons' mode of worship constituted a serious menace to the public. It was carried on in an orderly, lawful manner at a public street corner. And 'one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.' Jamison v. Texas, 318 U.S. 413, 416, 63 S.Ct. 669, 672. The sidewalk, no less than the cathedral or the evangelist's tent, is a proper place, under the Constitution, for the orderly worship of God. Such use of the streets is as necessary to the Jehovah's Witnesses, the Salvation Army and others who practice religion without benefit of conventional shelters as is the use of the streets for purposes of passage.

It is claimed, however, that such activity was likely to affect adversely the health, morals and welfare of the child. Reference is made in the majority opinion to 'the crippling effects of child employment, more especially in public***175** places, and the possible harms arising from other activities subject to all the diverse influences of the street.' To the extent that they flow from participation in ordinary commercial activities, these harms are irrelevant to this case. And the bare possibility that such harms might emanate from distribution of religious literature is not, standing alone, sufficient justification for restricting freedom of conscience and religion. Nor can parents or guardians be subjected to criminal liability because of vague possibilities that their religious teachings might cause injury to the child. The evils must be grave, immediate, substantial. Cf. Bridges v. California, 314 U.S. 252, 262, 62 S.Ct. 190, 193, 86 L.Ed. 192. Yet there is not the slightest indication in this record, or in sources subject to judicial notice, that children engaged in distributing literature pursuant to their religious beliefs have been or are likely to be subject to any of the harmful 'diverse influences of the street.' Indeed, if probabilities are to be indulged in, the likelihood is that children engaged in serious religious endeavor are immune from such influences. Gambling, truancy, irregular eating and sleeping habits, and the more serious vices are not consistent with the high moral character ordinarily displayed by children fulfilling religious obligations. Moreover, Jehovah's Witness

children invariably make their distributions in groups subject at all times to adult or parental control, as was done in this case. The dangers are thus exceedingly remote, to say the least. And the fact that the zealous exercise of the right to propagandize the community may result in violent or disorderly situations difficult for children to face is no excuse for prohibiting the exercise of that right.

No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement ****448** of little used ordinances and statutes. See Mulder and Comisky, 'Jehovah's Witnesses Mold Constitutional Law,' 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.

U.S. 1944.
Prince v. Massachusetts
321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645

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Supreme Court of the United States
SCHOOL BOARD OF NASSAU COUNTY, FLORIDA and Craig Marsh, Individually and as Superintendent of Schools of Nassau County, Florida
v.
Gene H. ARLINE.

No. 85-1277.
Argued Dec. 3, 1986.
Decided March 3, 1987.
Rehearing Denied April 20, 1987.
See 481 U.S. 1024, 107 S.Ct. 1913.

A school teacher, who was fired from her job solely because of her susceptibility to tuberculosis, brought an action alleging that her dismissal violated the Rehabilitation Act. The United States District Court for the Middle District of Florida, John H. Moore, II, J., entered judgment for the school board and superintendent. The teacher appealed. The Court of Appeals, Eleventh Circuit, 772 F.2d 759, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Brennan, J., held that school teacher afflicted with contagious disease of tuberculosis was a "handicapped individual" within meaning of Rehabilitation Act section prohibiting federally funded state program from discriminating against handicapped individual solely by reason of handicap.

Affirmed.

Chief Justice Rehnquist filed a dissenting opinion in which Justice Scalia joined.

West Headnotes

[1] Civil Rights 78 1227

78 Civil Rights
78II Employment Practices
78k1215 Discrimination by Reason of Handicap, Disability, or Illness
78k1227 k. Communicable diseases. Most Cited Cases
(Formerly 78k175, 78k9.16)

School teacher's hospitalization for tuberculosis sufficed to establish that she had a "record of impairment" within meaning of Rehabilitation Act and was therefore a "handicapped individual" under Act section prohibiting federally funded state program from discriminating against handicapped individual solely by reason of handicap. Rehabilitation Act of 1973, §§ 7(7)(B)(ii), 504, as amended, 29 U.S.C.A. §§ 706(7)(B)(ii), 794.

[2] Civil Rights 78 1023

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. Communicable diseases. Most Cited Cases
(Formerly 78k107(4), 78k9.16)

The fact that some persons who have contagious diseases may pose serious health threat to others under certain circumstances does not justify excluding from coverage of Rehabilitation Act all persons with actual or perceived contagious diseases. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[3] Civil Rights 78 1023

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. Communicable diseases. Most Cited Cases
(Formerly 78k107(4), 78k9.16)

Basic factors to be considered in determining whether a person handicapped by a contagious disease is "otherwise qualified" under Rehabilitation Act are nature of risk, duration of risk, severity of risk, and probability disease will be transmitted and will cause varying degrees of harm. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[4] Civil Rights 78 1023

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. Communicable diseases. Most Cited Cases
(Formerly 78k107(4), 78k9.16)

A person suffering from contagious disease of tuberculosis can be a handicapped person within meaning of Rehabilitation Act. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

*****1123 *273** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Act), provides, *inter alia*, that no "otherwise qualified handicapped individual," as defined in 29 U.S.C. § 706(7), shall, solely by reason of his handicap, be excluded from participation in any program receiving federal financial assistance. Section 706(7)(B) defines "handicapped individual" to mean any person who "(i) has a physical ... impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as ****1124** having such an impairment." Department of Health and Human Services (HHS) regulations define "physical impairment" to mean, *inter alia*, any physiological disorder affecting the respiratory system, and define "major life activities" to include working. Respondent was hospitalized for tuberculosis in 1957. The disease went into remission for the next 20 years, during which time respondent began teaching elementary school in Florida. In 1977, March 1978, and November 1978, respondent had relapses, after the latter two of which she was suspended with pay for the rest of the school year. At the end of the 1978-1979 school year, petitioners discharged her after a hearing because of the continued recurrence of tuberculosis. After she was denied relief in state administrative proceedings, she brought suit in Federal District Court, alleging a violation of § 504. The District Court held that she was not a "handicapped person" under the Act, but that, even assuming she were, she was not "qualified" to teach elementary school. The Court of Appeals reversed, holding that persons with contagious diseases are within § 504's coverage, and remanded for further findings as to whether respondent was "otherwise qualified" for her job.

Held:

1. A person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of § 504. Pp. 1127-1130.

(a) Respondent is a "handicapped individual" as defined in § 706(7)(B) and the HHS regulations. Her hospitalization in 1957, for a disease that affected her respiratory system, and that substantially limited "one or more of [her] major life activities," establishes that she has a "record of ... impairment." Pp. 1127-1128.

***274** (b) The fact that a person with a record of impairment is also contagious does not remove that person from § 504's coverage. To allow an employer to justify discrimination by distinguishing between a disease's contagious effects on others and its physical effects on a patient would be unfair, would be contrary to § 706(7)(B)(iii) and the legislative history, which demonstrate Congress' concern about an impairment's effect on others, and would be inconsistent with § 504's basic purpose to ensure that handicapped individuals are not denied jobs because of the prejudice or ignorance of others. The Act replaces such fearful, reflexive reactions with actions based on reasoned and medically sound judgments as to whether contagious handicapped persons are "otherwise qualified" to do the job. Pp. 1127-1130.

2. In most cases, in order to determine whether a person handicapped by contagious disease is "otherwise qualified" under § 504, the district court must conduct an individualized inquiry and make appropriate findings of fact, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (*e.g.*, how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. In making these findings, courts normally should defer to the reason-

able medical judgments of public health officials. Courts must then determine, in light of these findings, whether any "reasonable accommodation" can be made by the employer under the established standards for that inquiry. Pp. 1130-1132.

3. Because the District Court did not make appropriate findings, it is impossible for this Court to determine whether respondent is "otherwise qualified" for the job of elementary school teacher, and the case is remanded for additional findings of fact. Pp. 1131-1134.

772 F.2d 759 (CA 11 1985), affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. REHNQUIST, C.J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. ----.
Brian T. Hayes argued the cause for petitioners. With him on the briefs was *John D. Carlson.*

Solicitor General Fried argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Reynolds, Deputy* ****275*** *Solicitor General Ayer, Deputy Assistant Attorney General Carvin, Richard J. Lazarus,* and *Mark L. Gross.*

George K. Rahdert argued the cause for respondent. With him on the brief was *Steven H. Malone*.*

* Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Thomas R. Bagby;* and for Congressman William E. Dannemeyer et al. by *William E. Dannemeyer, pro se.*

Briefs of *amici curiae* urging affirmance were filed for the Association for Retarded Citizens of the United States et al. by *Thomas K. Gilhool, Michael Churchill, Frank J. Laski, Timothy M. Cook, Stanley S. Herr,* and *Donald S. Goldman;* and for the Employment Law Center et al. by *Robert E. Borton.*

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp,* Attorney General, *Andrea Sheridan Ordin,* Chief Assistant Attorney General, and *Marian M. Johnston* and *Anne Jennings,* Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Steven H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *W. Cary Edwards* of New Jersey, *Robert Abrams* of New York, and *Bronson C. La Follette* of Wisconsin; for the American Medical Association by *Benjamin W. Heineman, Jr.*, and *Carter G. Phillips;* for the American Public Health Association et al. by *Nan D. Hunter* and *Herbert Semmel;* for Doctors for AIDS Research and Education by *Stanley Fleish;man, Joseph Lawrence, Susan D. McGreivy,* and *Paul Hoffman;* for the Epilepsy Foundation of America by *Alexandra K. Finucane;* for the National School Boards Association by *Gwendolyn H. Gregory, August W. Steinhilber,* and *Thomas A. Shannon;* and for Senator Cranston et al. by *Arlene Mayerson.*

****1125** Justice BRENNAN delivered the opinion of the Court.

Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. § 794 (Act), prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap. This case presents the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of § 504 of the Act, and, if so, whether such an individual is "otherwise qualified" to teach elementary school.

***276** I

From 1966 until 1979, respondent Gene Arline taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years. After she was denied relief in state administrative proceedings, she brought suit in federal court, alleging that the school board's decision to dismiss her because of her tuberculosis violated § 504 of the Act.[FN1]

FN1. Respondent also sought relief under 42 U.S.C. § 1983, alleging that the board denied her due process of law. Both the District Court and the Court of Appeals rejected this argument, and respondent did not present the issue to this Court.

A trial was held in the District Court, at which the principal medical evidence was provided by Marianne McEuen, M.D., an assistant director of the Commu-

nity Tuberculosis Control Service of the Florida Department of Health and Rehabilitative Services. According to the medical records reviewed by Dr. McEuen, Arline was hospitalized for tuberculosis in 1957. App. 11-12. For the next 20 years, Arline's disease was in remission. *Id.*, at 32. Then, in 1977, a culture revealed that tuberculosis was again active in her system; cultures taken in March 1978 and in November 1978 were also positive. *Id.*, at 12.

The superintendent of schools for Nassau County, Craig Marsh, then testified as to the school board's response to Arline's medical reports. After both her second relapse, in the spring of 1978, and her third relapse in November 1978, the school board suspended Arline with pay for the remainder of the school year. *Id.*, at 49-51. At the end of the 1978-1979 school year, the school board held a hearing, after which it discharged Arline, "not because she had done anything wrong," but because of the "continued reoccurence [*sic*] of tuberculosis." *Id.*, at 49-52.

In her trial memorandum, Arline argued that it was "not disputed that the [school board dismissed her] solely on the basis of her illness. Since the illness in this case qualifies the ***277** Plaintiff as a 'handicapped person' it is clear that she was dismissed solely as a result of her handicap in violation of Section 504." Record 119. The District Court held, however, that although there was "[n]o question that she suffers a handicap," Arline was nevertheless not "a handicapped person under the terms of that statute." App. to Pet. for Cert. C-2. The court found it "difficult ... to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." The court then went on to state that, "even assuming" that a person with a contagious disease could be deemed a handicapped person, Arline was not "qualified" to teach elementary school. *Id.*, at C-2-C-3.

The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of section 504," and that Arline's condition "falls ... neatly within the statutory and regulatory framework" of the Act. 772 F.2d 759, 764 (CA11 1985). The court remanded the case "for further findings as to whether the risks of ****1126** infection precluded Mrs. Arline from being 'otherwise qualified' for her job and, if so, whether it was possible to make some reasonable accommodation for her in that teaching position" or in some other position. *Id.*, at 765 (footnote omitted). We granted certiorari, 475 U.S. 1118, 106 S.Ct. 1633, 90 L.Ed.2d 179 (1986), and now affirm.

II

In enacting and amending the Act, Congress enlisted all programs receiving federal funds in an effort "to share with handicapped Americans the opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted." 123 Cong.Rec. 13515 (1977) (statement of Sen. Humphrey). To that end, Congress not only increased federal support for vocational rehabilitation, but also addressed the broader problem of discrimination against the handicapped by including § 504, an anti-discrimination provision patterned after Title VI of the Civil Rights ***278** Act of 1964.[FN2] Section 504 of the Rehabilitation Act reads in pertinent part:

> FN2. Congress' decision to pattern § 504 after Title VI is evident in the language of the statute, compare 29 U.S.C. § 794 with 42 U.S.C. § 2000d, and in the legislative history of § 504, see, *e.g.*, S.Rep. No. 93-1297, pp. 39-40 (1974), U.S.Code Cong. & Admin.News 1974, p. 6373; S.Rep. No. 95-890, p. 19 (1978). Cf. TenBroek & Matson, The Disabled and the Law of Welfare, 54 Cal.L.Rev. 809, 814-815, and nn. 21-22 (1966) (discussing theory and evidence that "negative attitudes and practices toward the disabled resemble those commonly attached to "underprivileged ethnic and religious minority groups' "). The range of programs subject to § 504's prohibition is broader, however, than that covered by Title VI, because § 504 covers employment discrimination even in programs that receive federal aid with a primary objective other than the promotion of employment. See *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 104 S.Ct. 1248, 79 L.Ed.2d 568 (1984); Note, Accommodating the Handicapped: Rehabilitating Section 504 after *Southeastern*, 80 Colum.L.Rev. 171, 174-175, and n. 21 (1980).

"No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be

excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." 29 U.S.C. § 794.

In 1974 Congress expanded the definition of "handicapped individual" for use in § 504 to read as follows: [FN3]

> FN3. The primary focus of the 1973 Act was to increase federal support for vocational rehabilitation; the Act's original definition of the term "handicapped individual" reflected this focus by including only those whose disability limited their employability, and those who could be expected to benefit from vocational rehabilitation. After reviewing the Department of Health, Education, and Welfare's subsequent attempt to devise regulations to implement the Act, however, Congress concluded that the definition of "handicapped individual," while appropriate for the vocational rehabilitation provisions in Titles I and III of the Act, was too narrow to deal with the range of discriminatory practices in housing, education, and health care programs which stemmed from stereotypical attitudes and ignorance about the handicapped. S.Rep. No. 93-1297, at 16, 37-38, 50.

***279** "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B). The amended definition reflected Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but also from "archaic attitudes and laws" and from "the fact that the American people are simply unfamiliar with and insensitive to the difficulties confront [ing] individuals with handicaps." S.Rep. No. 93-1297, p. 50 (1974), U.S.Code Cong. & Admin.News 1974, p. 6400. To combat the effects of erroneous but nevertheless prevalent perceptions about the handicapped, Congress expanded the definition of "handicapped individual" so as to preclude discrimination against "[a] person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all." ****1127** *Southeastern Community College v. Davis*, 442 U.S. 397, 405-406, n. 6, 99 S.Ct. 2361, 2366-2367, n. 6, 60 L.Ed.2d 980 (1979).[FN4]

> FN4. See *id.*, at 39 ("This subsection includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having, as well as those persons whose mental or physical condition does not substantially limit their life activities and who thus are not technically within clause (A) in the new definition. Members of both of these groups may be subjected to discrimination on the basis of their being regarded as handicapped"); *id.*, at 37-39, 63-64; see also 120 Cong.Rec. 30531 (1974) (statement of Sen. Cranston).

In determining whether a particular individual is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance. As we have previously recognized, these regulations were drafted with the oversight and approval of Congress, see *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 634-635, and nn. 14-16, 104 S.Ct. 1248, 1254-1255, and nn. 14-16, 79 L.Ed.2d 568 (1984); they provide "an important source of guidance on the meaning of § 504." *Alexander v. Choate*, 469 U.S. 287, 304, n. 24, 105 S.Ct. 712, 722, n. 24, 83 L.Ed.2d 661 (1985). The ***280** regulations are particularly significant here because they define two critical terms used in the statutory definition of handicapped individual.[FN5] "Physical impairment" is defined as follows:

> FN5. In an appendix to these regulations, the Department of Health and Human Services explained that it chose not to attempt to "set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list." 45 CFR pt. 84, Appendix A, p. 310 (1985). Nevertheless, the Department went on to state that "such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, [and] emotional illness" would be covered. *Ibid.*

> The Department also reinforced what a careful reading of the statute makes plain, "that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities." *Ibid.* Although many of the comments on the regulations when first proposed suggested that the definition was unreasonably broad, the Department found that a broad definition, one not limited to so-called "traditional handicaps," is inherent in the statutory definition. *Ibid.*

"[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine." 45 CFR § 84.3(j)(2)(i) (1985).
In addition, the regulations define "major life activities" as

"functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." § 84.3(j)(2)(ii).

III

[1] Within this statutory and regulatory framework, then, we must consider whether Arline can be considered a handicapped individual. According to the testimony of Dr. ***281** McEuen, Arline suffered tuberculosis "in an acute form in such a degree that it affected her respiratory system," and was hospitalized for this condition. App. 11. Arline thus had a physical impairment as that term is defined by the regulations, since she had a "physiological disorder or condition ... affecting [her] ... respiratory [system]." 45 CFR § 84.3(j)(2)(i) (1985). This impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment. Thus, Arline's hospitalization for tuberculosis in 1957 suffices to establish that she has a "record of ... impairment" within the meaning of 29 U.S.C. § 706(7)(B)(ii), and is therefore a handicapped individual.

Petitioners concede that a contagious disease may constitute a handicapping condition to the extent that it leaves a person ****1128** with "diminished physical or mental capabilities," Brief for Petitioners 15, and concede that Arline's hospitalization for tuberculosis in 1957 demonstrates that she has a record of a physical impairment, see Tr. of Oral Arg. 52-53. Petitioners maintain, however, that Arline's record of impairment is irrelevant in this case, since the school board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others.[FN6]

> FN6. See Brief for Petitioners 15-16 (Act covers conditions that leave individuals with "diminished physical or mental capabilities," but not conditions that could "impair the health of others"); Pet. for Cert. 13-14 ("[T]he concept of a 'handicap' [should be limited] to physical and mental conditions which result in either a real or perceived diminution of an individual's capabilities.... [A]n individual suffering from a contagious disease may not necessarily suffer from any physical or mental impairments affecting his ability to perform the job in question. In other words, an employer's reluctance to hire such an individual is not due to any real or perceived inability on the individual's part, but rather because of the employer's reluctance to expose its other employees and its clientele to the threat of infection").

***282** We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant in a case such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.[FN7]

> FN7. The United States argues that it is possible for a person to be simply a carrier of a disease, that is, to be capable of spreading a disease without having a "physical impairment" or suffering from any other symptoms associated with the disease. The United

> States contends that this is true in the case of some carriers of the Acquired Immune Deficiency Syndrome (AIDS) virus. From this premise the United States concludes that discrimination solely on the basis of contagiousness is never discrimination on the basis of a handicap. The argument is misplaced in this case, because the handicap here, tuberculosis, gave rise both to a physical impairment *and* to contagiousness. This case does not present, and we therefore do not reach, the questions whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagiousness, a handicapped person as defined by the Act.

Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Congress extended coverage, in 29 U.S.C. § 706(7)(B)(iii), to those individuals who are simply "regarded as having" a physical or mental impairment.[FN8] The Senate Report provides as an example of a person who would be covered under this subsection "a person with some kind of visible physical impairment which in fact does not substantially limit that person's functioning." S.Rep. No. 93-1297, at 64.[FN9] ***283** Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the ****1129** negative reactions of others to the impairment. [FN10]

> FN8. See n. 4, *supra.*

> FN9. Congress' desire to prohibit discrimination based on the effects a person's handicap may have on others was evident from the inception of the Act. For example, Representative Vanik, whose remarks constitute "a primary signpost on the road toward interpreting the legislative history of § 504," *Alexander v. Choate*, 469 U.S. 287, 295-296, and n. 13, 105 S.Ct. 712, 717-718 and n. 13, 83 L.Ed.2d 661 (1985), cited as an example of improper handicap discrimination a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 Cong.Rec. 45974 (1971). See also 118 Cong.Rec. 36761 (1972) (remarks of Sen. Mondale) (a woman "crippled by arthritis" was denied a job not because she could not do the work but because "college trustees [thought] 'normal students shouldn't see her' "); *id.*, at 525 (remarks of Sen. Humphrey); cf. Macgregor, Some Psycho-Social Problems Associated with Facial Deformities, 16 Am. Sociological Rev. 629 (1961).

> FN10. The Department of Health and Human Services regulations, which include among the conditions illustrative of physical impairments covered by the Act "cosmetic disfigurement," lend further support to Arline's position that the effects of one's impairment on others is as relevant to a determination of whether one is handicapped as is the physical effect of one's handicap on oneself. 45 CFR § 84.3(j)(2)(i)(A) (1985). At oral argument, the United States took the position that a condition such as cosmetic disfigurement could not substantially limit a major life activity within the meaning of the statute, because the only major life activity that it would affect would be the ability to work. The United States recognized that "working" was one of the major life activities listed in the regulations, but said that to argue that a condition that impaired *only* the ability to work was a handicapping condition was to make "a totally circular argument which lifts itself by its bootstraps." Tr. of Oral Arg. 15-16. The argument is not circular, however, but direct. Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work. "[T]he primary goal of the Act is to increase employment of the handicapped." *Consolidated Rail Corporation v. Darrone*, 465 U.S., at 633, at n. 13, 104 S.Ct., at 1254, at n. 13; see also *id.*, at 632, 104 S.Ct., at 1253 ("Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year

felt it necessary to amend the statute to clarify whether § 504 was intended to prohibit other types of discrimination as well").

***284** [2] Allowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.[FN11] Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness.[FN12] Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.[FN13] The Act is ***285** carefully structured to replace such reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of "handicapped individual" is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief. The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* ****1130** persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology-precisely the type of injury Congress sought to prevent.[FN14] We conclude that ***286** the fact that a person with a record of a physical impairment is also contagious does not suffice to remove that person from coverage under § 504.[FN15]

FN11. S.Rep. No. 93-1297, at 50; see n. 4, *supra*. See generally, TenBroek & Matson, 54 Cal.L.Rev., at 814; Strauss, Chronic Illness, in The Sociology of Health and Illness 138, 146-147 (P. Conrad & R. Kern eds. 1981).

FN12. The isolation of the chronically ill and of those perceived to be ill or contagious appears across cultures and centuries, as does the development of complex and often pernicious mythologies about the nature, cause, and transmission of illness. Tuberculosis is no exception. See R. Dubos & J. Dubos, The White Plague (1952); S. Sontag, Illness as Metaphor (1978).

FN13. Senator Humphrey noted the "irrational fears or prejudice on the part of employers or fellow workers" that make it difficult for former cancer patients to secure employment. 123 Cong.Rec. 13515 (1977). See also Feldman, Wellness and Work, in Psychosocial Stress and Cancer 173-200 (C. Cooper ed. 1984) (documenting job discrimination against recovered cancer patients); S. Sontag, *supra*, at 6 ("Any disease that is treated as a mystery and acutely enough feared will be felt to be morally, if not literally, contagious. Thus, a surprisingly large number of people with cancer find themselves being shunned by relatives and friends ... as if cancer, like TB, were an infectious disease"); Dell, Social Dimensions of Epilepsy: Stigma and Response, in Psychopathology in Epilepsy: Social Dimensions 185-210 (S. Whitman & B. Hermann eds. 1986) (reviewing range of discrimination affecting epileptics); Brief for Epilepsy Foundation of America as *Amicus Curiae* 5-14 ("A review of the history of epilepsy provides a salient example that fear, rather than the handicap itself, is the major impetus for discrimination against persons with handicaps").

FN14. Congress reaffirmed this approach in its 1978 amendments to the Act. There, Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejected the original House

proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment ... would constitute a direct threat to property or the safety of others." 29 U.S.C. § 706(7)(B). See 124 Cong.Rec. 30322 (1978); Brief for Senator Cranston et al. as *Amici Curiae* 35-36; 43 Op.Atty.Gen. No. 12 (1977).

> This approach is also consistent with that taken by courts that have addressed the question whether the Act covers persons suffering from conditions other than contagious diseases that render them a threat to the safety of others. See, *e. g., Strathie v. Department of Transportation*, 716 F.2d 227, 232-234 (CA3 1983); *Doe v. New York University*, 666 F.2d 761, 775 (CA2 1981).

FN15. The dissent implies that our holding rests only on our "own sense of fairness and implied support from the Act," *post*, at 1132, and that this holding is inconsistent with *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). It is evident, however, that our holding is premised on the plain language of the Act, and on the detailed regulations that implement it, neither of which the dissent discusses and both of which support the conclusion that those with a contagious disease such as tuberculosis may be considered "handicapped" under the Act. We also find much support in the legislative history, while the dissent is unable to find any evidence to support its view. Accordingly, the dissent's construction of the Act to exclude those afflicted with a contagious disease is not only arbitrary (and therefore unfair) but unfaithful to basic canons of statutory construction.

> Nothing in *Pennhurst* requires such infidelity. The statutory provision at issue there was held to be "simply a general statement of 'findings' " and to express "no more than ... a congressional preference for certain kinds of treatment." *Id.*, at 19, 101 S.Ct., at 1541. See *Wright v. Roanoke Redevelopment and Housing Auth.*, 479 U.S. 418, 422, 107 S.Ct. 766, 770, 93 L.Ed.2d 781 (1987). ("In *Pennhurst* ... the statutory provisions were thought to be only statements of 'findings' indicating no more than a congressional preference-at most a 'nudge in the preferred directio [n]' "). The contrast between the congressional preference at issue in *Pennhurst* and the antidiscrimination mandate of § 504 could not be more stark.

Nor is there any reason to think that today's decision will extend the Act beyond manageable bounds. Construing § 504 not to exclude those with contagious diseases will complement rather than complicate state efforts to enforce public health laws. As we state, *infra*, at 1132, courts may reasonably be expected normally to defer to the judgments of public health officials in determining whether an individual is otherwise qualified unless those judgments are medically unsupportable. Conforming employment decisions with medically reasonable judgments can hardly be thought to threaten the States' regulation of communicable diseases. Indeed, because the Act requires employers to respond rationally to those handicapped by a contagious disease, the Act will assist local health officials by helping remove an important obstacle to preventing the spread of infectious diseases: the individual's reluctance to report his or her condition. It is not surprising, then, that in their brief as *amici curiae* in support of respondent, the States of California, Maryland, Michigan, Minnesota, New Jersey, New York, and Wisconsin conclude that "inclusion of communicable diseases within the ambit of Section 504 does not reorder the priorities of state regulatory agencies ... [and] would not alter the balance between state and federal authority." Brief for State of California et al. 30.

***287** IV

[3] The remaining question is whether Arline is otherwise qualified for the job of elementary schoolteacher. To answer this question in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 ****1131** is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.[FN16] The basic factors to be considered in conducting this inquiry are well established.[FN17] In the context***288** of the employment of a person handicapped with a contagious disease, we agree with *amicus* American Medical Association that this inquiry should include

> "[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." Brief for American Medical Association as *Amicus Curiae* 19.

In making these findings, courts normally should defer to the reasonable medical judgments of public health officials.[FN18] The next step in the "otherwise-qualified" inquiry is for the court to evaluate, in light of these medical findings, whether the employer could reasonably accommodate the employee under the established standards for that inquiry. See n. 17, *supra.*

Because of the paucity of factual findings by the District Court, we, like the Court of Appeals, are unable at this stage of the proceedings to resolve whether Arline is "otherwise qualified" for her job. The District Court made no findings as to the duration and severity of Arline's condition, nor as to the probability that she would transmit the disease. Nor did the court determine whether Arline was contagious at the time she was discharged, or whether the School Board could ***289** have reasonably accommodated her. [FN19] Accordingly, the resolution of whether Arline was

FN16. A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary schoolchildren. Respondent conceded as much at oral argument. Tr. of Oral Arg. 45.

FN17. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979). In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. 45 CFR § 84.3(k) (1985). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. *Ibid.* Accommodation is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, *Southeastern Community College v. Davis*, 442 U.S., at 412, 99 S.Ct., at 2370, or requires "a fundamental alteration in the nature of [the] program," *id.*, at 410. See 45 CFR § 84.12(c) (1985) (listing factors to consider in determining whether accommodation would cause undue hardship); 45 CFR pt. 84, Appendix A, p. 315 (1985) ("[W]here reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination"); *Davis, supra*, at 410-413, 99 S.Ct., at 2369-2370; *Alexander v. Choate*, 469 U.S., at 299-301, and n. 19, 105 S.Ct., at 720, and n. 19; *Strathie v. Department of Transportation*, 716 F.2d, at 231.

FN18. This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians on which an employer has relied.

otherwise qualified requires further findings of fact.

FN19. Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee. Although they are not required to find another job for an employee who is not qualified for the job he or she was doing, they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies. See n. 17, *supra;* 45 CFR § 84.12 and Appendix A, pp. 315-316 (1985).

****1132** V

[4] We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of § 504 of the Rehabilitation Act of 1973, and that respondent Arline is such a person. We remand the case to the District Court to determine whether Arline is otherwise qualified for her position. The judgment of the Court of Appeals is

Affirmed.

Chief Justice REHNQUIST, with whom Justice SCALIA joins, dissenting.

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), this Court made clear that, where Congress intends to impose a condition on the grant of federal funds, "it must do so unambiguously." *Id.*, at 17, 101 S.Ct., at 1540. This principle applies with full force to § 504 of the Rehabilitation Act, which Congress limited in scope to "those who actually 'receive' federal financial assistance." *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 605, 106 S.Ct. 2705, 2711, 91 L.Ed.2d 494 (1986). Yet, the Court today ignores this principle, resting its holding on its own sense of fairness and implied support from the Act. *Ante,* at 1128-1130. Such an approach, I believe, is foreclosed not only by *Pennhurst,* but also by our prior decisions interpreting the Rehabilitation Act.

Our decision in *Pennhurst* was premised on the view that federal legislation imposing obligations only on recipients of ***290** federal funds is "much in the nature of a contract." 451 U.S., at 17, 101 S.Ct., at 1539. See also *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 204, n. 26, 102 S.Ct. 3034, 3049, n. 26, 73 L.Ed.2d 690 (1982). As we have stated in the context of the Rehabilitation Act, " 'Congress apparently determined it would require ... grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds.' " *United States Department of Transportation v. Paralyzed Veterans of America, supra,* 477 U.S., at 605, 106 S.Ct., at 2711, quoting *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 633, n. 13, 104 S.Ct. 1248, 1254, n. 13, 79 L.Ed.2d 568 (1984). The legitimacy of this *quid pro quo* rests on whether recipients of federal funds voluntarily and knowingly accept the terms of the exchange. *Pennhurst, supra,* 451 U.S., at 17, 101 S.Ct., at 1539. There can be no knowing acceptance unless Congress speaks "with a clear voice" in identifying the conditions attached to the receipt of funds. 451 U.S., at 17, 101 S.Ct., at 1539.

The requirement that Congress unambiguously express conditions imposed on federal moneys is particularly compelling in cases such as this where there exists long-standing state and federal regulation of the subject matter. From as early as 1796, Congress has legislated directly in the area of contagious diseases.[FN1] Congress has also, however, left significant leeway to the States, which have enacted a myriad of public health statutes designed to protect against the introduction and spread of contagious diseases.[FN2] When faced ***291** with such extensive regulation, this Court has ****1133** declined to read the Rehabilitation Act expansively. See *Bowen v. American Hospital Assn.*, 476 U.S. 610, 642-647, 106 S.Ct. 2101, 2120-2123, 90 L.Ed.2d 584 (1986); *Alexander v. Choate*, 469 U.S. 287, 303, 307, 105 S.Ct. 712, 721, 723, 83 L.Ed.2d 661 (1985). Absent an expression of intent to the contrary, "Congress ... 'will not be deemed to have significantly changed the federal-state balance.' " *Bowen v. American Hospital Assn., supra,* 476 U.S., at 644, 106 S.Ct., at 2121, quoting *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 523, 30 L.Ed.2d 488 (1971).

FN1. See, *e.g.*, 42 U.S.C. §§ 243, 264; Act of May 27, 1796, ch. 31, 1 Stat. 474; see generally Morgenstern, The Role of the Federal Government in Protecting Citizens from Communicable Diseases, 47 U.Cin.L.Rev. 537 (1978).

FN2. The coverage of state statutes regulating contagious diseases is broad, addressing, *inter alia*, reporting requirements, quarantines, denial of marriage licenses based on the presence of certain diseases, compulsory immunization, and certification and medical testing requirements for school employees. See, *e.g.*, Ariz.Rev.Stat.Ann. § 36.621 *et seq.* (1986) (reporting requirements); Conn.Gen.Stat. §§ 19a-207, 19a-221 (1985) (quarantines); Fla.Stat. §§ 741.051-741.055 (1985) (marriage licenses); Mass.Gen.Laws c. 71 § 55B (1984) (certification requirements for school employees); Miss.Code Ann. § 37-7-301(i) (Supp.1986) (compulsory immunization of school students); W.Va.Code § 16-3-4a (1985) (medical testing).

Applying these principles, I conclude that the Rehabilitation Act cannot be read to support the result reached by the Court. The record in this case leaves no doubt that Arline was discharged because of the contagious nature of tuberculosis, and not because of any diminished physical or mental capabilities resulting from her condition.[FN3] Thus, in the language of § 504, the central question here is whether discrimination on the basis of contagiousness constitutes discrimination "by reason of ... handicap." Because the language of the Act, regulations, and legislative history are ***292** silent on this issue,[FN4] the principles outlined above compel the conclusion that contagiousness is not a handicap within the meaning of § 504. It is therefore clear that the protections of the Act do not extend to individuals such as Arline.

FN3. In testifying concerning his reasons for recommending Arline's termination, petitioner Craig Marsh, Superintendent of Schools of Nassau County, Florida, stated that "I felt like that for the benefit of the total student population and ... personnel in Nassau County and the public benefit, that it would be best if-not to continue or offer Mrs. Arline any employment." App. 62. Marsh added:

> "I am charged and so is the school board, with the responsibility for the protecting, the safety, health and welfare of students, every student in Nassau County. And the record clearly states that, you know, after all-after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it [was] in the best interest of the school system of Nassau County that she be dismissed from the classroom." *Id.*, at 81.

Before Arline's termination, Marsh consulted with Dr. Marianne McEuen, who testified that she recommended the termination because of the threat that Arline's condition posed to the health of the small children with whom Arline was in constant contact. *Id.*, at 12-17.

FN4. See, *e.g.*, 29 U.S.C. § 701 *et seq.*; 45 CFR pt. 84 (1985); H.R.Rep. No. 95-1149 (1978); S.Rep. No. 95-890 (1978); S.Rep. No. 93-1297 (1974); H.R.Rep. No. 93-244 (1973); S.Rep. No. 93-318 (1973).

In reaching a contrary conclusion, the Court never questions that Arline was discharged because of the threat her condition posed to others. Instead, it posits that the contagious effects of a disease cannot be "meaningfully" distinguished from the disease's effect on a claimant under the Act. *Ante*, at 1128. To support this position, the Court observes that Congress intended to extend the Act's protections to individuals who have a condition that does not impair their mental and physical capabilities, but limits their major life activities because of the adverse reactions of others. This congressional recognition of a handicap resulting from the reactions of others, we are told, reveals that Congress intended the Rehabilitation Act to regulate discrimination on the basis of contagiousness. *Ante*, at 1129.

This analysis misses the mark in several respects. To begin with, Congress' recognition that an individual may be handicapped under the Act solely by reason of the reactions of others in no way demonstrates that, for the purposes of interpreting the Act, the reactions of others to the condition cannot be considered separately from the effect of the condition on the claimant. In addition, the Court provides no basis for extending the Act's generalized coverage of individuals suffering discrimination as a result of the reactions of others to coverage of individuals with contagious

diseases. Although citing examples of handicapped individuals described in the regulations and legislative history, the Court points to nothing in these materials ****1134** suggesting that Congress contemplated that a person with a condition posing a threat to the health of others may be considered handicapped under ***293** the Act.[FN5] Even in an ordinary case of statutory construction, such meager proof of congressional intent would not be determinative. The Court's evidence, therefore, could not possibly provide the basis for "knowing acceptance" by such entities as the Nassau County School Board that their receipt of federal funds is conditioned on Rehabilitation Act regulation of public health issues. *Pennhurst*, 451 U.S., at 17, 101 S.Ct., at 1539.

FN5. In fact, two of the examples cited by the Court may be read to support a contrary conclusion. The 1978 amendments to the Rehabilitation Act, cited by the majority, *ante*, at 1130, n. 14, specifically exclude from the definition of a handicapped person alcoholics and drug abusers that "constitute a *direct threat to* property or *the safety of others.* " 29 U.S.C. § 706(7)(B) (emphasis added). If anything, this exclusion evinces congressional intent to avoid the Act's interference with public health and safety concerns. See Oversight Hearings on Rehabilitation Act of 1973 before the Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 2d Sess., 503 (1978) (statement of Rep. Hyde) ("Congress needs to give thoughtful and wide-ranging consideration to the needs of handicapped persons, balanced against the realities of public safety, economics, and commonsense"). This intent is also present in the statements of Representative Vanik relied on by the Court. See *ante*, at 1128, n. 9. Representative Vanik expressed apparent disapproval of a court ruling that " 'a cerebral palsied child, *who was not a physical threat* and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates.' " *Ante*, at 1128, n. 9, quoting 117 Cong.Rec. 45974 (1971) (emphasis added).

In *Alexander v. Choate, supra*, 469 U.S., at 299, 105 S.Ct., at 720, this Court stated that "[a]ny interpretation of § 504 must ... be responsive to two powerful but countervailing considerations-the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." The Court has wholly disregarded this admonition here.

U.S.Fla.,1987.
School Bd. of Nassau County, Fla. v. Arline
480 U.S. 273, 107 S.Ct. 1123, 43 Fair Empl.Prac.Cas. (BNA) 81, 42 Empl. Prac. Dec. P 36,791, 94 L.Ed.2d 307, 55 USLW 4245, 37 Ed. Law Rep. 448, 1 A.D. Cases 1026, 1 A.D.D. 313

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Supreme Court of the United States
B. T. SHELTON et al., Appellants,
v.
Everett TUCKER, Jr., etc., et al.
Max CARR et al., Petitioners,
v.
R. A. YOUNG et al.

Nos. 14, 83.
Argued Nov. 7, 1960.
Decided Dec. 12, 1960.

Actions in state court and federal court brought by schoolteachers and others challenging constitutionality of state statute requiring teachers in public schools to file affidavits giving names and addresses of all organizations to which they had belonged or contributed within the preceding five years as a prerequisite to employment. From adverse judgment of the United States District Court for the Eastern District of Arkansas, Western Division, 174 F.Supp. 351, the plaintiffs appealed and to review the judgment of the Supreme Court of Arkansas, 331 S.W.2d 701, affirming an adverse decree of the Chancery Court, First Division, Pulaski County, the plaintiffs petitioned for certiorari. The United States Supreme Court, Mr. Justice Stewart, held that statute compelling every teacher as a condition of employment in state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years, was unconstitutional as to teachers, who were hired on a year-to-year basis and were not covered by a civil service system and who had no job security beyond the end of each school year.

Judgments reversed.

Mr. Justice Frankfurter, Mr. Justice Harlan, Mr. Justice Whittaker, and Mr. Justice Clark, dissented.

West Headnotes

[1] Colleges and Universities 81 8(1)

81 Colleges and Universities
81k8 Staff and Faculty
81k8(1) k. In General. Most Cited Cases
(Formerly 81k8)

Schools 345 133

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)1 In General
345k133 k. Employment in General. Most Cited Cases

State statute compelling every teacher as a condition of employment in state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years, was unconstitutional as to teachers who were hired on a year-to-year basis, who were not covered by a civil service system and who had no job security beyond the end of each school year. U.S.C.A.Const. Amend. 14; Acts Ark.1958, 2d Ex.Sess., Act 10, § 1 et seq.; Ark.Stats. § 80-1304(b).

[2] Schools 345 133.1(1)

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)1 In General
345k133.1 Selection and Appointment
345k133.1(1) k. In General. Most Cited Cases
(Formerly 345k133.1)

The state has the right to investigate competence and fitness of those whom it hires to teach in its schools. Acts Ark.1958, 2d Ex.Sess., Act 10, § 1 et seq.

[3] Schools 345 133.1(1)

345 Schools

345II Public Schools
345II(K) Teachers
345II(K)1 In General
345k133.1 Selection and Appointment
345k133.1(1) k. In General. Most Cited Cases
(Formerly 345k133.1)

There is no requirement in federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Acts Ark.1958, 2d Ex.Sess., Act 10, § 1 et seq.

[4] Schools 345 133

345 Schools
345II Public Schools
345II(K) Teachers
345II(K)1 In General
345k133 k. Employment in General. Most Cited Cases

To compel a teacher to disclose his every associational tie is to impair teacher's right of free association. Acts Ark.1958, 2d Ex.Sess., Act 10, § 1 et seq.

[5] Constitutional Law 92 1079

92 Constitutional Law
92VII Constitutional Rights in General
92VII(B) Particular Constitutional Rights
92k1079 k. Personal Liberty. Most Cited Cases
(Formerly 92k83(1))

Even though governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

****247 *479** Mr. Robert L. Carter, for appellants.

***480** Messrs. Herschel H. Friday, Jr., Little Rock, Ark., and Louis L. Ramsay, Jr., Pine Bluff, Ark., for appellees.

Mr. Edwin E. Dunaway, Little Rock, Ark., for petitioners.

****248** Messrs. Robert V. Light and Herschel H. Friday, Jr., Little Rock, Ark., for respondents.

Mr. Justice STEWART delivered the opinion of the Court.

[1] An Arkansas statute compels every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years. At issue in these two cases is the validity of that statute under the Fourteenth Amendment to the Constitution. No. 14 is an appeal from the judgment of a three-judge Federal District Court upholding the statute's validity, 174 F.Supp. 351. No. 83 is here on writ of certiorari to the Supreme Court of Arkansas, which also held the statute constitutionally valid. 231 Ark. 641, 331 S.W.2d 701.

The statute in question is Act 10 of the Second Extraordinary Session of the Arkansas General Assembly of 1958. The provisions of the Act are summarized in the opinion of the District Court as follows (174 F.Supp. 353):

'Act 10 provides in substance that no person shall be employed or elected to employment as a superintendent, principal or teacher in any public school in Arkansas, or as an instructor, professor or teacher in any public institution of higher learning in that State until such person shall have submitted to the appropriate***481** hiring authority an affidavit listing all organizations to which he at the time belongs and to which he has belonged during the past five years, and also listing all organizations to which he at the time is paying regular dues or is making regular contributions, or to which within the past five years he has paid such dues or made such contributions. The Act further provides, among other things, that any contract entered into with any person who has not filed the prescribed affidavit shall be void; that no public moneys shall be paid to such person as compensation for his services; and that any such funds so paid may be recovered back either from the person receiving such funds or from the board of trustees or other governing body making the payment. The filing of a false affidavit is denounced as perjury, punishable by a fine of not less than five hundred nor more than one thousand dollars, and, in addition, the person filing the false affidavit is to lose his teaching license.' 174 F.Supp. 353-354.[FN1]

FN1. The statute is in seven sections. Section 1 provides: 'It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.'

Section 2 provides: 'No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor or professor is or within the past five years has been a member of, or to which organization or association such superintendent, principal, teacher, instructor, professor, or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.'

Section 3 sets out the form of affidavit to be used.

Section 4 provides: 'Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and/or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.'

Section 5 provides that a teacher filing a false affidavit shall be guilty of perjury, punishable by a fine, and shall forfeit his license to teach in any school or other institution of learning supported wholly or in part by public funds.

Section 6 is a separability provision.

Section 7 is an emergency clause, reading in part as follows:

'It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education.'

****249 *482** These provisions must be considered against the existing system of teacher employment required by Arkansas law. Teachers there are hired on a year-to-year basis. They are not covered by a civil

service system, and they have no job security beyond the end of each school year. The closest approach to tenure is a statutory provision for the automatic renewal of a teacher's contract if he is not notified within ten days after the end of a school year that the contract has not been renewed. Ark.1947 Stat.Ann. s 80-1304(b) (1960); Wabbaseka School District No. 7 of Jefferson County v. Johnson, 225 Ark. 982, 286 S.W.2d 841.

The plaintiffs in the Federal District Court (appellants here) were B. T. Shelton, a teacher employed in the Little Rock Public School System, suing for himself and others similarly situated, together with the Arkansas Teachers Association and its Executive Secretary, suing for the benefit of members of the Association. Shelton had been ***483** employed in the Little Rock Special School District for twenty-five years. In the spring of 1959 he was notified that, before he could be employed for the 1959-1960 school year, he must file the affidavit required by Act 10, listing all his organizational connections over the previous five years. He declined to file the affidavit, and his contract for the ensuing school year was not renewed. At the trial the evidence showed that he was not a member of the Communist Party or of any organization advocating the overthrow of the Government by force, and that he was a member of the National Association for the Advancement of Colored People. The court upheld Act 10, finding the information it required was 'relevant,' and relying on several decisions of this Court, particularly Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; ***484**250**Beilan v. Board of Higher Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414; and Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423.[FN2]

FN2. In th same proceeding the court held constitutionally invalid an Arkansas statute (Acts 1959, Act 115) making it unlawful for any member of the National Association for the Advancement of Colored People to be employed by the State of Arkansas or any of its subdivisions. 174 F.Supp. 351.

The plaintiffs in the state court proceedings (petitioners here) were Max Carr, an associate professor at the University of Arkansas, and Ernest T. Gephardt, a teacher at Central High School in Little Rock, each suing for himself and others similarly situated. Each refused to execute and file the affidavit required by Act 10. Carr executed an affirmation[FN3] in which he listed his membership in professional organizations, denied ever having been a member of any subversive organization, and offered to answer any questions which the University authorities might constitutionally ask touching upon his qualifications as a teacher. Gephardt filed an affidavit stating that he had never belonged to a subversive organization, disclosing his membership in the Arkansas Education Association and the American Legion, and also offering to answer any questions which the school authorities might constitutionally ask touching upon his qualifications as a teacher. Both were advised that their failure to comply with the requirements of Act 10 would make impossible their re-employment as teachers for the following school year. The Supreme Court of Arkansas upheld the constitutionality of Act 10, on its face and as applied to the petitioners. 231 Ark. 641, 331 S.W.2d 701.

FN3. The affirmation recited that Carr was 'conscientiously opposed to taking an oath or swearing in any form * * *.'

I.

It is urged here, as it was unsuccessfully urged throughout the proceedings in both the federal and state courts, that Act 10 deprives teachers in Arkansas of their ***485** rights to personal, associational, and academic liberty, protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action. In considering this contention, we deal with two basic postulates.

[2][3] First. There can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools, as this Court before now has had occasion to recognize. 'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.' Adler v. Board of Education, 342 U.S. 485, 493, 72 S.Ct. 380, 385, 96 L.Ed. 517. There is 'no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors.' Beilan v. Board of Education, 357 U.S. 399, 406, 78 S.Ct. 1317, 1322, 2 L.Ed.2d 1414.

FN4

FN4. The actual holdings in Adler and Beilan, involving the validity of teachers' discharges, are not relevant to the present case.

This controversy is thus not of a pattern with such cases as N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, and Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480. In those cases the Court held that there was no substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists involved. Here, by contrast, there can be no question of the relevance of a State's inquiry into the fitness and competence of its teachers.FN5

FN5. The declared purpose of Act 10 is 'to provide assistance in the administration and financing of the public schools * * *.' The declared justification for the emergency clause is 'to assist in the solution' of problems raised by 'the decisions of the United States Supreme Court in the school segregation cases.' See note 1. But neither the breadth and generality of the declared purpose nor the possible irrelevance of the emergency provision detracts from the existence of an actual relevant state interest in the inquiry.

****251** [4] Second. It is not disputed that to compel a teacher to disclose his every associational tie is to impair ***486** that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278; Bates v. Little Rock, supra, 361 U.S. at pages 522-523, 80 S.Ct. at pages 416-417. Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made-those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

The statute does not provide that the information it requires be kept confidential. Each school board is left free to deal with the information as it wishes.FN6 The record contains evidence to indicate that fear of public disclosure is neither theoretical nor groundless.FN7 Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority ***487** organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.

FN6. The record contains an opinion of the State Attorney General that 'it is an administrative determination, to be made by the respective Boards, as to the disclosure of information contained in the affidavits.' The Supreme Court of Arkansas has held only that 'the affidavits need not be opened to public inspection * * *.' 231 Ark. 641, 646, 331 S.W.2d 701, 704. (Emphasis added.)

FN7. In the state court proceedings a witness who was a member of the Capital Citizens Council testified that his group intended to gain access to some of the Act 10 affidavits with a view to eliminating from the school system persons who supported organizations unpopular with the group. Among such organizations he named the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers * * * has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their

associations by potential teachers.' Wieman v. Updegraff, 344 U.S. 183, 195, 73 S.Ct. 215, 221, 97 L.Ed. 216 (concurring opinion). 'Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate * * *.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S.Ct. 1203, 1212, 1 L.Ed.2d 1311.

II.

The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not ****252** whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has ***488** been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie-social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.

[5] In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.[FN8] The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[FN9]

FN8. In other areas, involving different constitutional issues, more administrative leeway has been thought allowable in the interest of increased efficiency in accomplishing a clearly constitutional central purpose. See Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 33 S.Ct. 44, 57 L.Ed. 184; Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264, 40 S.Ct. 141, 64 L.Ed. 260; Schlesinger v. Wisconsin, 270 U.S. 230, 241, 46 S.Ct. 260, 262, 70 L.Ed. 557 (dissenting opinion); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83, 66 S.Ct. 850, 851, 90 L.Ed. 1096. But cf. Dean Milk Co. v. Madison, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329.

FN9. See Freund, Competing Freedoms in American Constitutional Law, 13 U. of Chicago Conference Series 26, 32-33; Richardson, Freedom of Expression and the Function of Courts, 65 Harv.L.Rev. 1, 6, 23-24; Comment, Legislative Inquiry into Political Activity: First Amendment Immunity From Committee Interrogation, 65 Yale L.J. 1159, 1173-1175.

In Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, the Court invalidated an ordinance prohibiting all distribution of literature at any time or place in Griffin, Georgia, without a license, pointing out that so broad an interference was unnecessary to accomplish legitimate municipal aims. In ***489** Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 150, 84 L.Ed. 155, the Court dealt with ordinances of four different municipalities which either banned or imposed prior restraints upon the distribution of handbills. In holding the ordinances invalid, the Court noted that where legislative abridgment of 'fundamental personal rights and liberties' is asserted, 'the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.' 308 U.S. at page 161, 60 S.Ct. at page 151. In Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, the Court said that '(c)onduct remains subject to regulation for the protection of society,' but pointed out that in each case 'the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.' 310 U.S. at page 304, 60 S.Ct. at page 903. Illustrations of the same constitutional principle are to be found in many other decisions of the Court, among them, Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313; ****253**Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; and Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280.

As recently as last Term we held invalid an ordinance prohibiting the distribution of handbills because the breadth of its application went far beyond what was necessary to achieve a legitimate governmental purpose. Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559. In that case the Court noted that it had been 'urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited * * *. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.' 362 U.S. at page 64, 80 S.Ct. at page 538.

***490** The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. The judgments in both cases must be reversed.

It is so ordered.

Judgments reversed.

Mr. Justice FRANKFURTER, dissenting.

As one who has strong views against crude intrusions by the state into the atmosphere of creative freedom in which alone the spirit and mind of a teacher can fruitfully function, I may find displeasure with the Arkansas legislation now under review. But in maintaining the distinction between private views and constitutional restrictions, I am constrained to find that it does not exceed the permissible range of state action limited by the Fourteenth Amendment. By way of emphasis I therefore add a few words of the dissent of Mr. Justice HARLAN, in which I concur.

It is essential, at the outset, to establish what is not involved in this litigation:

(1) As the Court recognizes, this is not a case where, as in N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, and Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480, a State, asserting the power to compel disclosure of organizational affiliations, can show no rational relation between disclosure and a governmental interest justifying it. Those cases are relevant here only because of their recognition that an interest in privacy, in nondisclosure, may under appropriate circumstances claim constitutional protection. The question here is whether that interest is overborne by a countervailing public interest. To this concrete, limited question-whether the State's interest in knowing the nature ***491** of the organizational activities of teachers employed by it or by institutions which it supports, as a basis for appraising the fitness of those teachers for the positions which they hold, outweighs the interest recognized in N.A.A.C.P. and Bates-those earlier decisions themselves give no answer.

(2) The Court's holding that the Arkansas statute is unconstitutional does not, apparently, rest upon the threat that the information which it requires of teachers will be revealed to the public. In view of the opinion of the Supreme Court of Arkansas, decision here could not, I believe, turn on a claim that the teachers' affidavits will not remain confidential. That court has expressly said that 'Inasmuch as the validity of the act depends upon its being construed as a bona fide legislative effort to provide school boards with needed information, ****254** it necessarily follows that the affidavits need not be opened to public inspection, for the permissible purpose of the statute is to enlighten the school board alone.' 231 Ark. 641, 646, 331 S.W.2d 701, 704. If the validity of the statute depended on this matter, the pronouncement of the State's highest judicial organ would have to be read as establishing-the earlier view of the State Attorney General notwithstanding-that the statute does not authorize the making public of the affidavits. Even were the Arkansas court's language far more ambiguous than it is, it would be our duty so to understand its opinion, in accordance with the principle that 'So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed.' Fox v. Washington, 236 U.S. 273, 277, 35 S.Ct. 383, 384, 59 L.Ed. 573.

(3) This is not a case in which Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; and Kunz v. New York, 340 U.S. 290,

71 S.Ct. 312, 95 L.Ed. 280, call for condemnation of the 'breadth' of the statute. Those decisions struck down licensing laws ***492** which vested in administrative officials a power of censorship over communications not confined within standards designed to curb the dangers of arbitrary or discriminatory official action. The 'breadth' with which the cases were concerned was the breadth of unrestricted discretion left to a censor, which permitted him to make his own subjective opinions the practically unreviewable measure of permissible speech.[FN1] Nor is this a case of the nature of Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and Herndon v. Lowry, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066, [FN2] involving penal statutes which the Court found impermissibly 'broad' in quite another sense. Prohibiting, indiscriminately, activity within and without the sphere of the Fourteenth Amendment's protection of free expression, those statutes had the double vice of deterring the exercise of constitutional freedoms by making the uncertain line of the Amendment's application determinative of criminality and of prescribing indefinite standards of guilt, thereby allowing the potential vagaries and prejudices of juries, effectively insulated against control by reviewing courts, the power to intrude upon the protected sphere. The statute challenged in the present cases involves neither administrative discretion to censor nor vague, overreaching tests of criminal responsibility.

FN1. See also Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (the Irvington ordinance); Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; Jones v. Opelika, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290, vacating 316 U.S. 584, 62 S.Ct. 1231, 86 L.Ed. 1691 (the Opelika ordinance); Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 328, 95 L.Ed. 267, 280; Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002, 96 L.Ed. 1359; Superior Films, Inc., v. Department of Education, 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329; Staub v. Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302; cf. Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265; Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274. The common-law count in the Cantwell case involved considerations similar to those which were determinative of the decisions cited in text and note, at note 2, infra.

FN2. See also Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117; Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840.

***493** Where state assertions of authority are attacked as impermissibly restrictive upon thought, expression, or association, the existence vel non of other possible less restrictive means of achieving the ****255** object which the State seeks is, of course, a constitutionally relevant consideration. This is not because some novel, particular rule of law obtains in cases of this kind. Whenever the reasonableness and fairness of a measure are at issue-as they are in every case in which this Court must apply the standards of reason and fairness, with the appropriate scope to be given those concepts, in enforcing the Due Process Clause of the Fourteenth Amendment as a limitation upon state action-the availability or unavailability of alternative methods of proceeding is germane. Thus, a State may not prohibit the distribution of literature on its cities' streets as a means of preventing littering, when the same end might be achieved with only slightly greater inconvenience by applying the sanctions of the penal law not to the pamphleteer who distributes the paper but to the recipient who crumples it and throws it away. Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869. Nor may a State protect its population from the dangers and incitements of salacious books by restricting the reading matter of adults to that which would be harmless to the susceptible mind of a child. Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. And see De Jonge v. Oregon, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278; Talley v. California, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559.[FN3] But the consideration ***494** of feasible alternative modes of regulation in these cases did not imply that the Court might substitute its own choice among alternatives for that of a state legislature, or that the States were to be restricted to the 'narrowest' workable means of accomplishing an end. See Prince v. Massachusetts, 321 U.S. 158, 169-170, 64 S.Ct. 438, 443-444, 88 L.Ed. 645. Consideration of alternatives may focus the precise exercise of state legislative authority which is tested in this Court by the standard of reasonableness, but it does

not alter or displace that standard. The issue remains whether, in light of the particular kind of restriction upon individual liberty which a regulation entails, it is reasonable for a legislature to choose that form of regulation rather than others less restrictive. To that determination, the range of judgment easily open to a legislature in considering the relative degrees of efficiency of alternative means in achieving the end it seeks is pertinent.

> FN3. Language characterizing state statutes as overly broad has sometimes been found in opinions where it was unnecessary to the result, and merely meant to express the idea that whatever state interest was there asserted as underlying a regulation was insufficient to justify the regulation's application to particular circumstances fairly within the Fourteenth Amendment's protection. Compare Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430, with Fiske v. Kansas, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108. Compare Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313, with Breard v. Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233.

In the present case the Court strikes down an Arkansas statute requiring that teachers disclose to school officials all of their organizational relationships, on the ground that 'Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.' Granted that a given teacher's membership in the First Street Congregation is, standing alone, of little relevance to what may rightly be expected of a teacher, is that membership equally irrelevant when it is discovered that the teacher is in fact a member of the First Street Congregation and the Second Street Congregation and the Third Street Congregation and the 4-H Club and the 3-H Club and half a dozen other groups? Presumably, a teacher may have so many divers associations, so many divers commitments, that they consume his time and energy and interest at the expense of his ****256** work or even of his professional dedication. Unlike wholly individual interests, organizational connections-because they involve obligations undertaken with relation to other persons***495** -may become inescapably demanding and distracting. Surely, a school board is entitled to inquire whether any of its teachers has placed himself, or is placing himself, in a condition where his work may suffer. Of course, the State might ask: 'To how many organizations do you belong?' or 'How much time do you expend at organizational activity?' But the answer to such questions could reasonably be regarded by a state legislature as insufficient, both because the veracity of the answer is more difficult to test, in cases where doubts as to veracity may arise, than in the case of the answers required by the Arkansas statute, and because an estimate of time presently spent in organizational activity reveals nothing as to the quality and nature of that activity, upon the basis of which, necessarily, judgment or prophesy of the extent of future involvement must be based. A teacher's answers to the questions which Arkansas asks, moreover, may serve the purpose of making known to school authorities persons who come into contact with the teacher in all of the phases of his activity in the community, and who can be questioned, if need be, concerning the teacher's conduct in matters which this Court can certainly not now say are lacking in any pertinence to professional fitness. It is difficult to understand how these particular ends could be achieved by asking 'certain of (the State's) teachers about all their organizational relationships,' or 'all of its teachers about certain of their associational ties,' or all of its teachers how many associations currently involve them, or during how many hours; and difficult, therefore, to appreciate why the Court deems unreasonable and forbids what Arkansas does ask.

If I dissent from the Court's disposition in these cases, it is not that I put a low value on academic freedom. See Wieman v. Updegraff, 344 U.S. 183, 194, 73 S.Ct. 215, 220, 97 L.Ed. 216 (concurring opinion); Sweezy v. New Hampshire, 354 U.S. 234, 255, 77 S.Ct. 1203, 1214, 1 L.Ed.2d 1311 (concurring opinion). It is because that very freedom ***496** in its most creative reaches, is dependent in no small part upon the careful and discriminating selection of teachers. This process of selection is an intricate affair, a matter of fine judgment, and if it is to be informed, it must be based upon a comprehensive range of information. I am unable to say, on the face of this statute, that Arkansas could not reasonably find that the information which the statute requires-and which may not be otherwise acquired than by asking the question which it asks-is germane to that selection. Nor, on this record, can I attribute to the State a purpose to employ the enactment as a device for the accomplishment of what is constitutionally forbidden. Of course, if the information gathered by the required affidavits is used

to further a scheme of terminating the employment of teachers solely because of their membership in unpopular organizations, that use will run afoul of the Fourteenth Amendment. It will be time enough, if such use is made, to hold the application of the statute unconstitutional. See Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220. Because I do not find that the disclosure of teachers' associations to their school boards is, without more, such a restriction upon their liberty, or upon that of the community, as to overbalance the State's interest in asking the question, I would affirm the judgments below.

I am authorized to say that Mr. Justice CLARK, Mr. Justice HARLAN and Mr. Justice WHITTAKER agree with this opinion.

Mr. Justice HARLAN, whom Mr. Justice FRANKFURTER, Mr. Justice CLARK and Mr. Justice WHITTAKER join, dissenting.

****257** Of course this decision has a natural tendency to enlist support, involving as it does an unusual statute that touches constitutional rights whose protection in the context of the racial situation in various parts of the country ***497** demands the unremitting vigilance of the courts. Yet that very circumstance also serves to remind of the restraints that attend constitutional adjudication. It must be emphasized that neither of these cases actually presents an issue of racial discrimination. The statute on its face applies to all Arkansas teachers irrespective of race, and there is no showing that it has been discriminatorily administered.

The issue is whether, consistently with the Fourteenth Amendment, a State may require teachers in its public schools or colleges to disclose, as a condition precedent to their initial or continued employment, all organizations to which they have belonged, paid dues, or contributed within the past five years. Since I believe that such a requirement cannot be said to transgress the constitutional limits of a State's conceded authority to determine the qualifications of those serving it as teachers, I am bound to consider that Arkansas had the right to pass the statute in question, and therefore conceive it my duty to dissent.

The legal framework in which the issue must be judged is clear. The rights of free speech and association embodied in the 'liberty' assured against state action by the Fourteenth Amendment (see De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278; Gitlow v. New York, 268 U.S. 652, 672, 45 S.Ct. 625, 632, 69 L.Ed. 1138, dissenting opinion of Holmes, J.) are not absolute. Near v. Minnesota, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357; Whitney v. California, 274 U.S. 357, 373, 47 S.Ct. 641, 647, 71 L.Ed. 1095 (concurring opinion of Brandeis, J.). Where official action is claimed to invade these rights, the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether, judged in the light of that purpose, the questioned***498** action has substantial relevance thereto. See Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081, 3 L.Ed.2d 1115; Uphaus v. Wyman, 360 U.S. 72, 79 S.Ct. 1040, 3 L.Ed.2d 1090.

In the two cases at hand, I think both factors are satisfied. It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. See Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; Beilan v. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414; see also Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692. Furthermore, I take the Court to acknowledge that, agreeably to our previous decisions, the State may enquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. These cases therefore do not present a situation such as we had in N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, and Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480, where the required disclosure bears no substantial relevance to a legitimate state interest.

Despite these considerations this statute is stricken down because, in the Court's view, it is too broad, because it asks more than may be necessary to effectuate the State's legitimate interest. Such a statute, it is said, cannot justify ****258** the inhibition on freedom of association which so blanket an inquiry

may entail. Cf. N.A.A.C.P. v. Alabama, supra; Bates v. Little Rock, supra.

I am unable to subscribe to this view because I believe it impossible to determine a priori the place where the line should be drawn between what would be permissible inquiry and over broad inquiry in a situation like this. Certainly the Court does not point that place out. There can be little doubt that much of the associational information***499** called for by the statute will be of little or no use whatever to the school authorities, but I do not understand how those authorities can be expected to fix in advance the terms of their enquiry so that it will yield only relevant information.

I do not mean to say that alternatives such as an inquiry limited to the names of organizations of whose character the State is presently aware, or to a class of organizations defined by their purposes, would not be more consonant with a decent respect for the privacy of the teacher, nor that such alternatives would be utterly unworkable. I do see, however, that these alternatives suffer from deficiencies so obvious where a State is bent upon discovering everything which would be relevant to its proper purposes, that I cannot say that it must, as a matter of constitutional compulsion, adopt some such means instead of those which have been chosen here.

Finally, I need hardly say that if it turns out that this statute is abused, either by an unwarranted publicizing of the required associational disclosures or otherwise, we would have a different kind of case than those presently before us. See Lassiter v. Northampton Elections Board, 360 U.S. 45, 53-54, 79 S.Ct. 985, 991, 3 L.Ed.2d 1072. All that is now here is the validity of the statute on its face, and I am unable to agree that in this posture of things the enactment can be said to be unconstitutional.

I would affirm in both cases.

U.S. 1960.
Shelton v. Tucker
364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231

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Supreme Court of the United States.
W. W. SMITH, Plff. in Err.,
v.
STATE OF TEXAS.

No. 268.
Argued and submitted March 12, 1914.
Decided May 11, 1914.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a conviction in the County Court of Gregg County, in that state, of having acted as conductor of a freight train without previous experience as freight conductor or brakeman. Reversed and remanded for further proceedings.

See same case below, -- Tex. Crim. Rep. --, 146 S. W. 900.

The facts are stated in the opinion.

West Headnotes

Constitutional Law 92 ⚿4509(1)

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4509 Particular Offenses
92k4509(1) k. In General. Most Cited Cases
(Formerly 92k275(6), 92k275(2))

An infringement of the liberty of contract without due process of law, contrary to Const.U.S. Amend. 14, results from Acts Tex. 31st Leg. c. 46, making it a misdemeanor for any person to act as a conductor on a railway train without having served for two years as a freight conductor or brakeman.

Railroads 320 ⚿230

320 Railroads
320X Operation
320X(B) Statutory, Municipal, and Official Regulations
320k230 k. Employees. Most Cited Cases

Acts Tex. 31st Leg. c. 46, making it a misdemeanor to act as a conductor on a railway train without having served two years as a freight conductor or brakeman, *held* unconstitutional.

Railroads 320 ⚿255(1)

320 Railroads
320X Operation
320X(B) Statutory, Municipal, and Official Regulations
320k255 Offenses in Operation of Railroads
320k255(1) k. In General. Most Cited Cases

Acts Tex. 31st Leg. c. 46, making it a misdemeanor for any person to act as conductor without having served for two years as a freight conductor or brakeman, is unconstitutional.

***631 **682** Messrs. **Gardiner Lathrop** and Robert Dunlap for plaintiff in error.

***632** Mr. **B. F. Looney** Attorney General of Texas, and Mr. Luther Nickels for defendant in error.

***635** Mr. Justice **Lamar** delivered the opinion of the court:

W. W. Smith, the plaintiff in error, a man forty-seven years of age, had spent twenty-one years in the railroad business. He had never been a brakeman or a conductor, but for six years he served as fireman, for three years ran as extra engineer on a freight train, for eight years was engineer on a mixed train, hauling freight and passengers, and for four years had been engineer on a passenger train of the Texas & Gulf Railway. On July 22, 1910, he acted as conductor of a

freight train running between two Texas towns on that road. There is no claim in the brief for the state that he was not competent to perform the duties of that position. On the contrary, it affirmatively and without contradiction appeared that the plaintiff in error, like other locomotive engineers, was familiar with the duties of that position, and was competent to discharge them with skill and efficiency. He was, however, found guilty of the offense of violating the Texas statute which makes it unlawful for any person to act[FN†] as conductor of a freight train without having ***636** previously served for two years as conductor or brakeman on such trains. On that verdict he was sentenced to pay a fine, and the judgment having been affirmed, the case is here on a record in which he contends that the statute under which he was convicted violated the provisions of the 14th Amendment.

> FN† Sec. 2. If any person shall act or engage to act as a conductor on a railroad train in this state without having for two (2) years prior thereto served or worked in the capacity of a brakeman or conductor on a freight train on a line of railroad, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25 nor more than $500, and each day he so engages shall constitute a separate offense.
>
> Sec. 3. If any person shall knowingly engage, promote, require, persuade, prevail upon, or cause any person to do any act in violation of the provisions of the two preceding sections of this act, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than $25 nor more than $500, and each day he so engages shall constitute a separate offense. [Tex. Laws 1909, chap. 46.]

1. Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

If the service is public, the state may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; Hawker v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; Watson v. Maryland, 218 U. S. 173, 54 L. ed. 987, 30 Sup. Ct. Rep. 644. The private employer may likewise fix standards and tests, but, if his business is one in which the public health or safety is concerned, the state may legislate so as to exclude from work in such private calling those whose incompetence might cause injury to the public. But, as the public interest is the basis of such legislation, the tests and prohibition should be enacted with reference to that object, and so as not unduly to 'interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499.

A discussion of legislation of this nature is found in Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 98, 32 L. ed. 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28, where this court sustained the validity of a statute which required ***637** all locomotive engineers to submit to an examination for color blindness, and then provided that those ****683** unable to distinguish signals should not act as engineers on railroad trains. That statute did not prevent any competent person from being employed, but operated merely to exclude those who, on examination, were found to be physically unfit for the discharge of a duty where defective eyesight was almost certain to cause loss of life or limb. Another case cited by the plaintiff in error is that of Dent v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231. The act there under review provided that no one except licensed physicians should be allowed to practise medicine, and declared that licenses should be issued by the state board of health only to those (1) who were graduates of a reputable medical college; (2) to those who had practised medicine continuously for ten years; or (3) to those who, after examination, were found qualified to practice. Ten years' experience was accepted as proof of fitness, but such experience was not made the sole test, since the privilege of practising was attainable by all others who, by producing a diploma or by standing an examination, could show that they were qualified for the performance of the duties of the profession. In answer

to the contention that the act was void because it deprived the citizen of the liberty to contract and the right to labor, the court said no objection could be raised to the statutory requirements 'because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.'

The necessity of avoiding the fixing of arbitrary tests by which competent persons would be excluded from lawful employment is also recognized in Smith v. Alabama, 124 U. S. 465, 480, 31 L. ed. 508, 513, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564. There the act provided that all engineers should secure a license, and in sustaining the ***638** validity of the statute the court pointed out that the law 'requires that every locomotive engineer shall have a license, but it does not limit the number of persons who may be licensed, or prescribe any arbitrary conditions of the grant.' This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or remain in a private calling affecting the public safety. The liberty of contract is, of course, not unlimited; but there is no reason or authority for the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor on terms mutually satisfactory to employer and employee. None of the cases sustains the proposition that, under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve, and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

2. The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been freight conductors in other states, to act in the same capacity in the state of Texas. But barring these exceptional cases, the act permits brakemen of freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the ***639** applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

For it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, are given no chance to show their competency, but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains, and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals, and methods of ****684** moving and distributing cars, and if the training of one qualifies him to serve as conductor, the like training of the other should not exclude him from the right to earn his living in the same occupation.

It is argued in the brief for the state that, in practice, brakemen on freight trains are generally promoted to the position of freight conductors, and then to the position of conductors on passenger trains. And yet, under this act, even passenger conductors of the greatest experience and highest capacity would be punished if they acted as freight conductors without having previously been brakemen.

The statute not only prevents experienced and competent men in the passenger service from acting as freight conductors, but it excludes the engineer on a freight train,-even thought, under the rules of all railroads, the freight engineer now acts as conductor in the event the regular conductor is disable *en route*. This general custom***640** is a practical recognition of their qualification, and is founded on the fact that the engineer, by virtue of his position, is familiar with the rules and signals relating to the train's movement, and peculiarly qualified for the performance of the duties

of conductor. If we cannot take judicial knowledge of these facts, the record contains affirmative proof on the subject. For, according to the testimony FN† of the state's witness, 'acting as engineer on ***641** a freight train would better acquaint one with the knowledge of how to operate a freight train than acting as brakeman.' And yet, though at least equally competent, the engineer is denied the right to serve as conductor, and the exclusive right of appointment and promotion to that position is conferred upon brakemen.

> FN† I understand the railroad business, and know that a locomotive engineer learns as much about how a freight train should be operated by a conductor as a brakeman or conductor. Acting as engineer on a freight train will better acquaint one with a knowledge of how to operate a freight train than acting as brakeman. Under the rules of all railroads, and of the Texas & Gulf Railway Company, the engineer is held equally responsible with the conductor for the safe operation of the train. All orders are given to the engineer as well as to the conductor. Every order sent to a conductor in a train is made in duplicate, and one copy of it is given to the conductor and the other to the engineer. It is a rule with railway companies that if anything should happen to disable the conductor, or in any way prevent his proceeding with his train, the engineer is to immediately take charge of the train and handle it into the terminal. The engineer is constantly with the train and knows all of the signals, knows how the couplings are made, knows how the cars are switched and distributed, and knows how they are taken into the train and transported from one place to another. An engineer is so constantly associated with all the work of a conductor on a freight train that he should know as much about how a freight train should be operated by a conductor as the conductor himself. All actions of the conductor that pertain to the safe operation of the train are being carried on in his presence and within his observation all the time. The matter of handling the way bills and ascertaining the destinations of the cars in his train is easy and plain, and it does not take a person that has had experience as a conductor to understand that part of his service. The way bills are plainly written and the destinations plainly given, and booking the waybills and delivering them with the cars is clerical, and can be done by anyone that can read and write and who has ordinary sense. Every act that is to be done by the engineer, and all of the conductor's acts with reference to this are in the view and observation of the engineer.

3. So that the case distinctly raises the question as to whether a statute, in permitting certain competent men to serve, can lay down a test which absolutely prohibits other competent men from entering the same private employment. It would seem that to ask the question is to answer,-and the answer in no way denies the right of the state to require examinations to test the fitness and capacity of brakemen, firemen, engineers, and conductors to enter upon a service fraught with so much of risk to themselves and to the public. But all men are entitled to the equal protection of the law in their right to work for the support of themselves and families. A statute which permits the brakeman to act,-because he is presumptively competent,-and prohibits the employment of engineers and all others who can affirmatively prove that they are likewise competent, is not confined to securing the public safety, but denies to many the liberty of contract granted to brakemen, and operates to establish rules of promotion in a private employment.

If brakemen only are allowed the right of appointment to the position of conductors, then a privilege is given to them which is denied all other citizens of the United States. If the statute can fix the class from which conductors on freight trains shall be taken, another statute could limit the class from which brakeman and conductors on passenger trains could be selected, and so, progressively, the whole matter as to who could enter the railroad service, and who could go from one position to another, would be regulated by statute. In the nature of ****685** the case, promotion is a matter of private business management, and ***642** should be left to the carrier company, which, bound to serve the public, is held to the exercise of diligence in selecting competent men, and responsible in law for the acts of those who fill any of these positions.

4. There was evidence that Smith safely and properly operated the train which had in it cars containing freight destined for points in Texas, Missouri, Oklahoma, and Kansas. But in view of what has been

said it is not necessary to consider whether the plaintiff, as engineer, was in a position to raise the point that, under the decision in the Adams Express Case (Platt v. New York, 232 U. S. 35, 58 L. ed. 492, 34 Sup. Ct. Rep. 209) the statute interfered with interstate commerce. The judgment is reversed and the case remanded to the Court of Criminal Appeals of the State of Texas for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice **Holmes** dissents.

U.S. 1914
Smith v. State of Texas
L.R.A. 1915D,677, 233 U.S. 630, 34 S.Ct. 681, 58 L.Ed. 1129, Am.Ann.Cas. 1915D,420

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Supreme Court of the United States
Joseph VITEK, etc., et al., Applicants,
v.
Larry D. JONES.

No. 78-1155.
Argued Dec. 3, 1979.
Decided March 25, 1980.

An action was brought challenging the constitutionality, on procedural due process grounds, of Nebraska statute allowing the Director of Correctional Services to transfer a prisoner to a mental hospital if a designated physician or psychologist finds the prisoner to be suffering from a mental disease or defect that cannot be given proper treatment in prison. The Nebraska District Court, Urbom, Chief Judge, 437 F.Supp. 569, declared the statute unconstitutional. On appeal after remand of the case to the District Court for consideration of question of mootness, 436 U.S. 407, 98 S.Ct. 2276, 56 L.Ed.2d 381, the Supreme Court, Mr. Justice White, held, inter alia, that: (1) the case was not moot; (2) the involuntary transfer of a prisoner to a mental hospital implicates a liberty interest protected by the Fourteenth Amendment's due process clause; and (3) the District Court properly identified and weighed the relevant factors in arriving at its judgment of the statute's unconstitutionality.

Judgment affirmed as modified.

Mr. Justice Powell filed an opinion concurring in part.

Mr. Justice Stewart filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Rehnquist joined.

Mr. Justice Blackmun filed a dissenting opinion.

West Headnotes

[1] Constitutional Law 92 977

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k977 k. Mootness. Most Cited Cases
(Formerly 92k46(1))

Action challenging the constitutionality of Nebraska statute allowing Director of Correctional Services to transfer a prisoner to a mental hospital if a designated physician or psychologist finds the prisoner to be suffering from a mental disease or defect that cannot be given proper treatment in prison was not moot; the reality of the controversy had not been lessened by the cancellation of the prisoner's parole and his return to prison where he was protected from further transfer by the outstanding judgment and injunction of a district court and, under these circumstances, it was not "absolutely clear," absent the injunction, that the state's alleged wrongful behavior could not reasonably be expected to recur. R.R.S.Neb.1943, § 83-180.

[2] Constitutional Law 92 4782

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)9 Disadvantaged Persons
92k4781 Incompetency or Mental Illness
92k4782 k. In General. Most Cited Cases
(Formerly 92k272(2))

Involuntary transfer of a Nebraska state prisoner to a mental hospital implicates a liberty interest that is protected by the due process clause. R.R.S.Neb.1943, § 83-180; U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 4828

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)11 Imprisonment and Incidents

Thereof
92k4828 k. Transfer. Most Cited Cases
(Formerly 92k272(2))

Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons Subject to Control or Treatment. Most Cited Cases
(Formerly 310k13.5(1))

Mental Health 257A 43

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak43 k. Physicians' Certificates. Most Cited Cases
(Formerly 310k13.5(1))

A Nebraska state prisoner has a liberty interest, rooted in the Nebraska statute allowing the Director of Correctional Services to transfer a prisoner to a mental hospital if a designated physician or psychologist finds the prisoner to be suffering from a mental disease or defect that cannot be given proper treatment in prison, under which the prisoner can reasonably expect not to be transferred to a mental hospital without a finding that he is suffering from a mental illness for which he cannot secure adequate treatment in the correctional facility; and the state's reliance on the opinion of the physician or psychologist neither removes the prisoner's interest from due process protection nor answers the question of what process is due. R.R.S.Neb.1943, § 83-180; U.S.C.A.Const. Amend. 14.

[4] Constitutional Law 92 3873

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3868 Rights, Interests, Benefits, or Privileges Involved in General
92k3873 k. Liberties and Liberty Interests. Most Cited Cases
(Formerly 92k254.1)

State statutes may create liberty interests that are entitled to the procedural protections of the due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.

[5] Mental Health 257A 37.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak37.1 k. In General. Most Cited Cases
(Formerly 310k13.5(3))

Independently of statute allowing Director of Correctional Services to transfer a prisoner to a mental hospital if a designated physician or psychologist find the prisoner to be suffering from a mental disease or defect that cannot be given proper treatment in prison, the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. R.R.S.Neb.1943, § 83-180(1); U.S.C.A.Const. Amend. 14.

[6] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4337 k. Commitment and Proceedings Therefor. Most Cited Cases
(Formerly 92k255(5))

For the ordinary citizen, commitment to a mental hospital produces a massive curtailment of liberty and in consequence requires due process protection. U.S.C.A.Const. Amend. 14.

[7] Mental Health 257A 31

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak31 k. Control and Custody in General. Most Cited Cases

Loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement.

[8] Convicts 98 21

98 Convicts
98k21 k. Status, Rights, and Disabilities. Most Cited Cases
(Formerly 98k2, 110k1208.4(1), 110k1208(4))

Prisons 310 111

310 Prisons
310II Prisoners and Inmates
310II(A) In General
310k111 k. Status, Rights, and Disabilities in General. Most Cited Cases
(Formerly 98k2, 110k1208.4(1), 110k1208(4))

A valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement.

[9] Prisons 310 210

310 Prisons
310II Prisoners and Inmates
310II(E) Place or Mode of Confinement
310k210 k. In General. Most Cited Cases
(Formerly 310k13.3, 110k1218)

A valid criminal conviction and prison sentence sufficiently extinguish a defendant's liberty to empower the state to confine him in any of its prisons.

[10] Constitutional Law 92 4821

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)11 Imprisonment and Incidents Thereof
92k4821 k. Conditions of Confinement in General. Most Cited Cases
(Formerly 92k272(2))

Changes in the conditions of confinement having a substantial adverse impact on a prisoner are not alone sufficient to invoke the protections of the due process clause as long as the conditions or degree of confinement to which the prisoner is subjected are within the sentence imposed upon him. U.S.C.A.Const. Amend. 14.

[11] Constitutional Law 92 4338

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4338 k. Confinement and Conditions Thereof. Most Cited Cases
(Formerly 92k255(5))

While a conviction and sentence extinguish an individual's right to freedom from confinement for the term of the sentence, they do not authorize the state to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections. R.R.S.Neb.1943, § 83-180(1); U.S.C.A.Const. Amend. 14.

[12] Mental Health 257A 51.15

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.15 k. Involuntary Treatment or Medication. Most Cited Cases
(Formerly 310k13.5(3))

Stigmatizing consequences of a transfer of a prisoner to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kinds of deprivation of liberty that require procedural protections. R.R.S.Neb.1943, § 83-180(1); U.S.C.A.Const.

Amend. 14.

[13] Mental Health 257A 37.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak37.1 k. In General. Most Cited Cases
(Formerly 310k13.5(3))

Although the state's interest in segregating and treating mentally ill patients is strong, a prisoner's interest in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, and the risk of error in making the determinations required by Nebraska statute, which allows the Director of Correctional Services to transfer a prisoner to a mental hospital if a designated physician or psychologist finds the prisoner to be suffering from a mental disease or defect that cannot be given proper treatment in prison, is substantial enough to warrant appropriate procedural safeguards against error. R.R.S.Neb.1943, § 83-180(1); U.S.C.A.Const. Amend. 14.

[14] Constitutional Law 92 4828

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)11 Imprisonment and Incidents Thereof
92k4828 k. Transfer. Most Cited Cases
(Formerly 92k272(2))

Medical nature of the inquiry as to whether or not to transfer a prisoner to a mental hospital does not justify dispensing with due process requirements. R.R.S.Neb.1943, § 83-180(1); U.S.C.A.Const. Amend. 14.

[15] Mental Health 257A 37.1

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak37 Admission or Commitment Procedure
257Ak37.1 k. In General. Most Cited Cases
(Formerly 310k13.5(3))

Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty interests and because of the risk of a mistaken transfer, the District Court properly determined that certain procedural protections, including notice and an adversary hearing, were appropriate in the circumstances of the instant case. R.R.S.Neb.1943, § 83-180(1); U.S.C.A.Const. Amend. 14.

[16] Mental Health 257A 51.5

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak51 Restraint or Treatment
257Ak51.5 k. Treatment or Medication; Training or Habilitation. Most Cited Cases
(Formerly 257Ak51)

Counsel should be provided to indigent prisoners whom the state seeks to involuntarily treat as mentally ill. (Per Mr. Justice White, with three Justices concurring.) R.R.S.Neb.1943, § 83-180(1); U.S.C.A.Const. Amend. 14.

****1257** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***480** Appellee, a convicted felon, was transferred from state prison to a mental hospital pursuant to a Nebraska statute (§ 83-180(1)) which provides that if a designated physician or psychologist finds that a prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment" in prison, the Director of Correctional Services may transfer the prisoner to a mental hospital. In an action chal-

lenging the constitutionality of § 83-180(1) on procedural due process grounds, the District Court declared the statute unconstitutional as applied to appellee, holding that transferring him to the mental hospital without adequate notice and opportunity for a hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment, and that such transfers must be accompanied by adequate notice, an adversary hearing before an independent decisionmaker, a written statement by the factfinder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners. The court permanently enjoined the State from transferring appellee (who meanwhile had been transferred back to prison) to the mental hospital without following the prescribed procedures. Subsequently, appellee was paroled on condition that he accept mental treatment, but he violated that parole and was returned to prison. Relying on appellee's history of mental illness and the State's representation that he was a serious threat to his own and others' safety, the District Court held that the parole and revocation thereof did not render the case moot because appellee was still subject to being transferred to the mental hospital.

Held : The judgment is affirmed as modified. Pp. 1260-1265; 1265-1267.

Affirmed as modified.

Mr. Justice WHITE delivered the opinion of the Court with respect to Parts I, II, III, IV-A, and V, concluding that:

1. The District Court properly found that the case is not moot. The reality of the controversy between appellee and the State has not been lessened by the cancellation of his parole and his return to prison, where he is protected from further transfer by the District Court's judgment ***481** and injunction. Under these circumstances, it is not "absolutely clear," absent the injunction, that the State's alleged wrongful behavior could not reasonably be expected to recur. P. 1260.

2. The involuntary transfer of appellee to a mental hospital implicates a liberty interest that is protected by the Due Process Clause of the Fourteenth Amendment. Pp. 1261-1264.

(a) The District Court properly identified a liberty interest rooted in § 83-180(1), under which a prisoner could reasonably expect that he would not be transferred to a mental hospital without a finding that he was suffering from a mental illness for which he could not secure adequate treatment in prison. The State's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution. Pp. 1261-1262.

(b) The District Court was also correct in holding that, independently of § 83-180(1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. Involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. While a conviction****1258** and sentence extinguish an individual's right to freedom from confinement for the term of his sentence, they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections. Here, the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections. Pp. 1263-1264.

3. The District Court properly identified and weighed the relevant factors in arriving at its judgment. Pp. 1264-1265.

(a) Although the State's interest in segregating and treating mentally ill patients is strong, the prisoner's interest in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, and the risk of error in making the determinations required by § 83-180(1) is substantial enough to warrant appropriate procedural safeguards against error. P. 1264.

(b) The medical nature of the inquiry as to whether or not to transfer a prisoner to a mental hospital does not justify dispensing with due process requirements. P. 1265.

***482** (c) Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty interests and because of the risk of mistaken transfer, the District Court properly determined that certain procedural protections, including notice and an adversary hearing, were appropriate in the circumstances present in this case. P. 1265.

Mr. Justice WHITE, joined by Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice STEVENS, concluded in Part IV-B that it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill. Such a prisoner has an even greater need for legal assistance than does a prisoner who is illiterate and uneducated, because he is more likely to be unable to understand or exercise his rights. P. 1265.

Mr. Justice POWELL concluded that although the State is free to appoint a licensed attorney to represent a prisoner who is threatened with involuntary transfer to a mental hospital, it is not constitutionally required to do so, and that due process will be satisfied so long as such a prisoner is provided qualified and independent assistance. Pp. 1265-1267.

Melvin Kent Kammerlohr, Asst. Atty. Gen. of Neb., Lincoln, Neb., for appellants.

Thomas A. Wurtz, Omaha, Neb., for appellee.

Mr. Justice WHITE delivered the opinion of the Court, except as to Part IV-B.

The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner convicted and incarcerated in the State of Nebraska to certain procedural***483** rotections, including notice, an adversary hearing, and provision of counsel, before he is transferred involuntarily to a state mental hospital for treatment of a mental disease or defect.

I

Nebraska Rev.Stat. § 83-176(2) (1976) authorizes the Director of Correctional Services to designate any available, suitable, and appropriate residence facility or institution as a place of confinement for any state prisoner and to transfer a prisoner from one place of confinement to another. Section 83-180(1), however, provides that when a designated physician or psychologist finds that a prisoner "suffers from a mental disease or defect" and "cannot be given proper treatment in that facility," the director may transfer him for examination, study, and treatment to another institution within or without the Department of Correctional ****1259** Services.[FN1] Any prisoner so transferred to a mental hospital is to be returned to the Department if, prior to the expiration of his sentence, treatment is no longer necessary. Upon expiration of sentence,***484** f the State desires to retain the prisoner in a mental hospital, civil commitment proceedings must be promptly commenced. § 83-180(3).[FN2]

FN1. Section 83-180(1) provides:

> "When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary."

FN2. Section 83-180(3) provides:

> "When two psychiatrists designated by the Director of Correctional Services find that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred, permit him to

> remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect."

On May 31, 1974, Jones was convicted of robbery and sentenced to a term of three to nine years in state prison. He was transferred to the penitentiary hospital in January 1975. Two days later he was placed in solitary confinement, where he set his mattress on fire, burning himself severely. He was treated in the burn unit of a private hospital. Upon his release and based on findings required by § 83-180 that he was suffering from a mental illness or defect and could not receive proper treatment in the penal complex, he was transferred to the security unit of the Lincoln Regional Center, a state mental hospital under the jurisdiction of the Department of Public Institutions.

Jones then intervened in this case, which was brought by other prisoners against the appropriate state officials (the State) challenging on procedural due process grounds the adequacy of the procedures by which the Nebraska statutes permit transfers from the prison complex to a mental hospital. [FN3] On August 17, 1976, a three-judge District Court, convened ***485** pursuant to 28 U.S.C. § 2281 (1970 ed.),[FN4] denied the State's motion for summary judgment and trial ensued. On September 12, 1977, the District Court declared § 83-180 unconstitutional as applied to Jones, holding that transferring Jones to a mental hospital without adequate notice and opportunity for a hearing deprived him of liberty without due process of law contrary to the Fourteenth Amendment and that such transfers must be accompanied by adequate notice, an adversary hearing before an independent decisionmaker, a written statement by the factfinder of the evidence relied on and the reasons for the decision, and the availability of appointed counsel for indigent prisoners. *Miller v. Vitek*, 437 F.Supp. 569 (D.C.Neb.1977). Counsel was requested to suggest appropriate relief.

> FN3. After initially certifying this case as a class action, the District Court decertified the class, but permitted intervention by three individual plaintiffs, including Jones. The District Court subsequently dismissed the claims of all plaintiffs except Jones, who is the sole appellee in this Court.
>
> FN4. The statute authorizing the convening of a three-judge court, 28 U.S.C. § 2281 (1970 ed.), was repealed by Pub.L.94-381, 90 Stat. 1119, effective for actions commenced after August 12, 1976. Because the instant action was filed on November 12, 1975, the three-judge court was properly convened.

In response to this request, Jones revealed that on May 27, 1977, prior to the ****1260** District Court's decision, he had been transferred from Lincoln Regional Center to the psychiatric ward of the penal complex but prayed for an injunction against further transfer to Lincoln Regional Center. The State conceded that an injunction should enter if the District Court was firm in its belief that the section was unconstitutional. The District Court then entered its judgment declaring § 83-180 unconstitutional as applied to Jones and permanently enjoining the State from transferring Jones to Lincoln Regional Center without following the procedures prescribed in its judgment.

We noted probable jurisdiction 434 U.S. 1060, 98 S.Ct. 1230, 55 L.Ed.2d 760 (1978). Meanwhile, Jones had been paroled, but only on condition that he accept psychiatric treatment at a Veterans' Administration Hospital. We vacated the judgment of the District Court and remanded the case to that court for consideration ***486** of the question of mootness. *Vitek v. Jones*, 436 U.S. 407, 98 S.Ct. 2276, 56 L.Ed.2d 381 (1978). Both the State and Jones at this juncture insisted that the case was not moot. The State represented that because "Jones' history of mental illness indicates a serious threat to his own safety, as well as to that of others . . . there is a very real expectation" that he would again be transferred if the injunction was removed. App. to Juris. Statement 24. Jones insisted that he was receiving treatment for mental illness against his will and that he was continuing to suffer from the stigmatizing consequences of the previous determination that he was mentally ill. On these representations, the District Court found that the case was not moot because Jones "is subject to and is in fact under threat of being transferred to the state mental hospital under § 83-180." *Ibid.* The District Court reinstated its original judgment. We postponed consideration of jurisdiction to a hearing on the merits.

441 U.S. 922, 99 S.Ct. 2029, 60 L.Ed.2d 395 (1979). Meanwhile, Jones had violated his parole, his parole had been revoked, and he had been reincarcerated in the penal complex.

II

[1] We agree with the parties in this case that a live controversy exists and that the case is not moot. Jones was declared to be mentally ill pursuant to § 83-180 and was transferred to a mental hospital and treated. He was later paroled but only on condition that he accept mental treatment. He violated that parole and has been returned to the penal complex. On our remand to consider mootness, the District Court, relying on Jones' history of mental illness and the State's representation that he represented a serious threat to his own safety as well as to that of others, found that Jones "is in fact under threat of being transferred to the state mental hospital under § 83-180." We see no reason to disagree with the District Court's assessment at that time, and the reality of the controversy between Jones and the State has not been lessened by the cancellation of his parole and his return to the state prison, ***487** where he is protected from further transfer by the outstanding judgment and injunction of the District Court. The State, believing that the case is not moot, wants the injunction removed by the reversal of the District Court's judgment. Jones, on the other hand, insists that the judgment of the District Court be sustained and the protection against transfer to a mental hospital, except in accordance with the specified procedures, be retained.

Against this background, it is not "absolutely clear," absent the injunction, "that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968); *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). [FN5] Furthermore, as the ****1261** matter now stands, the § 83-180 determination that Jones suffered from mental illness has been declared infirm by the District Court. Vacating the District Court's judgment as moot would not only vacate the injunction against transfer but also the declaration that the procedures employed by the State afforded an inadequate basis for declaring Jones to be mentally ill. In the posture of the case, it is not moot.

FN5. Because Jones has not completed serving his sentence, he remains subject to the transfer procedures he challenges, unlike the plaintiff in *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975), where a challenge to parole procedures was held to be moot because plaintiff had completed his sentence and there was no longer any likelihood whatsoever that he would again be subjected to the parole procedures he challenged.

III

[2][3] On the merits, the threshold question in this case is whether the involuntary transfer of a Nebraska state prisoner to a mental hospital implicates a liberty interest that is protected by the Due Process Clause. The District Court held that it did and offered two related reasons for its conclusion. The District Court first identified a liberty interest rooted in ***488** § 83-180(1), under which a prisoner could reasonably expect that he would not be transferred to a mental hospital without a finding that he was suffering from a mental illness for which he could not secure adequate treatment in the correctional facility. Second, the District Court was convinced that characterizing Jones as a mentally ill patient and transferring him to the Lincoln Regional Center had "some stigmatizing" consequences which, together with the mandatory behavior modification treatment to which Jones would be subject at the Lincoln Center, constituted a major change in the conditions of confinement amounting to a "grievous loss" that should not be imposed without the opportunity for notice and an adequate hearing. We agree with the District Court in both respects.

A

[4] We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment. There is no "constitutional or inherent right" to parole, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979), but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revoke parole. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). The same is true of the revocation of probation. *Gagnon v. Scarpelli*, 411 U.S.

778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). In *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), we held that a state-created right to good-time credits, which could be forfeited only for serious misbehavior, constituted a liberty interest protected by the Due Process Clause. We also noted that the same reasoning could justify extension of due process protections to a decision to impose "solitary" confinement because "[it] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct." *Id.*, at 571-572, n. 19, 94 S.Ct., at 2982, n. 19. Once a State has ***489** granted prisoners a liberty interest, we held that due process protections are necessary "to insure that the state-created right is not arbitrarily abrogated." *Id.*, at 557, 94 S.Ct., at 2975.

In *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), and *Montanye v. Haymes*, 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976), we held that the transfer of a prisoner from one prison to another does not infringe a protected liberty interest. But in those cases transfers were discretionary with the prison authorities, and in neither case did the prisoner possess any right or justifiable expectation that he would not be transferred except for misbehavior or upon the occurrence of other specified events. Hence, "the predicate for invoking the protection of the Fourteenth Amendment as construed and ****1262** applied in *Wolff v. McDonnell* [was] totally nonexistent." *Meachum v. Fano*, *supra*, 427 U.S., at 226-227, 96 S.Ct., at 2540.

Following *Meachum v. Fano* and *Montanye v. Haymes*, we continued to recognize that state statutes may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons. *Enomoto v. Wright*, 434 U.S. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978), summarily aff'g 462 F.Supp. 397 (ND Cal.1976). Similarly in *Greenholtz v. Nebraska Penal Inmates*, *supra*, we held that state law granted petitioners a sufficient expectancy of parole to entitle them to some measure of constitutional protection with respect to parole decisions.

We think the District Court properly understood and applied these decisions. Section 83-180(1) provides that if a designated physician finds that a prisoner "suffers from a mental disease or defect" that "cannot be given proper treatment" in prison, the Director of Correctional Services may transfer a prisoner to a mental hospital. The District Court also found that in practice prisoners are transferred to a mental hospital only if it is determined that they suffer from a mental disease or defect that cannot adequately be treated within the penal complex. This "objective expectation, firmly fixed in state law and official penal complex practice," that ***490** a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital. Under our cases, this conclusion of the District Court is unexceptionable.

Appellants maintain that any state-created liberty interest that Jones had was completely satisfied once a physician or psychologist designated by the director made the findings required by § 83-180(1) and that Jones was not entitled to any procedural protections.[FN6] But if the State grants a pris oner***491** a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, "the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due ****1263** process appropriate for the circumstances must be observed." *Wolff v. McDonnell*, 418 U.S., at 558, 94 S.Ct., at 2976. These minimum requirements being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action. In *Morrissey*, *Gagnon*, and *Wolff*, the States had adopted their own procedures for determining whether conditions warranting revocation of parole, probation, or good-time credits had occurred; yet we held that those procedures were constitutionally inadequate. In like manner, Nebraska's reliance on the opinion of a designated physician or psychologist for determining whether the conditions warranting a transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution.

FN6. A majority of the Justices rejected an identical position in *Arnett v. Kennedy*, 416 U.S. 134, 166-167, 94 S.Ct. 1633, 1650-1651, 40 L.Ed.2d 15 (1974) (opinion of

POWELL, J., joined by BLACKMUN, J.), 177-178, 94 S.Ct., 1655-1656 (opinion of WHITE, J.), 210-211, 94 S.Ct., 1671-1672 (opinion of MARSHALL, J., joined by DOUGLAS and BRENNAN, JJ.). As Mr. Justice POWELL's opinion observed:

> "The plurality opinion evidently reasons that the nature of appellee's interest in continued federal employment is necessarily defined and limited by the statutory procedures for discharge and that the constitutional guarantee of procedural due process accords to appellee no procedural protections against arbitrary or erroneous discharge other than those expressly provided in the statute. The plurality would thus conclude that the statute governing federal employment determines not only the nature of appellee's property interest, but also the extent of the procedural protections to which he may lay claim. It seems to me that this approach is incompatible with the principles laid down in [*Board of Regents v.*] *Roth* [, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)] and [*Perry v.*] *Sindermann* [, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)]. Indeed, it would lead directly to the conclusion that whatever the nature of an individual's statutorily created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time. This view misconceives the origin of the right to procedural due process. That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. *Goldberg v. Kelly*, 397 U.S. 254 [90 S.Ct. 1011, 25 L.Ed.2d 287] (1970); *Bell v. Burson*, 402 U.S. 535 [91 S.Ct. 1586, 29 L.Ed.2d 90] (1971); *Board of Regents v. Roth, supra* [408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)]; *Perry v. Sindermann, supra* [408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972)]." *Id.*, at 166-167, 94 S.Ct. at 1650-1651.

B

[5] The District Court was also correct in holding that independently of § 83-180(1), the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections. The issue is whether after a conviction for robbery, Jones retained a residuum of liberty that would be infringed by a transfer to a mental hospital without complying with minimum requirements of due process.

[6][7] We have recognized that for the ordinary citizen, commitment to a mental hospital produces "a massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972), and in ***492** consequence "requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 580, 95 S.Ct. 2486, 2496, 45 L.Ed.2d 396 (1975) (BURGER, C. J., concurring). The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual" and that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." *Addington v. Texas, supra*, at 425-426, 99 S.Ct., at 1809. See also *Parham v. J. R.*, 442 U.S. 584, 600, 99 S.Ct. 2493, 2503, 61 L.Ed.2d 101 (1979). Also, "[a]mong the historic liberties" protected by the Due Process Clause is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). Compelled treatment in the form of mandatory behavior modification programs, to which the District Court found Jones was exposed in this case, was a proper factor to be weighed by the District Court. Cf. *Addington v. Texas, supra*, at 427, 99 S.Ct., at 1810.

The District Court, in its findings, was sensitive to these concerns:

> "[T]he fact of greater limitations on freedom of

action at the Lincoln Regional Center, the fact that a transfer to the Lincoln Regional Center has some stigmatizing consequences, and the fact that additional mandatory behavior modification systems are used at the Lincoln Regional Center combine to make the transfer a 'major change in the conditions of confinement' amounting to a 'grievous loss' to the inmate." *Miller v. Vitek*, 437 F.Supp., at 573.

Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause. ***493** We conclude that a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital.

[8][9][10] Undoubtedly, a valid criminal conviction and prison sentence extinguish a ****1264** defendant's right to freedom from confinement. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S., at 7, 99 S.Ct., at 2103. Such a conviction and sentence sufficiently extinguish a defendant's liberty "to empower the State to confine him in any of its prisons." *Meachum v. Fano*, 427 U.S., at 224, 96 S.Ct., at 2538 (emphasis deleted). It is also true that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Montanye v. Haymes*, 427 U.S., at 242, 96 S.Ct., at 2547.

[11] Appellants maintain that the transfer of a prisoner to a mental hospital is within the range of confinement justified by imposition of a prison sentence, at least after certification by a qualified person that a prisoner suffers from a mental disease or defect. We cannot agree. None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. *Baxstrom v. Herold*, 383 U.S. 107, 86 S.Ct. 760, 15 L.Ed.2d 620 (1966); *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); *Humphrey v. Cady*, 405 U.S. 504, 92 S.Ct. 1048, 31 L.Ed.2d 394 (1972); *Jackson v. Indiana*, 406 U.S. 715, 724-725, 92 S.Ct. 1845, 1851, 32 L.Ed.2d 435 (1972). A criminal conviction and sentence of imprisonment extinguish an individual's***494** right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.

[12] In light of the findings made by the District Court, Jones' involuntary transfer to the Lincoln Regional Center pursuant to § 83-180, for the purpose of psychiatric treatment, implicated a liberty interest protected by the Due Process Clause. Many of the restrictions on the prisoner's freedom of action at the Lincoln Regional Center by themselves might not constitute the deprivation of a liberty interest retained by a prisoner, see *Wolff v. McDonnell*, 418 U.S., at 572, n. 19, 94 S.Ct., at 2982, n. 19; cf. *Baxter v. Palmigiano*, 425 U.S. 308, 323, 96 S.Ct. 1551, 1560, 47 L.Ed.2d 810 (1976). But here, the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections.

IV

The District Court held that to afford sufficient protection to the liberty interest it had identified, the State was required to observe the following minimum procedures before transferring a prisoner to a mental hospital:

"A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

"B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

"C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except ***495** upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

****1265** "D. An independent decisionmaker;

"E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

"F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

"G. Effective and timely notice of all the foregoing rights." 437 F.Supp., at 575.

A

[13] We think the District Court properly identified and weighed the relevant factors in arriving at its judgment. Concededly the interest of the State in segregating and treating mentally ill patients is strong. The interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, however; and as the District Court found, the risk of error in making the determinations required by § 83-180 is substantial enough to warrant appropriate procedural safeguards against error.

[14] We recognize that the inquiry involved in determining whether or not to transfer an inmate to a mental hospital for treatment involves a question that is essentially medical. The question whether an individual is mentally ill and cannot be treated in prison "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington v. Texas*, 441 U.S., at 429, 99 S.Ct., at 1811. The medical nature of the inquiry, however, does not justify dispensing with due process requirements. It is precisely "[t]he subtleties and nuances of psychiatric diagnoses" that justify the requirement of adversary hearings. *Id.*, at 430, 99 S.Ct., at 1811.

[15] Because prisoners facing involuntary transfer to a mental hospital are threatened with immediate deprivation of liberty ***496** interests they are currently enjoying and because of the inherent risk of a mistaken transfer, the District Court properly determined that procedures similar to those required by the Court in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), were appropriate in the circumstances present here.

The notice requirement imposed by the District Court no more than recognizes that notice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him. *Wolff v. McDonnell, supra*, at 564, 94 S.Ct., at 2978. Furthermore, in view of the nature of the determinations that must accompany the transfer to a mental hospital, we think each of the elements of the hearing specified by the District Court was appropriate. The interests of the State in avoiding disruption was recognized by limiting in appropriate circumstances the prisoner's right to call witnesses, to confront and cross examine. The District Court also avoided unnecessary intrusion into either medical or correctional judgments by providing that the independent decisionmaker conducting the transfer hearing need not come from outside the prison or hospital administration. 437 F.Supp., at 574.

B [FN**]

FN** This part is joined only by Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice STEVENS.

[16] The District Court did go beyond the requirements imposed by prior cases by holding that counsel must be made available to inmates facing transfer hearings if they are financially unable to furnish their own. We have not required the automatic appointment of counsel for indigent prisoners facing other deprivations of liberty, *Gagnon v. Scarpelli*, 411 U.S., at 790, 93 S.Ct., at 1763; *Wolff v. McDonnell, supra*, at 569-570, 94 S.Ct., at 2981; but we have recognized that prisoners who are illiterate and uneducated have a greater need for assistance in exercising their rights. ****1266***Gagnon v. Scarpelli, supra*, at 786-787, 93 S.Ct., at 1761-1762; *Wolff v. McDonnell, supra*, at 570, 94 S.Ct., at 2981. A prisoner thought to be suffering from a ***497** mental disease or defect requiring involuntary treatment probably has an even greater need for legal assistance, for such a prisoner is more likely to be unable to understand or

exercise his rights. In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill.

V

Because Mr. Justice POWELL, while believing that Jones was entitled to competent help at the hearing, would not require the State to furnish a licensed attorney to aid him, the judgment below is affirmed as modified to conform with the separate opinion filed by Mr. Justice POWELL.

So ordered.

Mr. Justice POWELL, concurring in part.

I join the opinion of the Court except for Part IV-B. I agree with Part IV-B insofar as the Court holds that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital. I do not agree, however, that the requirement of independent assistance demands that a licensed attorney be provided.[FN1]

FN1. I also agree with the Court's holding that this case is not moot. The question is whether appellee faces a substantial threat that he will again be transferred to a state mental hospital. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930-932, 95 S.Ct. 2561, 2567-2568, 45 L.Ed.2d 648 (1975); *Steffel v. Thompson*, 415 U.S. 452, 458-460, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739, 745, 35 L.Ed.2d 201 (1973). He was involuntarily transferred from the prison complex to a mental institution, and thereafter paroled upon condition that he continue to receive psychiatric treatment. When he violated parole, he was returned to prison. The State advises us that appellee's "history of mental illness indicates a serious threat to his own safety, as well as to that of others," and "there is a very real expectation" of transfer if the District Court injunction were removed. App. to Juris. Statement 24. The District Court concluded that appellee is under threat of transfer. In these circumstances it is clear that a live controversy remains in which appellee has a personal stake. See *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 581-583, 100 S.Ct. 800, 806-807, 63 L.Ed.2d 36 (1980).

***498** I

In *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), my opinion for the Court held that counsel is not necessarily required at a probation revocation hearing. In reaching this decision the Court recognized both the effects of providing counsel to each probationer and the likely benefits to be derived from the assistance of counsel. "The introduction of counsel into a revocation proceeding [would] alter significantly the nature of the proceeding," *id.*, at 787, 93 S.Ct., at 1762, because the hearing would inevitably become more adversary. We noted that probationers would not always need counsel because in most hearings the essential facts are undisputed. In lieu of a *per se* rule we held that the necessity of providing counsel should be determined on a case-by-case basis. In particular, we stressed that factors governing the decision to provide counsel include (i) the existence of factual disputes or issues which are "complex or otherwise difficult to develop or present," and (ii) "whether the probationer appears to be capable of speaking effectively for himself." *Id.*, at 790, 791, 93 S.Ct., at 1764.

Consideration of these factors, and particularly the capability of the inmate, persuades me that the Court is correct that independent assistance must be provided to an inmate before he may be transferred involuntarily to a mental hospital. The essence of the issue in an involuntary commitment proceeding will be the mental health of the inmate. The resolution of factual disputes will be less important than the ability to understand and analyze expert psychiatric testimony that is often expressed in language relatively incomprehensible to laymen. It is unlikely that an inmate threatened with involuntary transfer ****1267** to mental hospitals will possess the competence or training to protect adequately his own interest in these state-initiated proceedings. And the circumstances of being imprisoned without normal access to others who may assist him places an additional handicap upon an inmate's ability to represent himself. I therefore agree ***499** that due process requires the provision of assistance to an inmate threatened with involuntary transfer to a mental hospital.

II

I do not believe, however, that an inmate must

always be supplied with a licensed attorney. "[D]ue Process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). See *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-903, 47 L.Ed.2d 18 (1976). Our decisions defining the necessary qualifications for an impartial decisionmaker demonstrate that the requirements of due process turn on the nature of the determination which must be made. "Due Process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham v. J. R.*, 442 U.S. 584, 607, 99 S.Ct. 2493, 2506, 61 L.Ed.2d 101 (1979). In that case, we held that due process is satisfied when a staff physician determines whether a child may be voluntarily committed to a state mental institution by his parents. That holding was based upon recognition that the issues of civil commitment "are essentially medical in nature," and that " 'neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.' " *Id.*, at 607, 609, 99 S.Ct., at 2506, 2507, quoting *In re Roger S.*, 19 Cal.3d 921, 942, 141 Cal.Rptr. 298, 311, 569 P.2d 1286, 1299 (1977) (Clark, J., dissenting). See also *Morrissey v. Brewer*, *supra*, 408 U.S., at 489, 92 S.Ct., at 2604; *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, 25 L.Ed.2d 287 (1970).

In my view, the principle that due process does not always require a law-trained decisionmaker supports the ancillary conclusion that due process may be satisfied by the provision of a qualified and independent adviser who is not a lawyer. As in *Parham v. J. R.*, the issue here is essentially medical. Under state law, a prisoner may be transferred only if he "suffers from a mental disease or defect" and "cannot be given proper treatment" in the prison complex. Neb.Rev. ***500** tat. § 83-180(1) (1976). The opinion of the Court allows a non-lawyer to act as the impartial decisionmaker in the transfer proceeding. *Ante*, at 1265.[FN2]

> FN2. The District Court specifically held that "a judicial officer is not required, and the decisionmaker need not be from outside the prison or hospital administration." *Miller v. Vitek*, 437 F.Supp. 569, 574 (Neb.1977) (three-judge court).

The essence of procedural due process is a fair hearing. I do not think that the fairness of an informal hearing designed to determine a medical issue requires participation by lawyers. Due process merely requires that the State provide an inmate with qualified and independent assistance. Such assistance may be provided by a licensed psychiatrist or other mental health professional. Indeed, in view of the nature of the issue involved in the transfer hearing, a person possessing such professional qualifications normally would be preferred. As the Court notes, "[t]he question whether an individual is mentally ill and cannot be treated in prison 'turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.' " *Ante*, at 1265, quoting *Addington v. Texas*, 441 U.S. 418, 429, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323 (1979). I would not exclude, however, the possibility that the required assistance may be rendered by competent laymen in some cases. The essential requirements are that the person provided by the State be competent and independent, and that he be free to act solely in the inmate's best interest.

****1268** In sum, although the State is free to appoint a licensed attorney to represent an inmate, it is not constitutionally required to do so. Due process will be satisfied so long as an inmate facing involuntary transfer to a mental hospital is provided qualified and independent assistance.

Mr. Justice STEWART, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join, dissenting.

It seems clear to me that this case is now moot. Accordingly, I would vacate the judgment and remand the case to ***501** the District Court with directions to dismiss the complaint. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36.

As the Court points out, this is not a class action, and the appellee is now incarcerated in the Nebraska Penal and Correctional Complex with an anticipated release date in March 1982. See *ante*, at 1259-1260, and n. 3, *ante*. In that status, the appellee is simply one of thousands of Nebraska prisoners, with no more standing than any other to attack the constitutionality of Neb.Rev.Stat. § 83-180(1) (1976) on the sole basis of the mere possibility that someday that statute might be invoked to transfer him to another institution.

Although the appellee was once transferred in accord with § 83-180(1), there is no demonstrated

probability that that will ever happen again. *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L.Ed. 350. And this case is not one that by its nature falls within the ambit of the "capable of repetition, yet evading review" exception to established principles of mootness. See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310; *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1. If the appellee should again be threatened with transfer under the allegedly infirm statute, there will be ample time to reach the merits of his claim.

" 'To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.' *Brownlow v. Schwartz*, 261 U.S. 216, 217-218 [43 S.Ct. 263, at page 264, 67 L.Ed. 620]." *Oil Workers v. Missouri*, 361 U.S. 363, 371, 80 S.Ct. 391, 396, 4 L.Ed.2d 373.

Mr. Justice BLACKMUN, dissenting.

I agree with Mr. Justice STEWART that this case is not properly before us. I write separately to express my own reasons for reaching that conclusion.

The claimed harm that gave birth to this lawsuit was the alleged deprivation of liberty attending appellee's transfer to the Lincoln Regional Center. It is clear to me that that asserted injury disappeared, at the latest, when appellee was ***502** granted parole.[FN1] Cf. ****1269***Preiser v. Newkirk*, 422 U.S. 395, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975). So did any immediate threat that that injury would be suffered again. Appellee has been returned to custody, however, and the ***503** parties agree that his reincarceration, coupled with his history of mental problems, has brought the controversy back to life.

FN1. The Court does not appear to share this view. It states that, even while at the Veterans' Administration Hospital, appellee Jones "insisted that he was receiving treatment for mental illness against his will." *Ante*, at 1260. It adds that appellee was "paroled, but only on condition that he accepts psychiatric treatment." *Ibid*. The Court does not identify the precise import of these facts, but a fair inference is that they are meant to suggest that this case-even during the time of appellee's parole-might properly have been pursued on the theory that the appellee was continuing to feel the effects of the alleged deprivation of constitutional rights in receiving in-patient care at the Veterans' Administration Hospital.

I cannot accept this suggestion. First, its premise appears to be faulty. The District Court did not find, and it does not appear clearly in the record, that the parole board's offer or appellee's acceptance of parole was in any way related to his prior transfer to the Lincoln Regional Center. Appellee chose to accept conditional parole. Moreover, at the time appellee elected to go on parole, he was being housed at the penal complex, not at the Lincoln Regional Center. Thus, it is not surprising that the District Court based its finding of nonmootness solely on its conclusion that appellee-notwithstanding his conditioned release-was "under threat of being transferred to the state mental hospital under § 83-180." App. to Juris. Statement 24. Second, the "continuing injury" theory seems to me to be incorrect as a matter of law. Appellee did not seek or evince any interest in seeking release from the Veterans' Administration Hospital, and a declaration that his initial transfer had been illegal would have neither justified nor predictably led to appellee's removal from that facility. In other words, after accepting the condition grant of parole, appellee could no longer show, as required by the case-or-controversy requirement, "that he personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975).

The Court also finds some support for its holding in the fact that vacating the District Court's order would remove the declaration that the challenged procedures "afforded an inadequate basis for declaring Jones to be mentally ill." *Ante*, at 1260. If the Court, by this statement, means to imply that appellee's suit is somehow mootness-proof due to the continuing stigma resulting from the transfer to the mental hospital, I cannot accept that sweeping proposition. The Court has never

> suggested that the "collateral consequences" doctrine of *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), which saves an action challenging the validity of a conviction after a prisoner has served his sentence, also saves a challenge to a commitment by a patient who has been released from a mental hospital. Nor does the logic of *Sibron* -focusing on tangible and remediable collateral consequences, such as use of a prior conviction to enhance a sentence for a later crime, or to impeach credibility if one appears as a witness-comfortably extend to the claim of a former mental patient. See *id.*, at 55, 88 S.Ct., at 1898 (referring to "adverse collateral legal consequences").

Given these facts, the issue is not so much one of mootness as one of ripeness. At most, although I think otherwise, it is a case presenting a "mixed question" of ripeness and mootness, hinging on the possibility that the challenged procedures will be applied again to appellee. This Court has confronted mixed questions of this kind in cases presenting issues "capable of repetition, yet evading review," see, *e. g., Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), and *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and in cases concerning the cessation of challenged conduct during the pendency of litigation, see, *e. g., Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944). In those contexts, the Court has lowered the ripeness threshold so as to preclude manipulation by the parties or the mere passage of time from frustrating judicial review. Mr. Justice STEWART correctly observes, and the Court apparently concedes, however, that the "capable of repetition" doctrine does not apply here. Neither does the liberal rule applied in "voluntary cessation" cases, since the current state of affairs is in no way the product of the appellants' voluntary discontinuation of their challenged conduct.[FN2] Certainly it is not the result of any effort on the part of the appellants to avoid review by this Court. Thus, since these mixed mootness/ripeness rules are inapplicable, this case presents for me nothing more than a plain, old-fashioned question of ripeness.[FN3]

> FN2. The decisions to award and revoke parole were made by the Nebraska Parole Board, not by appellants.

> FN3. It is not clear whether the Court views this as a "voluntary cessation" case. It nowhere expressly relies on the doctrine and does not explain what factors might justify characterizing appellee's present situation as the result of voluntary cessation of illegal conduct by appellants. On the other hand, each of the three decisions cited by the Court to support its application of a "creampuff" ripeness standard, *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979); *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953), pivoted on the presence of "voluntary cessation." It is therefore unclear whether the Court deems this a "voluntary cessation" case (without explaining why) or deems the "no reasonable expectation of recurrence" standard-to date a litmus carefully confined by a policy-tailored and principled "voluntary cessation" rule-applicable to an amorphous cluster of facts having nothing to do with parties' artful dodging of well-founded litigation. In either event, the Court's analysis invites the criticism, increasingly voiced, that this Court's decisions on threshold issues "are concealed decisions on the merits of the underlying constitutional claim." Tushnet, The New Law of Standing: A Plea for Abandonment, 62 Cornell L.Rev. 663 (1977).

***504** The Court's cases lay down no mechanistic test for determining whether a dispute ****1270** is ripe for adjudication. But past formulations are uniformly more rigorous than the one the Court now applies. The Court has observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy," *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974), and that "general assertions or inferences" that illegal conduct will recur do not render a case ripe. *Id.*, at 497, 94 S.Ct., at 676. "A hypothetical threat is not enough." *Public Workers v. Mitchell*, 330 U.S. 75, 90, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947). There must be "actual present or immediately threatened injury resulting

from unlawful governmental action." *Laird v. Tatum*, 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972). See *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, 93 S.Ct. 1146, 1148, 35 L.Ed.2d 536 (1973) (requiring "some threatened or actual injury"); *Massachusetts v. Mellon*, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923) (requiring that the litigant "has sustained or is immediately in danger of sustaining some direct injury"). A "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" is required. *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 959-960, 22 L.Ed.2d 113 (1969), quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

***505** Applying these principles, I have difficulty in perceiving an existing "case or controversy" here. Since our remand, the state officials have indicated nothing more than that they have a general right to apply their statute, and to apply it to appellee if necessary.[FN4] They have not expressed a present intent or desire to transfer appellee to a mental facility pursuant to the challenged provisions. Nor have they suggested that they may transfer appellee to the Lincoln Regional Center now on the basis of the diagnosis made five years ago. And they have not suggested that they would subject appellee immediately to a "fresh" psychiatric evaluation if the District Court's injunction were lifted. The appellee has represented that he "does not reside in the psychiatric unit of the Nebraska Penal and Correctional Complex, nor is he receiving or accepting psychiatric treatment." Brief for Appellee 11-12. The brief containing that statement was filed some six months ago and some nine months after the revocation of appellee's parole.

> FN4. Appellants, to be sure, have announced their intention to continue to use the challenged procedures. That fact, however, is of small, if any, significance, for it is hardly surprising to hear state officials say that they plan to abide by the State's own laws. See *Public Workers v. Mitchell*, 330 U.S. 75, 91, 67 S.Ct. 556, 565, 91 L.Ed. 754 (1947) ("the existence of the law and the regulations" does not alone render a suit ripe). Cf. *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (desuetude statute).

In sum, for all that appears, appellee has been assimilated once again into the general prison population, and appellants, at least at this time, are content to leave him where he is.[FN5] Given these facts, determining whether prison officials within two years again will seek to send appellee to a mental institution***506** "takes us into the area of speculation and conjecture." *O'Shea v. Littleton*, 414 U.S., at 497, 94 S.Ct., at 676. Cf. *Longshoremen v. Boyd*, 347 U.S. 222, 74 S.Ct. 447, 98 L.Ed. 650 (1954).

> FN5. I do not go so far as Mr. Justice STEWART does when he says that appellee is "simply one of thousands of Nebraska prisoners." *Ante*, at 1267. For purposes of the "case or controversy" requirement, appellee differs from his fellow inmates in two relevant respects: he has a recent history of perceived psychiatric problems, and in fact he was previously transferred pursuant to the challenged statutes. Cf. *O'Shea v. Littleton*, 414 U.S., at 496, 94 S.Ct., at 676 ("Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury").

It is for these reasons that I would vacate the judgment of the District Court and remand the case to that court with directions to dismiss the complaint.

U.S.Neb.,1980.
Vitek v. Jones
445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552

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(Cite as: 166 F.3d 1041)

United States Court of Appeals,
Ninth Circuit.
Sherrie Lynn ZUKLE, Plaintiff–Appellant,
v.
The REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant–Appellee.

No. 97–16708.
Argued and Submitted Nov. 3, 1998.
Decided Feb. 23, 1999.

Learning disabled student who was dismissed from program at medical school brought action against university regents, alleging violation of the Americans with Disabilities Act (ADA) and Rehabilitation Act. The United States District Court for the Eastern District of California, David F. Levi, J., granted summary judgment for regents, and student appealed. The Court of Appeals, O'Scannlain, Circuit Judge, held that: (1) student bore initial burden of production, and burden would then shift to university, but student bore ultimate burden of persuasion; (2) university's academic decisions were entitled to judicial deference; and (3) student's requested accommodations were not reasonable, since they would require substantial modification of school's program.

Affirmed.

West Headnotes

[1] Federal Courts 170B 915

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)7 Waiver of Error in Appellate Court
170Bk915 k. In General. Most Cited Cases

Appellant's failure to raise certain claims in her opening brief on appeal waived any appeal from the district court's grant of summary judgment on those claims.

[2] Civil Rights 78 1402

78 Civil Rights
78III Federal Remedies in General
78k1400 Presumptions, Inferences, and Burdens of Proof
78k1402 k. Education. Most Cited Cases
(Formerly 78k240(1))

In student's action alleging that educational institution discriminated against her on basis of disability, in violation of Americans with Disabilities Act (ADA) and Rehabilitation Act, student bears initial burden of producing evidence that she is otherwise qualified, which includes burden of producing evidence of existence of a reasonable accommodation that would enable her to meet institution's essential eligibility requirements; burden then shifts to institution to produce evidence that requested accommodation would require a fundamental or substantial modification of its program or standards, or evidence that requested accommodations, regardless of whether they are reasonable, would not enable student to meet its academic standards, although student retains ultimate burden of persuading court that she is otherwise qualified. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7); 34 C.F.R. §§ 104.3(k)(3), 104.44(a).

[3] Civil Rights 78 1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)

Although ultimate determination of whether an individual is otherwise qualified to participate in educational institution's program must be made by the court, in action brought under Americans with Disabilities Act (ADA) and Rehabilitation Act, judicial

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deference will be extended to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[4] Civil Rights 78 1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)

Judicial deference should be accorded an educational institution's determination that a reasonable accommodation is not available to a disabled student, for purpose of student's claim of discrimination under Americans with Disabilities Act (ADA) and Rehabilitation Act; court's duty is to first find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is not available. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[5] Civil Rights 78 1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)

University's dismissal of learning disabled student from medical school program did not amount to discrimination under Americans with Disabilities Act (ADA) or Rehabilitation Act; accommodations requested by student in addition to those offered by university, such as permitting student to begin one clerkship before finishing another, reducing amount of required clinical time, and placing student on decelerated schedule, were not reasonable because they would require substantial modification of school's program and would have lowered school's academic standards. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

[6] Civil Rights 78 1069

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1059 Education
78k1069 k. Disabled Students. Most Cited Cases
(Formerly 78k127.1)

For purpose of student's claim, under Americans with Disabilities Act (ADA) and Rehabilitation Act, that she was otherwise qualified to participate in medical school program, with reasonable accommodation, reasonableness is not a constant; rather, what is reasonable in a particular situation may not be reasonable in a different situation, even if the situational differences are relatively slight, and court must thus evaluate student's requests for accommodation in light of the totality of her circumstances. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794; Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

***1042** Dan Siegel,Hunter Pyle, Siegel & Yee, Oakland, California, for the plaintiff-appellant.

Charity Kenyon, Diepenbrock, Wulff, Plant & Hannegan, Sacramento, California, for the defendant-appellee.

Appeal from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding. D.C. No. CV–96–00127–DFL.

Before: ALARCON, O'SCANNLAIN and FERNANDEZ, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether a medical school violated the Americans with Disabilities Act or the Rehabilitation Act when it dismissed a learning disabled student for failure to meet the school's academic standards.

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I

Sherrie Lynn Zukle entered the University of California, Davis School of Medicine ("Medical School") in the fall of 1991 for a four year course of study. The first two years comprise the "basic science" or "pre-clinical" curriculum, consisting of courses in the function, design and processes of the human body. The final two years comprise the "clinical curriculum." In the third year, students take six consecutive eight-week clinical clerkships. During the fourth year, students complete clerkships of varying lengths in more advanced areas. Most clerkships involve treating patients in hospitals or clinics, and oral and written exams.

From the beginning, Zukle experienced academic difficulty. During her first quarter, she received "Y" grades in Anatomy and Biochemistry.[FN1] Upon reexamination, her Biochemistry grade was converted to a "D." She did not convert her Anatomy grade at that time. In her second quarter, she received a "Y" grade in Human Physiology, which she converted to a "D" upon reexamination.

> FN1. The Medical School assigns letter grades of A, B, C, D, F, I and Y to measure academic performance. A "Y" grade in a pre-clinical course is provisional; it means that a student has earned a failing grade but will be or has been permitted to retake the exam. However, a "Y" grade in a clinical clerkship indicates unsatisfactory performance in a major portion of that clerkship and may not be converted until the student repeats that portion of the clerkship.

In April 1992, the Medical School referred Zukle to the Student Evaluation Committee ("SEC").[FN2] Although subject to dismissal ***1043** pursuant to the Medical School's bylaws,[FN3] Zukle was allowed to remain in school. The SEC (1) placed Zukle on academic probation,[FN4] (2) required her to retake Anatomy and Biochemistry, (3) required her to be tested for a learning disability, and (4) placed her on a "split curriculum," meaning that she was given three years to complete the pre-clinical program, instead of the usual two years. Zukle continued to experience academic difficulty. For the spring quarter of 1992 (while on academic probation) she received a "Y" grade in Neurobiology. In the fall, she received a "Y" grade in Medical Microbiology and in the winter she received a "Y" in Principles of Pharmacology. In total, Zukle received eight "Y" grades during the pre-clinical portion of her studies. Five were converted to "C" after reexamination, two to "D" and one to "F."

> FN2. The Medical School's Committee on Student Evaluation and Promotion, which consists of two Promotions Boards and the SEC, monitors the progress of students with academic difficulties. Promotions Board A reviews preclinical students (i.e. students in the first two years of study); Promotions Board B reviews clinical students (i.e. students in the last two years of study). Generally, the SEC meets with students and their advisors before making a recommendation to the appropriate Promotions Board. The Promotions Board then conducts an independent review of the student's performance and decides whether to accept or reject the SEC's recommendation.

> FN3. The Medical School's bylaws provide that a student is subject to dismissal if she receives two or more failing grades within one academic quarter. Zukle received two "Y" grades in her first quarter.

> FN4. The Medical School's bylaws provide that a student on academic probation is required to remedy her deficient grades, and is subject to dismissal for failure to do so or if she receives another deficient grade while on academic probation.

In November 1992, Zukle was tested for a learning disability. The results received in January 1993, revealed that Zukle suffered from a reading disability which "affects visual processing as it relates to reading comprehension and rate when under timed constraints." In short, it takes Zukle longer to read and to absorb information than the average person. [FN5] Zukle asked Christine O'Dell, Coordinator of the University's Learning Disability Resource Center, to inform the Medical School of her test results in mid-July 1993. O'Dell informed Gail Currie of the Office of Student Affairs in a letter dated July 21, 1993. O'Dell recommended that the Medical School make various accommodations for Zukle's disability and recommended various techniques for Zukle to try to increase her reading comprehension. The Medical School of-

fered all of these accommodations to Zukle.

FN5. Under timed conditions, Zukle's reading comprehension is in the 2nd percentile, whereas when untimed her comprehension is in the 83rd percentile.

After completing the pre-clinical portion of Medical School, Zukle took the United States Medical Licensing Exam, Part I ("USMLE") in June 1994. Shortly thereafter, she began her first clinical clerkship, OB–GYN. During this clerkship, Zukle learned that she had failed the USLME.[FN6] The Medical School allowed Zukle to interrupt her OB–GYN clerkship to take a six-week review course to prepare to retake the USMLE, for which the Medical School paid.

FN6. Zukle's score placed her in the 5th percentile nationally.

Before leaving school to take the USMLE review course offered in southern California, Zukle asked Donal A. Walsh, the Associate Dean of Curricular Affairs, if she could rearrange her clerkship schedule. At this point, Zukle had completed the first half of her OB–GYN clerkship. She asked Dean Walsh if, instead of completing the second half of her OB–GYN clerkship upon return from retaking the USMLE, she could start the first half of a Family Practice Clerkship, and then repeat the OB–GYN clerkship in its entirety at a later date. Zukle testified that she made this request because she was concerned about how far behind she would be when she returned from the USMLE review course. She further asserted that she thought that if she started the Family Practice clerkship (which apparently requires less reading than the OB–GYN clerkship), she would be able to read for her upcoming Medicine clerkship at night. Zukle testified that Dean Walsh, and several other faculty members, including the Instructor of Record for Family Practice and the Instructor of Record for OB–GYN, initially approved her request. Later, however, Dean Walsh denied Zukle's request and informed her that she had to complete the OB–GYN clerkship before beginning another clerkship.

***1044** In September 1994, Zukle took and passed the USMLE on her second attempt.[FN7] She returned to the Medical School and finished her OB–GYN clerkship. Without requesting any accommodations, she began her Medicine clerkship. During this clerkship, she learned that she had earned a "Y" grade in her OB–GYN clerkship. Because of this grade, Zukle was automatically placed back on academic probation.[FN8]

FN7. Zukle's score placed her in the 9th percentile nationally.

FN8. The Promotions Board had voted to remove Zukle from academic probation in October 1994. At that time, it was unaware of her OB–GYN clerkship grade. The Medical School's bylaws provide that a student who receives a "Y" grade in her third or fourth years is automatically placed on academic probation at the time of receipt of the grade.

Two weeks before the Medicine written exam, Zukle contacted her advisor, Dr. Joseph Silva, and expressed concern that she had not completed the required reading. Dr. Silva offered to speak with Dr. Ruth Lawrence, the Medicine Instructor of Record, on Zukle's behalf. According to Zukle, she then spoke with Dr. Lawrence in person and requested time off from the clerkship to prepare for the exam. Dr. Lawrence denied Zukle's request. Zukle passed the written exam, but failed the Medicine clerkship because of unsatisfactory clinical performance. On Zukle's grade sheet, Dr. Lawrence rated Zukle as unsatisfactory in clinical problem solving skills; data acquisition, organization and recording; and skill/ability at oral presentations. Dr. Lawrence also reported negative comments from the people who worked with Zukle during the clerkship. Because Zukle had earned a failing grade while on academic probation, she was again subject to dismissal pursuant to the Medical School's bylaws.

On January 13, 1995, Zukle appeared before the SEC. The SEC recommended that Zukle (1) drop her current clerkship, Pediatrics; (2) start reviewing for the OB–GYN exam, and retake it; (3) repeat the Medicine clerkship in its entirety; (4) obtain the approval of the SEC before enrolling in any more clerkships; and (5) remain on academic probation for the rest of her medical school career.

On January 17, 1995, the Promotions Board met to consider Zukle's case. The Promotions Board voted to dismiss Zukle from the Medical School for "failure

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to meet the academic standards of the School of Medicine." According to Dr. Lewis, who was a member of the Promotions Board and was present when it reached its decision, "the Promotions Board considered Plaintiff's academic performance throughout her tenure at the medical school and determined that it demonstrated an incapacity to develop or use the skills and knowledge required to competently practice medicine."

In June 1995, Zukle appealed her dismissal to an *ad hoc* Board on Student Dismissal composed of faculty and students ("the Board").[FN9] Zukle appeared before the Board on November 12, 1995, and requested that her dismissal be reconsidered and that she be given extra time to prepare prior to some of her clerkships to accommodate her disability. The Board also heard testimony from Dr. Silva, who spoke favorably on her behalf, Dr. Ernest Lewis, Associate Dean of Student Affairs and Dr. George Jordan, the Chair of the Promotions Board at the time of Zukle's dismissal. When asked about Zukle's request to remain in Medical School on a decelerated schedule, Dean Lewis testified:

> FN9. The Medical School's bylaws provide that any student who has been dismissed from the Medical School may appeal her dismissal to the Dean, who in turn may appoint an *ad hoc* board consisting of five faculty members and two students to review the appeal. The Dean is responsible for the final disposition of the appeal.

> There is a certain point when everyone has to be able to respond in the same time frame. A physician does not have extra time when in the ER, for example. Speed of appropriate reaction to crisis is essential.
> The Board on Student Dismissal voted unanimously to uphold the Promotions Board's decision of dismissal.

***1045** On January 22, 1996, Zukle filed a complaint in federal district court for damages and injunctive relief against the Regents of the University of California ("Regents"). The complaint alleged discrimination based on disability, sex and race, and sexual harassment. On June 6, 1997, the Regents filed a motion for summary judgment. The district court entered its Memorandum of Opinion and Order on August 7, 1997, granting summary judgment to The Regents on all of Zukle's claims. The court found that Zukle's "race, sex, and sexual harassment claims are unsupported by the record and do not merit discussion." On Zukle's Americans with Disabilities Act ("ADA") and Rehabilitation Act claims, the district court found that "[b]ecause the evidence before the court shows that Zukle could not meet the minimum standards of the UCD School of Medicine with reasonable accommodation, she is not an otherwise qualified individual with a disability under the Rehabilitation Act or the ADA."

[1] Zukle timely appeals from the district court's grant of summary judgment on her ADA and Rehabilitation Act claims.[FN10]

> FN10. Zukle did not raise her race, sex or sexual harassment claims in her opening brief; therefore she has waived any appeal from the district court's grant of summary judgment on these claims. *See Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1100 (9th Cir.1998) ("Ordinarily, a party's failure to raise an issue in the opening brief constitutes a waiver of that issue.").

II

Zukle claims that she was dismissed from the Medical School in violation of Title II of the ADA and section 504 of the Rehabilitation Act. Title II of the ADA provides, in relevant part:

> no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Title II prohibits discrimination by state and local agencies, which includes publicly funded institutions of higher education. *See id.* at § 12131(1)(B).

Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, which provides:

> No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the

> benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....
>
> 29 U.S.C. § 794.

To make out a prima facie case under either the ADA or Rehabilitation Act Zukle must show that (1) she is disabled under the Act; (2) she is "otherwise qualified" to remain a student at the Medical School, i.e., she can meet the essential eligibility requirements of the school, with or without reasonable accommodation; (3) she was dismissed solely because of her disability; and (4) the Medical School receives federal financial assistance (for the Rehabilitation Act claim), or is a public entity (for the ADA claim). *See Dempsey v. Ladd*, 840 F.2d 638, 640 (9th Cir.1988); *cf. Willis v. Pacific Maritime Assoc.*, 162 F.3d 561, 565 (9th Cir.1998) (stating prima facie elements for ADA employment case).[FN11]

> FN11. There is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act. *See* 42 U.S.C. § 12133 ("The remedies, procedures, and rights set forth in [the Rehabilitation Act] shall be the remedies, procedures, and rights [applicable to ADA claims]."); *Bragdon v. Abbott*, 524 U.S. 624, ——, 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1998) (stating that courts are required to "construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"). Thus, courts have applied the same analysis to claims brought under both statutes, *see Doe v. Univ. of Maryland Med. Sys. Corp.*, 50 F.3d 1261, 1265 n. 9 (4th Cir.1995) ("Because the language of the two statutes is substantially the same, we apply the same analysis to both."), and courts routinely look to Rehabilitation Act case law to interpret the rights and obligations created by the ADA, *see, e.g., Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n. 3 (9th Cir.1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA."); *Theriault v. Flynn*, 162 F.3d 46, 48 n. 3 (1st. Cir.1998) ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act, and is to be interpreted consistently with that provision."); *cf. Weinreich v. Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir.1997) ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act ...." (citations omitted)).

***1046** The Regents do not dispute that Zukle is disabled and that the Medical School receives federal financial assistance and is a public entity. The Regents argue, however, that Zukle was not "otherwise qualified" to remain at the Medical School. Zukle responds that she *was* "otherwise qualified" with the aid of reasonable accommodations and that the Medical School failed reasonably to accommodate her.[FN12]

> FN12. Zukle does not argue that she could meet the Medical School's essential eligibility requirements *without* the aid of reasonable accommodations. Indeed, Zukle could not make this argument. As discussed below, Zukle had failed to meet the Medical School's essential eligibility requirements at the time she was dismissed. Because she had received a failing grade while on academic probation, she was subject to dismissal pursuant to the Medical School's bylaws. Accordingly, Zukle must show that she can meet the academic standards of the Medical School *with* the aid of reasonable accommodations. *See Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 n. 2 (9th Cir.1998).

A

The ADA defines a "qualified individual with a disability" as one who "meets the essential eligibility requirements ... for participation in [a given] program[ ] provided by a public entity" "*with or without reasonable modifications* to rules, policies, or practices...." 42 U.S.C. § 12131(2) (emphasis added); *accord Southeastern Community College v. Davis*, 442 U.S. 397, 406, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) (holding that under the Rehabilitation Act, an otherwise qualified individual is "one who is able to meet all of a program's requirements in spite of his handicap"). In the school context, the implementing regulations of the Rehabilitation Act define an otherwise qualified individual as an individual who, although disabled, "meets the academic and technical standards requisite to admission or participation in the [school's]

education program or activity." 34 C.F.R. § 104.3(k)(3).

However, under Rehabilitation Act regulations, educational institutions are required to provide a disabled student with reasonable accommodations to ensure that the institution's requirements do not discriminate on the basis of the student's disability. *See* 34 C.F.R. § 104.44(a). Similarly, the ADA's implementing regulations require a public entity to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity." 28 C.F.R. § 35.130(b)(7). The Supreme Court has made clear that an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones. *See Alexander v. Choate*, 469 U.S. 287, 300, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).

B

[2] In order to evaluate Zukle's claim, we must clarify the burdens of production and persuasion in cases of this type. The district court correctly noted that we have not previously addressed the allocation of the burdens of production and persuasion for the "otherwise qualified"—"reasonable accommodation" prong for a prima facie case in the school context. We have, however, recently articulated the allocation of these burdens in the employment context. *See Barnett v. U.S. Air, Inc.*, 157 F.3d 744 (9th Cir.1998). In *Barnett,* we made clear that the plaintiff bears the ultimate burden of persuasion with regard to whether he is qualified, i.e., in the school context, that he is able to meet the educational institution's essential eligibility requirements with or without the aid of reasonable accommodations. *See id.* at 749 (noting that, in the employment context, the plaintiff bears the burden of proving that he can perform the essential functions of the job with or without reasonable accommodation).

We further held that when the plaintiff alleges a failure to accommodate, part of the plaintiff's initial burden includes "showing the existence of a reasonable accommodation." *Id.* at 749. In the employment context,***1047** "[o]nce the plaintiff has established the existence of a reasonable accommodation that would enable him or her to perform the essential functions of an available job, the burden switches to the defendant to show that this accommodation would constitute an undue hardship." *Id.*

Adopting a similar burden shifting framework in the school context, we hold that the plaintiff-student bears the initial burden of producing evidence that she is otherwise qualified. This burden includes the burden of producing evidence of the existence of a reasonable accommodation that would enable her to meet the educational institution's essential eligibility requirements. The burden then shifts to the educational institution to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards. The school may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards. However, the plaintiff-student retains the ultimate burden of persuading the court that she is otherwise qualified.

C

[3] Before turning to the merits of Zukle's claims, we must decide whether we should accord deference to academic decisions made by the school in the context of an ADA or Rehabilitation Act claim, an issue of first impression in this circuit.

In *Regents of the Univ. of Michigan v. Ewing*, the Supreme Court analyzed the issue of the deference a court should extend to an educational institution's decision in the due process context. *See* 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985). In *Ewing,* the plaintiff-medical student challenged his dismissal from medical school as arbitrary and capricious in violation of his substantive due process rights. *See id.* at 217, 106 S.Ct. 507. The Court held that:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

Id. at 225, 106 S.Ct. 507 (footnote omitted).

166 F.3d 1041, 132 Ed. Law Rep. 81, 9 A.D. Cases 80, 14 NDLR P 188, 99 Cal. Daily Op. Serv. 1355, 1999 Daily Journal D.A.R. 1707
(Cite as: 166 F.3d 1041)

While the Court made this statement in the context of a due process violation claim, a majority of circuits have extended judicial deference to an educational institution's academic decisions in ADA and Rehabilitation Act cases. *See* *Doe v. New York Univ.*, 666 F.2d 761 (2d. Cir.1981); *McGregor v. Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850 (5th Cir.1993); *Wynne v. Tufts Univ. Sch. of Med. ("Wynne I")*, 932 F.2d 19 (1st. Cir.1991).[FN13] *But see* *Pushkin v. Regents of the Univ. of Colorado*, 658 F.2d 1372 (10th Cir.1981) (refusing to adopt deferential, rational basis test in evaluating educational institution's decisions in Rehabilitation Act case). These courts noted the limited ability of courts, "as contrasted to that of experienced educational administrators and professionals," to determine whether a student "would meet reasonable standards for academic and professional achievement established by a university," and have concluded that " '[c]ourts are particularly ill-equipped to evaluate academic performance.' " *Doe*, 666 F.2d at 775–76 (quoting *Board of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978)).

> FN13. Each circuit has, however, developed its own formulation of the deference standard. *Compare* *Doe*, 666 F.2d at 776 (holding that in determining whether a plaintiff is otherwise qualified to attend medical school, "*considerable judicial deference* must be paid to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no other purpose than to deny an education to handicapped persons." (emphasis added)), *with* *McGregor*, 3 F.3d at 859 ("[A]bsent evidence of discriminatory intent or disparate impact, we must accord *reasonable deference* to the [school's] academic decisions." (emphasis added)).

We agree with the First, Second and Fifth circuits that an educational institution's academic decisions are entitled to deference. Thus, while we recognize that the ultimate determination of whether an individual is otherwise qualified must be made by the ***1048** court, we will extend judicial deference "to the evaluation made by the institution itself, absent proof that its standards and its application of them serve no purpose other than to deny an education to handicapped persons." *Doe*, 666 F.2d at 776.

[4] Deference is also appropriately accorded an educational institution's determination that a reasonable accommodation is not available. Therefore, we agree with the First Circuit that "a court's duty is to first find the basic facts, giving due deference to the school, and then to evaluate whether those facts add up to a professional, academic judgment that reasonable accommodation is not available." *Wynne I*, 932 F.2d at 27–28; *see also* *McGregor*, 3 F.3d at 859 (the court must "accord deference to [the school's] decisions not to modify its programs [when] the proposed modifications entail academic decisions").

We recognize that extending deference to educational institutions must not impede our obligation to enforce the ADA and the Rehabilitation Act. Thus, we must be careful not to allow academic decisions to disguise truly discriminatory requirements. The educational institution has a "real obligation ... to seek suitable means of reasonably accommodating a handicapped person and to submit a factual record indicating that it conscientiously carried out this statutory obligation." *Wynne I*, 932 F.2d at 25–26. Once the educational institution has fulfilled this obligation, however, we will defer to its academic decisions.

III

[5] Having answered several preliminary questions, we now turn to the ultimate question—did Zukle establish a prima facie case of discrimination under the ADA or the Rehabilitation Act? As noted before, only the "otherwise qualified" prong of the prima facie case requirements is disputed by the parties. Zukle argues that she was otherwise qualified to remain at the Medical School, with the aid of the three accommodations she requested. The Medical School argues that Zukle's requested accommodations were not reasonable because they would have required a fundamental or substantial modification of its program. *See* *Alexander*, 469 U.S. at 300, 105 S.Ct. 712 (holding that institution subject to Rehabilitation Act may be required to make reasonable modifications to accommodate a disabled plaintiff, but need not make fundamental or substantial modifications).

Zukle bears the burden of pointing to the existence of a reasonable accommodation that would enable her to meet the Medical School's essential eligibility requirements. Once she meets this burden, the Medical School must show that Zukle's requested

accommodation would fundamentally alter the nature of the school's program. We must determine, viewing the evidence in the light most favorable to Zukle, if there are any genuine issues of material fact with regard to the reasonableness of Zukle's requested accommodations. *See* *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998).

[6] We note at this stage that "[r]easonableness is not a constant. To the contrary, what is reasonable in a particular situation may not be reasonable in a different situation-even if the situational differences are relatively slight." *Wynne v. Tufts Univ. Sch. of Med. ("Wynne II")*, 976 F.2d 791, 795 (1st Cir.1992). Thus, we must evaluate Zukle's requests in light of the totality of her circumstances. *See* *Barnett*, 157 F.3d at 748 ("Whether a particular accommodation is reasonable depends on the circumstances of the individual case.").

The evidence is undisputed that the Medical School offered Zukle all of the accommodations that it normally offers learning disabled students. When the Medical School first learned of Zukle's disability she was offered double time on exams, notetaking services and textbooks on audio cassettes. Further, Zukle was allowed to retake courses, proceed on a decelerated schedule and remain at the Medical School despite being subject to dismissal under the Medical School's bylaws.

Even with these accommodations, Zukle consistently failed to achieve passing grades in her courses. Though Zukle was on a decelerated schedule, she continued to receive "Y" grades in her pre-clinical years and ***1049** failed the USMLE on her first attempt. Further, although she was able to remedy some of her failing grades in her pre-clinical years, she was only able to do so by retaking exams. Moreover, she received a "Y" grade in her first clinical clerkship, automatically placing her on academic probation, and an "F" in her second. Because Zukle received a failing grade while on academic probation, she was subject to dismissal pursuant to the Medical School's bylaws. Clearly, Zukle could not meet the Medical School's essential eligibility requirements without the additional accommodations she requested.

The issue, then, is whether the ADA and Rehabilitation Act required the Medical School to provide Zukle with those additional accommodations. As noted above, the Medical School was only required to provide Zukle with *reasonable* accommodations. Accordingly, we examine the reasonableness of Zukle's requested accommodations.

A

Zukle claims that the Medical School should have granted her request to modify her schedule by beginning the first half of the Family Practice Clerkship instead of finishing the second half of her OB–GYN clerkship when she returned from retaking the USMLE. She proposed that she would then begin the Medicine clerkship, and finish Family Practice and OB–GYN at a later time.

The Regents presented evidence that granting this request would require a substantial modification of its curriculum. While the Medical School has granted some students reading time prior to the commencement of a clerkship, Dean Walsh testified that once a clerkship begins "all students are expected to complete the reading and other requirements of the clerkship, including night call and ward care, and to prepare themselves for the written exam which is given only at the end of the 8–week clerkship." Zukle's request would have entailed interrupting her OB–GYN clerkship, and starting the Medicine clerkship before finishing the Family Practice clerkship. Thus, by the time Zukle began the Medicine clerkship she would have had two uncompleted clerkships.

Dean Walsh testified that the only time the Medical School allows a student to begin a clerkship, interrupt it, and then return to that clerkship at a later point is when a student has failed the USMLE and needs time off to study. However, the student is still required to return to the same clerkship. Given that no student had been allowed to rearrange her clerkships in the manner Zukle requested and that Zukle's request would entail Zukle interrupting two courses to complete them at some later date, we have little difficulty concluding that this would be a substantial alteration of the Medical School's curriculum. *See* *Davis*, 442 U.S. at 413, 99 S.Ct. 2361 (holding that a school is not required to make substantial modifications to accommodate a handicapped student).

Zukle argues that the Medical School allowed numerous students to rearrange their clerkship schedules, and thus there is a material issue of fact as to

whether her request was reasonable. However, while the students that Zukle mentions were allowed to remedy failing grades by retaking clerkships or exams, *none* was allowed to begin a clerkship, interrupt it, begin another clerkship, and retake the second half of the first clerkship at a later point. The facts are undisputed that no student had been allowed to rearrange their clerkship schedule as Zukle requested. Indeed, Zukle admitted in the district court that "no student has been permitted to finish an interrupted course in the fashion [she] requested because it would require substantial curricular alteration." [FN14] We defer to the Medical School's academic decision to require students to complete courses once they are begun and conclude, therefore, that this requested accommodation was not reasonable.

> FN14. Zukle stated that this statement was "undisputed" in her Response to Separate Statement of Undisputed Facts.

B

Two weeks before the scheduled written exam in her Medicine clerkship, Zukle asked ***1050** Dr. Silva, her advisor, if she could have more time to prepare for the exam because she was behind in the readings. Zukle testified that she specifically requested to leave the hospital early every day so that she could spend more time preparing for the written exam in Medicine. Dr. Silva and Zukle spoke with the Instructor of Record in Zukle's Medicine clerkship, Dr. Lawrence. Dr. Lawrence told Zukle that she could not excuse her from the in-hospital part of the clerkship. Dr. Lawrence testified that she denied this request because she thought that it would be unfair to the other students.

The Medical School presented uncontradicted evidence that giving Zukle reduced clinical time would have fundamentally altered the nature of the Medical School curriculum. The Medical School presented the affidavit of Dean Lewis in which he explained the significance of the clinical portion of the Medical School curriculum:

> The third-year clinical clerkships are designed to simulate the practice of medicine.... Depending on the specialty and the setting, students are generally required to be "on call" at the hospital through an evening and night one or more times each week. Other than these call nights, students remain at the hospital or clinic during day time hours on a schedule similar to that expected of clinicians.... Releasing a student from a significant number of scheduled hours during the course of a rotation would compromise the clerkship's curricular purpose, i.e. the simulation of medical practice.

We defer to the Medical School's academic decision that the in-hospital portion of a clerkship is a vital part of medical education and that allowing a student to be excused from this requirement would sacrifice the integrity of its program. Thus, we conclude that neither the ADA nor the Rehabilitation Act require the Medical School to make this accommodation.

In any event, the evidence shows that Zukle was not prejudiced by the Medical School's failure to grant this accommodation because she in fact passed the Medicine written exam. *See Ellis v. Morehouse School of Medicine*, 925 F.Supp. 1529, 1548 (N.D.Ga.1996) (noting that student was not prejudiced by failure to accommodate because he passed exam for which he was denied accommodation). Zukle's low score on the exam did not help her Medicine grade, but Zukle failed the clerkship because of her inadequate clinical performance. Indeed, as the district court stated, because Zukle was doing so poorly in the clinical portion of the clerkship, "[g]iving [her] time off from the clinical portion to study for the test[ ] could not have helped, but could only have further damaged, her already marginal clinical skills." Thus, Zukle did not establish that she would have been able to meet the Medical School's requirements with the requested accommodation.

C

Finally, after she was dismissed, Zukle requested that the *ad hoc* Board place her on a decelerated schedule during the clinical portion of her studies. Specifically, Zukle sought eight weeks off before each clerkship to read the assigned text for that clerkship in its entirety.[FN15]

> FN15. The Regents allege that Zukle has abandoned this argument on appeal. While Zukle's presentation of this issue in her opening brief is not extensive, we do not feel that it is so lacking that she can be said to have abandoned it.

Zukle presented evidence that the Medical School regularly allowed students to proceed on a decelerated

schedule. Indeed, Zukle herself was allowed an extra year to complete the pre-clinical curriculum. However, no student had been provided the specific accommodation that Zukle requested, i.e., taking eight weeks off between clerkships. Furthermore, simply because the Medical School had granted other students' requests to proceed on a decelerated schedule, does not mean that Zukle's request was reasonable. The reasonableness of Zukle's request must be evaluated in light of Zukle's particular circumstances.

We agree with the district court that the Board's denial of Zukle's request to proceed on a decelerated schedule was a "rationally justifiable conclusion." *See Wynne II*, 976 F.2d at 793 (quoting ***1051***Wynne I*, 932 F.2d at 26). The Board noted that, even on a decelerated schedule during the pre-clinical phase, Zukle experienced severe academic difficulties: Zukle earned deficient grades in five courses and failed the USMLE exam on her first attempt even though she had taken several pre-clinical courses twice. The Board noted that there is "a fair amount of overlap on written exams of material from second-year courses and that the clinical work overlaps with the written." In sum, the evidence makes clear that the decelerated schedule would not have aided Zukle in meeting the Medical School's academic standards. Given Zukle's unenviable academic record, allowing her to remain in Medical School on a decelerated schedule would have lowered the Medical School's academic standards, which it was not required to do to accommodate Zukle. *See Davis*, 442 U.S. at 413, 99 S.Ct. 2361.[FN16]

> FN16. Furthermore, Zukle requested this accommodation after the Medical School's decision to dismiss her. At no time prior to her dismissal did she request that the Medical School place her on a decelerated schedule. Her failure to request this accommodation earlier contributes to our finding of unreasonableness. *See Wynne II*, 976 F.2d at 796 n. 3 (finding relevant to reasonableness inquiry the fact that student did not ask for accommodation "until after [the school] sent him packing and adversary proceedings were underway").

IV

In conclusion, we are persuaded that Zukle failed to establish that she could meet the essential eligibility requirements of the Medical School with the aid of reasonable accommodations. Accordingly, she failed to establish a prima facie case of disability discrimination under the ADA or the Rehabilitation Act.

AFFIRMED.

C.A.9 (Cal.),1999.
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71 Cal.App.4th 568, 84 Cal.Rptr.2d 27, 142 Lab.Cas. P 59,147, 99 Cal. Daily Op. Serv. 2877, 1999 Daily Journal D.A.R. 3710
(Cite as: 71 Cal.App.4th 568)

MICHAEL BOLLINGER et al., Plaintiffs and Respondents,
v.
SAN DIEGO CIVIL SERVICE COMMISSION et al., Defendants and Appellants.

No. D026130.

Court of Appeal, Fourth District, Division 1, California.
Mar. 30, 1999.

SUMMARY

The trial court granted a police officer and the city police officers' association a writ of mandate compelling the civil service commission to set aside its ratification, made during a closed session, of a hearing officer's findings of fact and recommendation that the police officer's demotion be upheld. (Superior Court of San Diego County, No. 693456, Anthony C. Joseph, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in concluding that the police officer had a right, under the Ralph M. Brown Act (Gov. Code, § 54957), to written notification of his right to an open hearing of the commission's ratification deliberations, since a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice. The court further held that the commission did not violate the police officer's procedural due process rights by denying him the opportunity to respond to the hearing officer's determination before the commission made its final decision, since the hearing officer made that determination following a noticed three-day public evidentiary hearing, which, together with the police officer's opportunity to seek judicial review, satisfied due process requirements. (Opinion by Nares, J., with O'Neill, J., [FN*] concurring. Concurring opinion by Work, Acting P. J. (see p. 578).)

FN* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

(1) Statutes § 29--Construction--Language--Legislative Intent.

Statutory interpretation presents a question of law subject to independent review. A court's analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. In determining intent, the court looks first to the words themselves. When the language is clear and unambiguous, there is no need for construction. When the language is susceptible of more than one reasonable interpretation, however, the court must look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.

(2a, 2b) Law Enforcement Officers § 11--Demotion--Administrative Hearing and Decision--Personnel Exception to Ralph M. Brown Act.

The underlying purposes of the "personnel exception" (Gov. Code, § 54957) to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body. Nonetheless, a court must construe the personnel exception narrowly and the open meeting requirements liberally. Under Gov. Code, § 54957, an employee may request a public hearing only when complaints or charges are involved. Negative comments in an employee's performance evaluation do not constitute complaints or charges within the meaning of Gov. Code, § 54957.

(3) Statutes § 31--Construction--Language--Qualifying Words and Phrases.

An accepted rule of statutory construction is that qualifying words and phrases, when no contrary intention appears, refer solely to the last antecedent.

(4a, 4b, 4c) Law Enforcement Officers § 11--Demotion--Administrative Hearing and Decision--Ratification of Hearing Officer's Determination

71 Cal.App.4th 568, 84 Cal.Rptr.2d 27, 142 Lab.Cas. P 59,147, 99 Cal. Daily Op. Serv. 2877, 1999 Daily Journal D.A.R. 3710
(Cite as: 71 Cal.App.4th 568)

in Closed Session--Ralph M. Brown Act--Due Process.

In a mandamus proceeding in which a police officer objected to the civil service commission's ratification, during a closed session, of a hearing officer's findings of fact and recommendation that the police officer's demotion be upheld, the trial court erred in concluding that the police officer had a right, under the Ralph M. Brown Act (Gov. Code, § 54957), to written notification of his right to an open hearing of the commission's ratification deliberations. A public agency may deliberate in closed session whether complaints or charges brought against an employee justify dismissal or disciplinary action without providing the statutory notice. Further, the commission did not violate the police officer's procedural due process rights by denying him the opportunity to respond to the hearing officer's determination before the commission made its final decision, since the hearing officer made that determination following a noticed three-day public evidentiary hearing, which, together with the police officer's opportunity to seek judicial review, satisfied due process requirements.

[See 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 581.]

(5) Statutes § 42--Construction--Aids--Legislative History--Significance of Rejection of Specific Provision.

The rejection of a specific provision contained in a legislative act as originally introduced is most persuasive that the act should not be interpreted to include what was left out.

(6) Civil Service § 9--Discharge, Demotion, Suspension, and Dismissal-- Administrative Hearing and Decision--Constitutional Procedural Due Process Requirements.

U.S. Const., 14th Amend., places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of "property" within the meaning of the due process clause. The California Constitution contains a similar provision. In cases of public employment, the employee is entitled to due process in matters involving contemplated discipline. Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is based, and (4) the opportunity to respond in opposition to the proposed action. To be meaningful, the right to respond must afford the employee an opportunity to present his or her side of the controversy before a reasonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter. The use of a single hearing officer, whose findings and proposed decision are adopted by the public agency, complies with due process.

COUNSEL

John W. Witt and Casey Gwinn, City Attorneys, Anita M. Noone, Assistant City Attorney, and Lisa A. Foster, Deputy City Attorney, for Defendants and Appellants.

Everitt L. Bobbitt; and Sanford A. Toyen for Plaintiffs and Respondents. ***571**

NARES, J.

In this employment matter, Michael Bollinger and the San Diego Police Officers' Association (the Association) obtained a writ of mandate compelling the San Diego Civil Service Commission and Commissioners Linda LeGerrette, Robert P. Ottilie, Franne M. Ficara, Daniel E. Eaton and Al Best (collectively the Commission), to set aside its closed session ratification of a hearing officer's findings of fact and recommendation that Bollinger's demotion be upheld. The court agreed the Commission's act was void under Government Code [FN1] section 54957, a provision of the Ralph M. Brown Act (§ 54950 et seq.) (the Brown Act) because it failed to give Bollinger 24-hour written notice of his right to request a public hearing. We reverse.

FN1 Statutory references are to the Government Code except where specified otherwise.

Background

The facts are undisputed. On January 13, 1995, the San Diego Police Department demoted Bollinger from police agent to police officer II based upon his misconduct. He appealed to the Commission. A noticed public evidentiary hearing was held over three days in April and June 1995, with Commissioner Ottilie serving as the sole hearing officer. [FN2]

FN2 The City of San Diego's civil service rules at the relevant time gave the Commission the discretion to "appoint one or more of

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> its members to hear the appeal and submit findings of fact and a decision to [it]. Based on the findings of fact, the Commission may affirm, modify, or overturn the decision[.]"

The Commission's written agenda for its August 3, 1995, meeting noted it would "recess into closed session ... to ratify hearings in the cases of Michael Bollinger and [another person][.]" The Commission posted the agenda 72 hours before the hearing (§ 54954.2) and mailed a copy to the Association. Bollinger was notified of the meeting in a telephone call. During closed session, the Commission ratified Ottilie's factual findings and recommendation that Bollinger's demotion be upheld. Shortly thereafter, the Commission for the first time provided Bollinger with a copy of Ottilie's 22-page written report. Bollinger complained to no avail that he was deprived of the opportunity to respond to Ottilie's report before the full Commission made its decision.

Bollinger then filed this action for a writ of mandamus under Code of Civil Procedure section 1085. He alleged the Commission's decision was void as a matter of law under section 54947 because it failed to notify him in writing of his right to request a public hearing. The court agreed and tentatively granted the petition in a telephonic ruling; it confirmed its decision after oral argument. ***572**

Discussion

I. *Standard of Review*

(1) Statutory interpretation presents a question of law subject to independent review. (*Board of Retirement v. Lewis* (1990) 217 Cal.App.3d 956, 964 [266 Cal.Rptr. 225].) " 'Our analysis starts from the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citation.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]' " (*Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554, 1562 [11 Cal.Rptr.2d 222], citing *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008 [239 Cal.Rptr. 656, 741 P.2d 154].)

II. *The Brown Act*

A

(2a) In enacting the open meeting requirements of the Brown Act in 1953, the Legislature expressly declared "the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." (§ 54950.) Section 54953 accordingly provides "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

The Brown Act's "personnel exception" to the open meeting rule, found at section 54957, provides in relevant part: "Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions ... during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

"As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the ***573** employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void." [FN3]

> FN3 Ordinarily, acts of a legislative body in violation of the Brown Act are not invalid; they merely subject the member of the governing body to criminal penalties. (*Griswold v. Mt. Diablo Unified Sch. Dist.* (1976) 63 Cal.App.3d 648, 657-658 [134 Cal.Rptr. 3]; § 54959.) Section 54957 thus affords an employee wrongfully deprived of written

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notice a valuable remedy.

"[T]he underlying purposes of the 'personnel exception' are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body." (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955 [196 Cal.Rptr. 45].) We must nonetheless "construe the 'personnel exception' narrowly and the 'sunshine law' liberally in favor of openness [citation] ...." (*Ibid.*)

In *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876 [80 Cal.Rptr.2d 589], the court interpreted the first paragraph of section 54957 to allow an employee to request a public hearing only where "complaints or charges" are involved. It reasoned the phrase " 'unless the employee requests a public session' " applies only to the immediately preceding phrase " 'or to hear complaints or charges brought against the employee' ...." (68 Cal.App.4th at p. 881.) (3) "An accepted rule of statutory construction is that qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent." (*Ibid.*)

(2b) The *Furtado* court held that negative comments in an employee's performance evaluation did not constitute "complaints or charges" within the meaning of section 54957. "[T]o merge employee evaluations into the category of 'complaints or charges' in order to permit an open session is effectively to rewrite the statute." (*Furtado v. Sierra Community College, supra,* 68 Cal.App.4th at p. 882.) "[T]he Legislature has drawn a reasonable compromise, leaving most personnel matters to be discussed freely and candidly in closed session, but permitting an employee to request an open session to defend against specific complaints or charges brought against him or her by another individual." (*Ibid.*; see also *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87 [82 Cal.Rptr.2d 452] [performance evaluation of probationary teacher does not constitute the bringing of "specific complaints or charges"].)
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(4a) Here, in contrast to *Furtado* and *Fischer,* the Commission concedes this matter does not involve a routine employee performance evaluation but "specific complaints or charges" other police officers brought against Bollinger. [FN4] It contends, though, that Bollinger was not entitled to 24-hour written notice of its August 3, 1995, closed session, because it was solely for the purpose of *deliberating* whether the complaints or charges justified disciplinary action rather than conducting an evidentiary hearing thereon.

FN4 Ottilie's written report shows several police officers accused Bollinger of disobeying numerous orders and failing to properly document the chain of custody of evidence.

The Commission relies upon the clause in the second paragraph of section 54957, which provides "the employee shall be given written notice of his or her right to have the complaints or charges *heard* in open session rather than a closed session[.]" (Italics added.) We also note that in the first paragraph of section 54957, the Legislature used "to consider" in reference to the "appointment, employment, evaluation of performance, discipline, or dismissal" of an employee, but used "to hear" in reference to "complaints or charges brought against the employee by another person or employee." To "consider" is to "deliberate upon[.]" (American Heritage Dict. (1981) p. 284, col. 1.) To "hear" is to "listen to in an official ... capacity[.]" (*Id.* at p. 607, col. 2.) A "hearing" is "[a] proceeding of relative formality ..., generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented." (Black's Law Dict. (6th ed. 1990) p. 721, col. 1.) The plain language of section 54957 lends itself to the interpretation the Commission urges.

The statute's legislative history further supports the Commission's position. The second paragraph of section 54957 was enacted by parallel Assembly and Senate Bills. (Stats. 1993, ch. 1136, § 12 (Assem. Bill No. 1426 (1993-1994 Reg. Sess.)); Stats. 1993, ch. 1137, § 12 (Sen. Bill No. 36 (1993-1994 Reg. Sess.)).) As originally introduced, both bills read in part: "As a condition to holding a closed session *on the complaints or charges to consider disciplinary action or to consider dismissal, the employee shall be given written notice of his or her right to have a public hearing rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session." (Sen. Bill No. 36 (1993-1994 Reg. Sess.) § 17; Assem. Bill No. 1426 (1993-1994 Reg. Sess.) § 17, italics added.)*

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Later, however, the italicized language was deleted and the bills were altered to what now appears in paragraph two of section 54957, cited *ante*. (Assem. Amend. to Sen. Bill No. 36, § 12 (1993-1994 Reg. Sess.) Aug. 19, 1993; Sen. Amend. to Assem. Bill No. 1426, § 12 (1993-1994 Reg. Sess.) ***575** Sept. 8, 1993.) The Legislature thus specifically rejected the notion an employee is entitled to 24-hour written notice when the closed session is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action. (5) "The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out. [Citations.]" (*Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555 [7 Cal.Rptr.2d 848].) (4b) Accordingly, we conclude a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice.

B

Under the particular facts here, however, a question remains: Was Bollinger entitled to be "heard," within the meaning of section 54957, by the Commission before it recessed into closed session to deliberate whether to adopt the factual findings and recommendation of the single hearing officer?

Bollinger argues the Commission violated his procedural due process rights by denying him the opportunity to respond to Ottilie's written factual findings and recommendation before it made its final decision. The Commission counters that the evidentiary hearing before a single hearing officer, and the opportunity to seek judicial review, satisfied due process requirements. [FN5]

> FN5 Because due process principles were not raised in the trial court or in the initial appellate briefing, we asked the parties to provide supplemental letter briefs on the issue. We have taken their responses into consideration.

(6) " 'The Fourteenth Amendment to the United States Constitution "places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." [Citations.] The California Constitution contains a similar provision. [Citations.]' " (*Townsel v. San Diego Metropolitan Transit Development Bd.* (1998) 65 Cal.App.4th 940, 946 [77 Cal.Rptr.2d 231].) "[I]n cases of public employment, the employee is entitled to due process in matters involving contemplated discipline." (*Robinson v. State Personnel Bd.* (1979) 97 Cal.App.3d 994, 1005 [159 Cal.Rptr. 222] (conc. opn. of Evans, J.).)

"Minimal standards of due process require that a public employee receive, prior to imposition of discipline: (1) Notice of the action proposed, (2) the grounds for discipline, (3) the charges and materials upon which the action is ***576** based, and (4) the opportunity to respond in opposition to the proposed action. (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736 [150 Cal.Rptr. 475, 586 P.2d 956]; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215 [124 Cal.Rptr. 14, 539 P.2d 774].) To be meaningful, the right to respond must afford the employee an opportunity to present his side of the controversy before a reasonably impartial and noninvolved reviewer who possesses the authority to recommend a final disposition of the matter." (*Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362-363 [181 Cal.Rptr. 699]; accord, *Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770 [49 Cal.Rptr.2d 813]; *Coleman v. Regents of University of California* (1979) 93 Cal.App.3d 521, 526 [155 Cal.Rptr. 589].) The use of a single hearing officer, whose findings and proposed decision are adopted by the public agency, complies with due process. (*Nat. Auto. & Cas. Co. v. Ind. Acc. Com.* (1949) 34 Cal.2d 20, 29-30 [206 P.2d 841].)

(4c) In *Titus v. Civil Service Com., supra*, 130 Cal.App.3d 357, a lieutenant in the sheriff's department received notice of his proposed discharge. He was given the materials upon which the disciplinary action was based and the opportunity to respond orally or in writing. After the employee argued his position to a chief, the chief recommended his firing. The undersheriff and two assistant sheriffs reviewed the matter and adopted the chief's recommendation. The employee appealed to the Civil Service Commission of Los Angeles County, which adopted the hearing officer's recommendation and sustained the firing.

The employee then sought a writ of mandate to compel his reinstatement, arguing his due process rights were violated when he was precluded from responding to the chief's recommendation before a

final decision was made. In affirming the lower court's denial, the court explained: "The record discloses that Chief Knox possessed the authority to recommend the ultimate disposition to the charges against appellant, subject only to review by a panel consisting of the undersheriff and two assistant sheriffs.... Appellant was permitted to present his side of the controversy. Due process requires nothing more." (*Titus v. Civil Service Com., supra,* 130 Cal.App.3d at p. 363.)

The Administrative Procedure Act (§ 11500 et seq.), applicable to certain state agencies, provides that if a contested matter is heard by an administrative law judge, the agency may adopt the written proposed decision in its entirety. In *Greer v. Board of Education* (1975) 47 Cal.App.3d 98 [121 Cal.Rptr. 542], the court held that in that instance an employee has no right to receive the hearing officer's proposed decision or present any argument to the full agency before it acts. The court noted the aggrieved party's remedy ***577** is to seek review in the superior court on the basis of the evidentiary hearing record. [FN6] (*Id.* at pp. 110-112; § 11517.)

> FN6 Here, the City of San Diego's civil service rules required that a reporter record testimony taken at the evidentiary hearing.

In *Dami v. Dept. Alcoholic Bev. Control* (1959) 176 Cal.App.2d 144, 154 [1 Cal.Rptr. 213], the court likewise held "neither the language of [section 11517] nor constitutional principle requires that the proposed decision [of the hearing officer] be served prior to the rendition of the final one." (Accord, *American Federation of Teachers v. San Lorenzo etc. Sch. Dist.* (1969) 276 Cal.App.2d 132, 136 [80 Cal.Rptr. 758]; *Stoumen v. Munro* (1963) 219 Cal.App.2d 302, 314 [33 Cal.Rptr. 305]; *Strode v. Board of Medical Examiners* (1961) 195 Cal.App.2d 291, 297-298 [15 Cal.Rptr. 879].) It is only when the agency does not adopt the hearing officer's recommendation and reviews the evidence itself that the employee has the opportunity to argue the matter to the agency. (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 396 [184 P.2d 323]; § 11517, subd. (c).)

California's Civil Service Act (§ 18500 et seq.) similarly provides the board may adopt the proposed decision of its representative or may hear the matter itself. Only in the latter instance is the employee allowed to make additional argument to the board. (§ 19582.) In *Sinclair v. Baker* (1963) 219 Cal.App.2d 817 [33 Cal.Rptr. 522], the court rejected the notion due process was violated where the board adopted the hearing officer's recommendation without allowing the employee to respond. The court found dispositive the reasoning of the cases concerning the Administrative Procedure Act. (*Id.* at pp. 822-823; accord, *Fichera v. State Personnel Board* (1963) 217 Cal.App.2d 613, 620 [32 Cal.Rptr. 159] ["... due process is supplied by the hearing officer's taking of evidence, his findings and proposed decision, the decision of the board based on the findings and proposal, and by review by the court even though the last is not a trial de novo, followed by this appeal"].)

Where an administrative agency relegates the evidentiary hearing to one or more of its members, we observe the better practice would be to give the employee the opportunity to respond orally or in writing to the factual findings and recommendation before a final decision is made. [FN7] A hearing officer's report may contain critical inaccuracies and the employee's ability to address them would benefit everyone and result in a fairer process. ***578**

> FN7 In its supplemental letter brief, the Commission advises that after Bollinger's case was heard, its rules were modified to allow an employee to challenge the proposed decision in writing prior to the final decision. The provision, however, expired after six months and has apparently not been renewed.

Given the above authorities, however, we are constrained to conclude Bollinger's minimum due process rights were satisfied. He received notice of the proposed demotion and the basis therefor and had the opportunity to fully respond at a public evidentiary hearing. Ottilie was a "reasonably impartial and noninvolved reviewer," and under the City of San Diego's civil service rules, he had the authority to recommend a final disposition of the matter. Moreover, Bollinger could have sought review of the substantive merits of the Commission's decision in his petition for writ relief, based upon the record of the evidentiary hearing before Ottilie. [FN8]

> FN8 While Bollinger did seek writ relief, he raised only the Brown Act issue and failed to submit the administrative hearing record or challenge the substantive merits of the

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Commission's decision.

It follows that because Bollinger had no legal right to learn of or respond to Ottilie's factual findings and recommendation before the Commission ratified them, no portion of its August 1995 meeting can be construed as a "hearing" on complaints or charges within the meaning of section 54957. Rather, the matter was confined to deliberation which, as discussed, may be held in closed session. In sum, contrary to the trial courts' ruling, the Commission did not run afoul of the Brown Act and its action is valid. [FN9]

FN9 Given our holding, we deny without discussion Bollinger's request for sanctions under Code of Civil Procedure section 907 on the ground the Commission's appeal is frivolous.

Disposition

The judgment is reversed. Bollinger to pay the Commission's costs on appeal.

O'Neill, J., [FN*] concurred.

FN* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

WORK, Acting P. J.,

Concurring.-Although I concur in the opinion, I write separately to identify the narrow context of the legal issue we address in part II.A as presented to the trial court by Michael Bollinger's petition for mandate and the narrow confines of the trial court's judgment in response to that petition which is a subject of this appeal.

I also point out the procedural due process discussion in part II.B fails to consider the significance of the fact that, in this case, the hearing officer whose findings of fact and recommendation were considered by the San Diego Civil Service Commission (Commission) in executive session, was himself a commissioner and was present when his fellow commissioners ***579** considered his findings and recommendation. In response to our letter inquiry, we were advised, "The full Commission routinely meets with the hearing officer to fully discuss the proposed report of the hearing officer and ratify the findings that are prepared prior to the meeting." We were further advised that although more than three months transpired between the conclusion of the evidentiary hearing on these complaints and charges and the ratification of the hearing officer's findings and recommendation, Bollinger was first apprised of those findings and recommendation when served with a copy of the Commission's ratification decision.

A.

Bollinger's petition for mandamus sets forth one narrow issue: whether the ratification action taken by the full Commission in closed session following a public evidentiary hearing was null and void for failure to notify Bollinger in writing that he also had the right to have the Commission's later ratification deliberations in open session. The issue was posed in light of the facts of this case. Here, Bollinger's evidentiary proceedings were heard by a single member of the Commission who had been designated as a hearing officer. More than three months after its conclusion, Bollinger received oral notice of the Commission's intent to meet in closed session to determine whether to ratify the hearing officer's findings and recommendation. Bollinger did not receive a copy of the hearing officer's findings or his recommendation. In spite of the oral notice, Bollinger did not make a specific request to have the deliberative session open.

Relevant to this appeal, the trial court found that although Bollinger was orally informed the deliberations would be held in a closed session, he never made a request for a public session. Finding actual notice irrelevant, the trial court confined its decision solely to whether Government Code section 54957 requires the Commission to give Bollinger written notice of a right to have the ratification deliberations conducted in public. Therefore, the court below did not, nor do we, address the broader issue of whether, had Bollinger specifically requested that deliberative process to be open, the failure to accede to his request would be a Ralph M. Brown Act violation.

B.

Turning to the procedural due process discussion, I agree with the analysis as a stated general proposition. However, had the issue been framed in light ***580** of the facts of this case, we would have had to address it in a more meaningful context.

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First, it is true that procedural due process is usually satisfied by the mere availability of an appellate remedy. However, in a practical sense, in cases such as this, appellate review is less than meaningful to one who is denied the right to present his case, to argue its merits, and to dissect factual findings for the edification of those faceless decision makers who are empowered to remove, demote or discipline. As the question is posed in our opinion, we only decide that constitutional procedural due process did not require, although we believe it preferable, to permit Bollinger to appear before the full Commission after first receiving the hearing officer's recommended findings, for the purpose of enlightening the Commission members as to their validity and whether the evidence was fairly characterized in that report.

Be that as it may, there is an additional significant fact which we obtained from the parties upon our direct inquiry which sets this case apart from those cited. That is, the hearing officer Commission member whose findings and recommendation were ratified by the Commission was present in the closed session while his fellow Commission members engaged in the deliberations. Thus, Bollinger, who was not even apprised of the hearing officer's findings and recommendation until after they were ratified, was excluded from the Commission's “free and candid” discussion of his fate in the presence of the hearing officer who was present to defend, encourage, enlighten and “freely and candidly” respond to any concerns expressed by his fellow Commission members. Whether the hearing officer did anything more than merely sit silently and impassively while his findings and recommendation were considered and ratified by the Commission, or in fact participated in some manner during the closed proceedings, is not shown in this record. However, the fact of his presence alone, in a position to defend his findings and recommendation while preventing Bollinger from even being aware of their nature let alone having the ability to argue their validity to the Commission, transcends the procedural unfairness considered in any of the numerous cases cited by the majority. However, whether a hearing officer/commissioner's presence while his colleagues deliberate to ratify his findings in closed sessions, coupled with the failure to disclose the nature of those findings to the affected employee, denying him the opportunity to argue their validity before the commissioners meet in closed session with the hearing officer may deny the procedural due process guaranteed by the Fourteenth Amendment and article I, section 7, subdivision (a) of the California ***581** Constitution, although a significant concern, is an issue not raised in this appeal. [FN1]

FN1 During oral argument in a recent unpublished case, *Kathan v. Civil Service Com.* (Mar. 10, 1999) D028812, the city attorney advised that the commission had adopted an interim policy, pending a decision in this matter, for the commission to hold its deliberations on personnel matters arising out of complaints and charges in open session. We were told that conducting those deliberations openly had created no impediment to efficiency, appropriate disposition of those matters or candor.

Therefore, subject to the comments expressed herein, I concur. ***582**

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C

COUNTY OF SACRAMENTO, Petitioner,
v.
JOHN S. CHAMBERS, as Controller, etc., Respondent.

Civ. No. 1645.

Court of Appeal, Third District, California.
March 1, 1917.

COUNTIES--CLASSIFICATION--USE OF STATE MONEYS.

Counties are not municipal corporations or, strictly speaking, corporations of any kind, but are local subdivisions of the state, created by the sovereign power without the consent of the people who inhabit them, although they possess some corporate characteristics and may be within the inhibition of sections 22 and 31 of article IV of the constitution, against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual or municipal or other corporation.

ID.--TUBERCULOSIS LAW--ACT CONSTITUTIONAL.

The act (Stats. 1915, p. 1530) providing for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health and granting state aid to counties for the support and care of persons afflicted with tuberculosis, is not violative of article IV, section 22, of the constitution, providing that no money shall be drawn or appropriated from the state treasury for the benefit of any corporation or institution not under the exclusive control and management of the state, or of article XI, section 13, providing that the legislature shall not delegate to a special commission the power to interfere with or supervise the affairs of counties, or of article IV, section 31, providing that the legislature shall not lend or authorize the lending of the credit of the state or of any county in aid of or to any person for the payment of any liabilities of any individual, etc.

APPLICATION for a Writ of Mandate originally made to the District Court of Appeal for the Third Appellate District to compel the State Controller to draw his warrant in favor of petitioner in payment of his claim arising under the state tuberculosis law.

The facts are stated in the opinion of the court.

***143** Hugh B. Bradford, District Attorney, and Kemper B. Campbell, Attorney for State Board of Health, for Petitioner.

U. S. Webb, Attorney-General, and Robert T. McKisick, Deputy Attorney-General, for Respondent.

HART, J.

This is an original application for a writ of mandate to compel the respondent, as state controller, to draw his warrant in favor of the petitioner for the sum of $2,299.30, in payment of the claim of said petitioner arising under an act of the legislature of 1915, entitled: "An act to provide for the establishment and maintenance of a bureau of tuberculosis under the direction of the state board of health; defining its powers and duties; providing for the granting of state aid to cities, counties, cities and counties and groups of counties for the support and care of persons afflicted with tuberculosis; making an appropriation therefor; and repealing certain acts of the legislature of the state of California." (Stats. 1915, p. 1530.)

The first section of said act provides: "The state board of health shall maintain a bureau of tuberculosis for the complete and proper registration of all tuberculosis persons within the state; for supervision over all hospitals, dispensaries, sanatoria, farm colonies, and other institutions for tuberculosis, both public and private; for advising officers of the state penal and charitable institutions regarding the ***144** proper care of tuberculosis inmates, and for such educational and publicity work as may be necessary; for administration of the fund for state aid to cities, counties, cities and counties and groups of counties for the care of patients who are county charges in city, county, or city and county tuberculosis wards or hospitals or in tuberculosis wards and hospitals maintained by any group of counties, and for the performance of such

other duties as may be assigned by the said board."

The second section provides that the state board of health shall appoint a director, who shall be duly qualified and trained in public health work. In addition to the administration of the bureau, under the supervision of the said state board, it is by said section made the duty of the director, "and he is hereby vested with full power," to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated. "He shall prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision for proper food, and such other matters of administration as may be designated. Administration of the fund for the care of patients who are county charges in city, county, and city and county tuberculosis wards and hospitals and the tuberculosis wards and hospitals maintained by any group of counties shall be based upon his reports and under the rules and regulations of the board."

Section 3 provides that any city, county, etc., establishing a tuberculosis ward or hospital shall receive from the state three dollars per week for each person in the active stages of tuberculosis, cared for therein at public expense, who is unable to pay for his support and who has no relatives legally liable and financially able to pay for his support and who has been a *bona fide* resident of such city, county, etc., for one year; provided, that the city, county, etc., shall not become entitled to receive such state aid unless the tuberculosis ward or hospital conforms to the regulations of and is approved by the state bureau of tuberculosis. "The medical superintendent of each hospital receiving state aid under this act shall render semi-annually to the state bureau of tuberculosis a report under oath showing, for the period covered by the report, (1) the number of patients in the active stages of ***145** tuberculosis cared for therein at public expense, unable to pay for their own support and having no relatives legally liable and financially able to pay therefor, and (2) the number of weeks of treatment of each of such patients."

The refusal of the respondent to draw his warrant in favor of the petitioner for the amount named in the petition is based entirely upon the claim that said statute, in so far as it authorizes the payment of the sums specified therein to cities, counties, etc., for the purposes stated in the act, is in violation of sections 22 and 31 of article IV, and section 13 of article XI of the constitution. His position, more specifically stated, is that the maintenance and support and the control of county hospitals constitute duties and burdens which the law casts upon the supervisors and the taxpayers of counties, and that the expense necessary to be incurred in supporting such hospitals is a county charge, citing sections 4223, 4041, subdivision 7, and 4307 of the Political Code. It is hence argued that, since county hospitals are not under the exclusive management and control of the state as state institutions, the proposed payment of money drawn from the treasury to counties, etc., for the purpose mentioned in the said act, is in contravention of section 22 of article IV of the constitution; 2. That counties are municipal corporations and that, therefore, the payment of such moneys to counties would involve a gift of the same, contrary to section 31 of said article; 3. That the act, in violation of section 13 of article XI of the constitution, attempts to delegate to the bureau of tuberculosis or the state board of health the power to control and supervise and thus interfere with the affairs of a county, to the extent to which the bureau or board may require the tuberculosis ward or hospital of such county to conform, in the management thereof, to the regulations established by said bureau, and to make reports thereto, as prescribed by the act.

Referring first to one of the several points made by the petitioner in support of the claim that the act in question impinges upon none of the provisions of the constitution within the inhibitions of which the respondent insists the act in question falls, it may be remarked: That it is well settled that counties are not municipal corporations or, strictly speaking, corporations of any kind. They are obviously lacking in the essentials which chiefly characterize and distinguish***146** municipal corporations, and it has often been said that they do not come within the latter class of corporations. It is true that both municipal corporations and counties are governmental agencies, but the manner and source of their creation and the purposes, respectively, to subserve which they are brought into existence and activity are entirely at variance. "Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are local subdivisions of the state, created by the sovereign

power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former (municipal) is asked for, or at least assented to, by the people it embraces; and the latter organization (counties) is superimposed by a sovereign and paramount authority. … With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy." (1 Dillon on Municipal Corporations, 5th ed., sec. 35.) Counties, however, possess some corporate characteristics. Like all involuntary political or governmental subdivisions of the state, they are classed as *quasi* corporations. But whatever may be their proper classification, we are not prepared to say that counties are not within the inhibitions of sections 22 and 31 of article IV of the constitution, against the drawing or appropriation of money from the state treasury for the benefit of a corporation or any institution not under the exclusive control and management of the state and against the making of any gift of such money to any individual, municipal, or other corporation of whatsoever kind or character. It is undoubtedly true that the design of the sections of the constitution invoked against the act in question was to prevent the appropriation of the moneys of the state for any purpose other than that which pertains to the state, and that an appropriation by the legislature of money from the state treasury for a purpose wholly foreign to any of the essential functions of the state government would clearly and unquestionably amount to a gift within the plain meaning and intent of section 31 of article IV. (***147***Stevenson v. Colgan*, 91 Cal. 649, 651, [[25 Am. St. Rep. 230, 14 L. R. A. 459, 27 Pac. 1089]; *Bourn v. Hart*, 93 Cal. 321, [27 Am. St. Rep. 203, 15 L. R. A. 431, 28 Pac. 951].)

But we do not hesitate to express the opinion that the provision of the act in question authorizing the payment to counties of the sums to be used for the purpose therein specified is not in contravention of the sections of the constitution just adverted to. Nor are we impressed with the argument that said provision of said act is obnoxious to the objection that it offends section 13 of article XI of the constitution, in that it involves an attempt by the legislature to delegate to "a special commission," etc., the power to interfere with or supervise the affairs of counties or to "perform any municipal function whatever."

It has never been, nor will it ever be, questioned that, among the first or primary duties devolving upon a state is that of providing suitable means and measures for the proper care and treatment, at the public expense, of the indigent sick, having no relatives legally liable for their care, support, and treatment, those who are infirm and helpless from the ravages of advancing years and without means of their own or relatives upon whom the law places responsibility for their care and support, and the insane, likewise situated as to means necessary for their care, support, and safekeeping. (Cooley on Taxation, p. 204.) Nor can it for a moment be doubted that it is the duty of the state to take all necessary steps for the promotion of the health and comfort of its inhabitants and to make such regulations as may be conceived to be essential to the protection of the state and the people thereof, so far as such result may be attained, against the visitations and prevalence of deadly epidemical and endemical diseases, and to take and prosecute such health and sanitary steps and measures as will result in stamping them out, or, by recognized methods of scientific treatment, reducing to the lowest possible minimum the percentage of fatalities following therefrom. These are duties which the state owes to its inhabitants for the protection, promotion, and the preservation of their general happiness and welfare; and, as is true of the duty of the state in the matter of taking proper care of the impecunious or indigent who are afflicted with disease and who have no means for caring for themselves or relatives legally responsible for such care, they are duties ***148** which the state may perform in the exercise of its sovereignty, even in the absence of direct constitutional authority therefor--indeed, duties which it may discharge under its inherent power of police.

But we do not understand that it is claimed by the respondent that the duties to which we refer do not rest upon the state or that the state is without the power to execute them. In fact, as we understand the position of the respondent, it is not claimed by him that the sections of the constitution invoked against the validity of the legislation involved in this dispute were intended to have the effect of prohibiting the state from performing the duty or exercising the power of which we have been speaking. In such a case, these questions may arise, however: Whether the state has shifted the burden of those duties upon the counties, and, if not, whether, in the exercise of the power whereby it may

perform those duties, the state has adopted a mode or method of doing so which is not discountenanced by any of the provisions of the constitution. In this case, the fundamental proposition upon which the respondent builds up his argument against the constitutional propriety of that provision of the act in question which authorizes the payment of certain sums to the counties for the purpose stated therein is that the state has made it the duty of counties to maintain hospitals for the care, support, and treatment of the indigent sick, and that therefore the burden of supporting such hospitals is upon the counties and not upon the state.

The constitution nowhere places the burden of maintaining, supporting, caring for, and treating the indigent sick upon the counties of the state. The legislature, however, in the exercise of its duty and power to establish a system of county governments (section 4, article XI, constitution), has, in fixing and enumerating the powers of boards of supervisors of the counties, authorized said boards to establish and maintain county hospitals, prescribe rules for the government and management thereof, and appoint county physicians and the necessary officers and employees thereof, who shall hold office during the pleasure of the board (Pol. Code, sec. 4223); to build or rebuild, furnish or refurnish hospitals and almshouses (Pol. Code, sec. 4041, subd. 7); and has further provided that the necessary expenses incurred in the support of the county hospitals, almshouses, and the indigent sick and ***149** otherwise dependent poor, whose support is chargeable to the county, constitute county charges (Pol. Code, sec. 4307, subd. 7).

As stated, upon the foregoing provisions of the Political Code the argument is erected that, the state having transferred to counties the duty and burden of maintaining hospitals for the care, support, and treatment of the indigent sick, an appropriation of any moneys from the state treasury for the support of such afflicted persons amounts to a gift, and is therefore in violation of the constitution, and that the statute in question not only runs up against that inhibition of the constitution, but violates the other sections of the organic law above referred to for the reasons heretofore stated.

There is no doubt that the legislature, by the legislation above referred to, intended to and did transfer from its own shoulders and so placed upon the counties the duty and burden of caring for, supporting, and treating the classes of persons mentioned. But this does not mean that the state has thus forever surrendered all control over those matters or the right itself to exercise full and complete and exclusive jurisdiction and control over hospitals for the indigent sick and helpless paupers. As before stated, the constitution does not require this burden to be borne by the counties. The state may so transfer it to counties, however, in the exercise of its sovereignty. As we have seen, counties are mere agencies of the state, the functions of whose organization are, to the extent of the territorial limits of their geographical divisions, concerned with the administration of the general governmental policy of the state, "and are, in fact, but a branch of the general administration of that policy." All the people of the state, while not directly interested in the administration of the affairs of municipal corporations of which they are not members, are so interested in the administration of the governmental affairs of a county, whether they reside or own property therein or not, because, as stated, such administration involves, to the extent of the geographical limits of a county, the administration of the affairs and policy of the state. The state may, through its legislature, and in the exercise of its sovereign power and will, in all cases where the people themselves have not restricted or qualified such exercise of that power, apportion and delegate to the counties any of the functions which belong to it. On the other hand, the ***150** state may take back and itself resume the exercise of certain functions which it had delegated to those local agencies; and, in some cases, particularly those having reference to the state's police power, we know of no reason, constitutional or otherwise, why the state and the counties may not act conjointly and synchronously in carrying out the policies of the former. Indeed, an analogy to the latter situation may be found in the matter of the regulation by the state of the right to pursue and kill wild birds and animals. By an act of the legislature of 1909 (Stats. 1909, p. 663), the authority to issue licenses for such hunting and killing is vested not only in the state board of fish commissioners, but also in the county clerks of the various counties of the state. The act requires the last-named officials, upon application therefor, to issue such licenses, to receive the fees therefor, to account for the same to the state controller every three months, and pay all sums so received into the state treasury, they (the clerks) to receive as their compensation for the services so performed out of the state "game preservation fund" ten per cent of the amounts accounted for. (*County of Sacramento v. Pfund*, 165

Cal. 84, [130 Pac. 1041].) This so-called "game law" does not, it is true, make the collection of the licenses therein provided for a function of the county organization. But it is very clear that it does employ a part of that organization's machinery for carrying out its policy with respect to a branch of its own functions, and we doubt not that it could have devolved that duty upon the counties themselves, designating the particular officers thereof to discharge it, and have provided that the compensation for such service should be paid into the treasury of the county from the state fund mentioned in that act, in which case it would not be contended or held, as it has never been contended or held under the provisions of the present game law, that the payment for the service so performed for the state out of moneys in the state treasury would involve a gift of such moneys within the inhibition of section 31 of article IV of the constitution or an appropriation or the drawing of money from said treasury in violation of section 22 of said article. The game law, however, as before suggested, stands as a concrete example of the proposition above explained, viz.: That the true purpose of county government organizations is to perform functions which belong to the state itself, and that the latter may employ them, either jointly ***151** with itself or alone, as instrumentalities in aid of the administration or the carrying out of its own general governmental functions and policy.

The act in question does not, it seems to us, go any further than the act regulating the right to pursue and kill wild game and animals, above referred to. It does not purport to nor does it involve an appropriation of money for the support or in aid of the support of county hospitals. As a matter of fact, there is no such institution as a county hospital as a separate entity. As has been shown, the legislature has authorized or empowered the supervisors of counties to establish and maintain, at the expense of taxpayers of counties, hospitals at which the indigent sick and infirm, otherwise eligible to the public bounty in that particular, may receive proper care, support, and medical treatment. The power to maintain such establishments, like that whereby the counties may build and maintain public roads and highways, or administer public justice, is only a part of the general scheme established by the legislature whereby those political subdivisions are required to exercise and perform certain of the functions of the state which the latter, for convenience and economy, has elected to commit to them. As above declared, the state may, if it so elects, assume entire control of the matter of caring for and supporting and administering aid to the classes of persons for whose benefit county hospitals are established and maintained. It has the right and the power to establish and maintain, under its own exclusive control and management, hospitals for such purposes, and so entirely relieve counties of that duty and burden. And, having the right and the power to take upon itself entire responsibility for the support and the treatment of all such persons, it has the undoubted right and power to take exclusive or only partial control and assume corresponding liability for the care, treatment, and support of a portion or a certain class of such persons, or those only who are afflicted with a particular kind of malady. By establishing state hospitals, under its exclusive control and management, where the insane and feebleminded are maintained and given medical treatment, the state has exercised this very right and power. And it is in effect what it has done in this case.

Tuberculosis is a deadly disease, fatal almost in every instance, unless, in its earliest stages, its progress is arrested ***152** and the tubercle bacilli are destroyed. That it is a contagious disease or one that is by contact transmissible from a victim of the malady to one not so afflicted, is a thoroughly established scientific fact. By health statistics and data gathered and published by the public health department of the state government, it has been shown that over one-seventh of all the deaths in California, prior to the passage and enforcement of the law here under attack, were caused by this dread and justly dreaded disease, and that, down to the time mentioned, the ratio of deaths from tuberculosis was constantly increasing. Incidentally, it may be observed that, according to verified and authentic statistics gathered and prepared by the same official authority, there has been in California a marked and readily noticeable decrease in deaths from said cause since the passage and enforcement of this statute.

There are still in California, however, as we learn from the official reports of the said health department, large numbers of persons suffering from this deadly disease, mostly in the form of attacks upon the pulmonary organs, very many of whom are without financial means to pay for their own support and medical treatment and without relatives legally liable or financially able to give them support and the care and treatment indispensable in such cases. The existence of such conditions is obviously a positive menace to

the health of the inhabitants of the state.

But it has been demonstrated that by special scientific treatment, under favorable sanitary and general health conditions, tuberculosis, when not advanced to its final stages, may be cured; but that, unless such conditions are established and uniformly maintained, the difficulty of securing restoration of the patient, however able, persistent, and scientific may be the medical treatment, becomes in most cases insuperable.

Considering and finding all these facts, as we must assume that it did, the legislature has adjudged that drastic or at least more than the usual or ordinary precautions taken to guard and protect and preserve the public health should be provided for and taken against the spread of this well-nigh implacable destroyer of human life. That body conceived, as certainly there was real, substantial, and alarming occasion for conceiving, that measures should be adopted requiring the subjection of the disease to the strictest surveillance, to the ***153** end that spread of the disease by the indiscriminate intercommunication of its victims with the public at large might be prevented, and to special medical treatment and scientific nursing, under such scientifically arranged and maintained conditions as the latest and most scientifically conducted investigations and experiments have demonstrated to be all-essential to successful treatment of the malady. The manifest purpose of the statute is therefore twofold: 1. To succor those indigents who are afflicted with tuberculosis and who have no relatives legally liable for their support, maintenance, and treatment, or, if legally liable, having no financial means to discharge the liability; 2. To prevent the spread of the disease.

The state, to attain these ends, has, by the statute in question, and in the exercise of its sovereignty--indeed, in the exercise of its police power-- assumed the right and authority to control the matter of the care and treatment of those indigents who are legally entitled to be cared for and treated at public expense and who are afflicted with tuberculosis; but, in the place of erecting and maintaining hospitals or sanatoria for that purpose in various parts of the state, which it would have a right to do, it has employed the counties--its agents in the administration of certain of its functions of govern ment--as instrumentalities for or aids in controlling and managing that branch of its governmental duties and policy. That this is the true analysis and exposition of the object and intent of the statute in controversy here is evidenced by the provisions that, as conditions to the payment to the counties of the money therein provided for, the latter must establish tuberculosis wards or hospitals in compliance with regulations established by the state bureau of tuberculosis, that the medical superintendent of such wards or hospitals must render, semi-annually, to the said state bureau, a report under oath, showing the number of patients in the active stages of tuberculosis legitimately cared for therein at public expense and the number of weeks of treatment of each such patients, and that the director of the state bureau may have full power to inspect and investigate, and have access to all records and departments of all institutions, both public and private, where tuberculosis patients are treated, and must prepare annually for each institution a report of its rating on sanitary construction, enforcement of sanitary measures, adequate provision for medical and nursing attendance, provision ***154** for food, and such matters of administration as may be designated, etc. The latter provision--giving the state's agents the authority to inspect and investigate private tuberculosis hospitals--is indicative of the importance attached by the state to the exercise of special care in the matter of the treatment of tuberculosis and the maintenance of the most favorable sanitary conditions and surroundings wherever victims of that disease may be cared for and treated. The state undoubtedly has the right, under its police power, to adopt sanitary or other appropriate regulations, applicable to the whole state and to private as well as to public tuberculosis sanatoria, looking to the stamping out of the disease and the prevention of its increase, and thus to the protection of the public health. With respect to county tuberculosis wards or hospitals, it proposes by the law in question to do no more than this. In authorizing the payment by the state of the sum named in the act to counties maintaining such wards or hospitals according to regulations formulated and promulgated by its health department, the legislature did not intend, nor was it the object of the act, to appropriate the state's money to or for the benefit of counties, but only to facilitate the proper execution of its scheme to control in part or itself supervise the matter of the treatment of indigent tuberculosis patients, legally entitled to be taken care of at public expense. Obviously, the counties, to which these moneys are authorized to be paid, are, as to such money, mere trustees of an express trust, with absolutely no authority or right to divert the use of the same

to any other than the purpose or object for which it has been expressly appropriated by the state. As repeatedly herein declared, we can perceive no sound reason for holding that it is not within the competence of the state to enter into such an arrangement with the counties under its broad and comprehensive and essential sovereign power--that power, unhampered by constitutional restrictions, except, perhaps, as to the mode and manner of its exercise, under which the state is not only authorized, but it is its duty to make and enforce all such reasonable rules and regulations as may be necessary and conducive to the promotion and preservation of the general health, happiness, and welfare of its inhabitants. Thus it is very clear that, in enacting the law with which we are here concerned, and thereby making an appropriation of the state's money for the proper carrying out of ***155** the plan therein set forth for the care and suppression of a dangerous contagious disease, the state has not transcended but has remained within its rights as a sovereign commonwealth. Thus it does not make a gift of the public money in contravention of the thirty-first section of article IV of the constitution, nor appropriate the money of the state to the use or benefit of the corporations or associations or institutions specified in section 22 of said article. Nor, under our view as above set forth as to the nature of the power under which the state has proceeded in the enactment of the law in question, should it be necessary to suggest that the provision of the last-named section of article IV of the constitution expressly authorizing the state to grant aid to institutions conducted for the support and maintenance of certain classes of persons (minor orphans, half-orphans, etc.), even when viewed by the light of the rule of construction, *expressio unius est exclusio alterius*, does not preclude the state from the exercise of the right to apply its police power on all proper and appropriate occasions, and to pass laws, such as the one before us, whose purpose is to protect the lives, health, and general happiness of its inhabitants. And it is equally patent, for reasons already given, that the act does not authorize the state bureau of tuberculosis or the state board of health to interfere with or supervise counties, their property or affairs. As stated, the supervisory control exercised by the state under the act is over the tuberculosis patients in the hospitals of those counties conforming in their treatment of those cases to the regulations of said state bureau.

It is conceded that the petitioner maintains a tuberculosis ward in connection with its county hospital conforming in all particulars to the rules established by the state bureau of tuberculosis for the regulation thereof.

In accordance with the foregoing views, the demurrer interposed by the respondent to the petition is hereby overruled, and a writ of mandate is hereby ordered to issue out of this court directed to said respondent, commanding him to issue to and in behalf of the petitioner his warrant for the amount named in the petition.

Chipman, P. J., and Burnett, J., concurred.

Cal.App. 3 Dist. 1917.
Sacramento County v. Chambers
33 Cal.App. 142, 164 P. 613

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In re DAVID ANTHONY YORK et al. on Habeas Corpus.
In re JOHNNY CADENAZ et al. on Habeas Corpus.
In re PAUL BLAISE ATKINS et al. on Habeas Corpus.

No. S032327.

Supreme Court of California
Apr 27, 1995.

SUMMARY

In each of 11 criminal proceedings, involving defendants who had been charged with having committed one or more felonies involving controlled substances and who were unable to post the prescribed bail, the trial court released defendant from custody before trial on his or her own recognizance (OR), on the condition that he or she agree to submit to random drug testing and warrantless search and seizure during the period of release. (Superior Court of Santa Clara County, Nos. 161088, 161238, 161957, 163882 and 163935, John J. Garibaldi and Robert Michael Foley, Judges; Municipal Court for the Santa Clara Judicial District of Santa Clara County, Nos. C9327030, C9327239, C9327432, C9327583, C9327609 and C9327981, Marliese G. Kim, Judge.) In a consolidated proceeding, the Court of Appeal, Sixth. Dist., Nos. H011030, H011177 and H011242, concluded that a court or magistrate may, in appropriate circumstances, condition a defendant's OR release upon a defendant's agreement to submit to random drug testing and warrantless search and seizure. The court held that these OR release conditions are permissible if, after considering the specific facts and circumstances of a defendant's case, the court or magistrate determines that these facts and circumstances reasonably justify imposition of the conditions. However, because the court or magistrate in each of these proceedings failed to make an individualized determination as to the reasonableness of the conditions imposed upon defendants based upon all the circumstances presented in each defendant's case, the Court of Appeal issued writs of habeas corpus, vacating those portions of the supervised OR release orders that required submission to random drug testing and warrantless search and seizure, and allowing the prosecutor 30 days to request additional conditions of OR release for any such defendant.

The Supreme Court affirmed the judgment of the Court of Appeal. It held that a court or magistrate has the authority in granting OR release to require the defendant to comply with all reasonable conditions, even one implicating the defendant's constitutional rights, provided that the condition is reasonable under the circumstances. Pen. Code, § 1318, subd. (a)(2), added in 1988, authorizes a court to impose reasonable conditions on OR defendants. The statute is ambiguous as to whether the term "reasonable conditions" is limited to conditions assuring a defendant's appearance at subsequent court proceedings. However, the legislative history indicates that the Legislature intended to authorize courts to weigh considerations relating to public safety that extend beyond those intended to ensure subsequent court appearances. Although random drug testing and warrantless search and seizure conditions do not relate directly to the likelihood that a defendant will comply with his or her duty to attend subsequent court hearings, the conditions clearly relate to the prevention and detection of further crime and thus to the safety of the public. The court also held that the conditions did not deprive defendants of their constitutional rights to the presumption of innocence, privacy, or equal protection of the law. (Opinion by George, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Bail and Recognizance § 7--Release on Own Recognizance--Conditions-- Submission to Drug Testing and Warrantless Searches--Validity--As "Reasonable Condition" Under Governing Statute.

In each of 11 criminal proceedings, involving defendants who had been charged with having committed one or more felonies involving controlled substances and who were unable to post the prescribed bail, the trial court's release of defendant from custody before trial on his or her own recognizance (OR), on the condition that defendant agree to submit to random drug testing and warrantless search and seizure during the period of release, was not invalid. Pen. Code, § 1318, subd. (a)(2), added in 1988, authorizes a court to impose reasonable conditions on OR defendants. The

statute is ambiguous as to whether the term "reasonable conditions" is limited to conditions assuring a defendant's appearance at subsequent court proceedings. However, the legislative history indicates that the Legislature intended to authorize courts to weigh considerations relating to public safety that extend beyond those intended to ensure subsequent court appearances. Thus, a court or magistrate has the authority in granting OR to require the defendant to comply with all reasonable conditions, even one implicating the defendant's constitutional rights, provided that the condition is reasonable under the circumstances. Although random drug testing and warrantless search and seizure conditions do not relate directly to the likelihood that a defendant will comply with his or her duty to attend subsequent court hearings, the conditions clearly relate to the prevention and detection of further crime and thus to the safety of the public.

[See 4 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) § 2034.]

(2) Bail and Recognizance § 7--Release on Own Recognizance--Conditions-- Submission to Drug Testing and Warrantless Searches--Validity--As Violating Presumption of Innocence.

In releasing defendants (who had been charged with felonies involving controlled substances) before trial on their own recognizance (OR), the trial court did not violate defendants' constitutional right to the presumption of innocence by the imposition of a condition that defendants agree to submit to random drug testing and warrantless search and seizure during the period of release. The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials. Although this principle lies at the foundation of the administration of our criminal law, it has no application to a determination of the rights of a pretrial detainee during confinement before his or her trial has even begun. Thus, whether a pretrial detainee is given OR release with-or without-conditions has no bearing upon the presumption of innocence to which that person is entitled at trial.

(3a, 3b) Bail and Recognizance § 7--Release on Own Recognizance-- Conditions--Submission to Drug Testing and Warrantless Searches--Validity--As Violating Right to Privacy.

In releasing defendants (who had been charged with felonies involving controlled substances) before trial on their own recognizance (OR), the trial court did not violate defendants' constitutional right to privacy by the imposition of a condition that defendants agree to submit to random drug testing and warrantless search and seizure during the period of release. First, a defendant who seeks OR release does not have the same reasonable expectation of privacy as that enjoyed by persons not charged with any crime, and by defendants who have posted reasonable bail. Because an incarcerated individual generally is subject to random drug testing and warrantless search and seizure in the interest of prison security, the conditions imposed upon defendants did not place greater restrictions upon their privacy rights than they would have experienced had they not secured OR release. Second, a pretrial detainee is not required to agree to such restrictions, but rather is subject to them only if he or she consents to their imposition in exchange for obtaining OR release. A defendant granted OR release is not entitled to unconditional, bail-free release. This does not render the consent coerced or involuntary.

(4) Searches and Seizures § 9--Constitutional Provisions--Proscription of Unreasonable Searches:Constitutional Law § 58--Right to Privacy.

The United States and California Constitutions proscribe only unreasonable searches and seizures. In determining the standard of reasonableness applicable to a particular type of search or seizure, a court must balance the nature and quality of the intrusion on the individual's interests under U.S. Const., 4th Amend., against the importance of the governmental interests alleged to justify the intrusion. In the search and seizure context, the privacy clause of Cal. Const., art. I, § 1, does not establish a broader protection than that provided by the Fourth Amendment or Cal. Const., art. I, § 13 (search and seizure).

(5a, 5b) Bail and Recognizance § 7--Release on Own Recognizance-- Conditions--Submission to Drug Testing and Warrantless Searches--Validity--As Violating Right to Equal Protection.

In releasing defendants (who had been charged with felonies involving controlled substances and who were unable to post the prescribed bail) before trial on their own recognizance (OR), the trial court did not violate defendants' constitutional right to equal protection by the imposition of a condition that defendants agree to submit to random drug testing and warrantless search and seizure during the period of release. Even if warrantless drug testing and search and seizure conditions could not be imposed upon a defendant who is able to post reasonable bail, this disparate treatment does not violate principles of equal

protection. On its face, Pen. Code, § 1318 (OR agreements; reasonable conditions), is facially neutral; it does not create wealth-based distinctions or establish any classifications whatsoever, and a defendant's ability to post bail, in itself, does not implicate equal protection principles. Also, § 1318 does not have a discriminatory purpose. Nothing contained in the statute's history suggests a legislative attempt to discriminate against indigent defendants. To the contrary, the Legislature clearly had a rational basis for concluding that public safety would be enhanced if such defendants were required to comply with reasonable conditions necessary in order to deter further criminal conduct.

(6) Constitutional Law § 85--Equal Protection--Judicial Review-- Presumptions.

The burden of establishing the unconstitutionality of a statute rests upon the party who assails it, and courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it. The equal protection clause of U.S. Const., 14th Amend., guarantees equal laws, not equal results.

COUNSEL

Stuart R. Rappaport, Public Defender, and Stephen B. Elrick, Deputy Public Defender, for Petitioners.

Ann Brick, Grossman & Gibbs and Lawrence A. Gibbs as Amici Curiae on behalf of Petitioners.

George W. Kennedy, District Attorney, and Joseph V. Thibodeaux, Deputy District Attorney, for Respondents.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Ronald E. Niver and Clifford K. Thompson, Deputy Attorneys General, Thomas Sneddon, Jr., District Attorney (Santa Barbara) and Gerald McC. Franklin, Deputy District Attorney, as Amici Curiae on behalf of Respondents.

GEORGE, J.

We granted review in this case to determine whether, in making the decision to release an accused from custody on his or her own recognizance (OR) prior to judgment, a court or magistrate may condition such release upon the defendant's agreement to submit to random drug testing and warrantless search and seizure during that period. Petitioners maintain that the imposition of such conditions is not permitted by the statutory provision governing OR release, and, in any event, violates various constitutional guarantees.

For the reasons set forth below, we conclude that neither the statutory nor the constitutional provisions upon which petitioners rely prohibit a court, in ***1138** appropriate circumstances, from conditioning OR release upon a defendant's agreement to comply with these challenged terms.

I.

The proceedings in this case were brought on behalf of 11 named individuals, each of whom had been charged with having committed one or more felonies involving controlled substances. Unable to post the bail prescribed for their offenses by the bail schedules, petitioners were given the choice of remaining in custody pending trial upon the charges, or obtaining OR release upon their agreement to comply with specified conditions, including those requiring that petitioners "[s]ubmit to drug [and, in some instances, alcohol] testing" and "[p]ermit search and seizure of his/her person, residence, and vehicle by any peace officer without a search warrant." [FN1] Several of the petitioners objected to these conditions when they initially were proposed, but the judge or magistrate refused to order OR release without them. In each case, the conditions were listed on a court-generated form entitled "Release on: Supervised Own Recognizance," and an "X" had been placed on the form in the box to the left of various conditions. These conditions were imposed categorically upon petitioners, without individualized consideration of the facts alleged in each case, such as whether an individual petitioner had any prior drug-related convictions, had admitted drug use, or had received drug test results indicating drug use.

FN1 The OR release orders contained additional conditions, including a residence requirement that compelled petitioners to re-

side within the county, a requirement that petitioners not operate a motor vehicle without possessing a valid California driver's license and proof of insurance, and a prohibition upon the possession of weapons during the pendency of the case. Because petitioners do not challenge the imposition of these additional conditions, their validity is not at issue in this case.

The record indicates that the magistrate who imposed the drug testing and search conditions upon all but two of the petitioners did so as a matter of course or as an established policy in cases involving the alleged commission of drug-related felonies. [FN2] The pretrial release officer assigned to the magistrate's court testified that the public defender routinely objected to these conditions being imposed upon petitioners (and upon other public defender clients), but that the magistrate overruled these objections without explanation for the imposition of these conditions, other than "take it or leave it." ***1139**

FN2 Because each petitioner in these proceedings was charged with having committed a felony, we need not and do not reach the question whether the OR release conditions imposed in these proceedings properly could be required of arrestees charged only with having committed a misdemeanor, such persons having a statutory right to OR release "unless the court makes a finding upon the record that an [OR] release will not reasonably assure the appearance of the defendant as required." (Pen Code., § 1270, subd. (a).)

After consolidating petitioners' cases, the Court of Appeal held that a court or magistrate may, in appropriate circumstances, condition a defendant's OR release upon a defendant's agreement to submit to random drug testing and warrantless search and seizure. In the view of the appellate court, such OR release conditions are permissible if, after considering the specific facts and circumstances of a defendant's case, the court or magistrate determines that these facts and circumstances reasonably justify their imposition. Because the court or magistrate in the present proceedings failed to make an individualized determination as to the reasonableness of the conditions imposed upon petitioners, based upon all the circumstances presented in each petitioner's case, the Court of Appeal issued writs of habeas corpus, vacating those portions of the supervised OR release orders that required submission to random drug testing and warrantless search and seizure, and allowing the prosecutor 30 days to request additional conditions of OR release for any such petitioner.

Petitioners sought review in this court, challenging that portion of the Court of Appeal's decision holding that, under certain circumstances, a court or magistrate may condition OR release upon a defendant's agreement to submit to random drug testing and warrantless search and seizure. Petitioners contend the imposition of such conditions upon OR release is contrary to the applicable California statute and violates several provisions of the federal and state Constitutions. We granted review to consider these issues. [FN3]

FN3 Because the People, represented by the Santa Clara County District Attorney's Office, did not seek review from, and do not now challenge, that portion of the Court of Appeal's decision holding that the imposition of random drug testing and warrantless search and seizure conditions upon OR releasees is permissible only when the court or magistrate has made an individualized determination that such conditions are warranted in light of the facts of the particular case, we need not and do not address the validity of the Court of Appeal's conclusion in this regard.

II.

Article I, section 12, of the California Constitution establishes a person's right to obtain release on bail from pretrial custody, identifies certain categories of crime in which such bail is unavailable, prohibits the imposition of excessive bail as to other crimes, sets forth the factors a court shall take into consideration in fixing the amount of the required bail, and recognizes that a person "may be released on his or her own recognizance in ***1140** the court's discretion." [FN4] Penal Code section 1318 sets forth a variety of requirements that an OR release agreement must satisfy. [FN5] ***1141**

FN4 Article I, section 12, of the California Constitution provides:

"A person shall be released on bail by suffi-

cient sureties, except for:

"(a) Capital crimes when the facts are evident or the presumption great;

"(b) Felony offenses involving acts of violence on another person when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

"(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

"Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

"A person may be released on his or her own recognizance in the court's discretion."

The provisions set forth in article I, section 12, of the California Constitution were contained in Proposition 4, enacted by the voters at the June 1982 Primary Election. Proposition 4 received more votes than did Proposition 8, an omnibus initiative that, in the same election, added (among other provisions) article I, section 28, subdivision (e), to the California Constitution, providing in pertinent part: "*A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.*" (Italics added.)

Because Proposition 4 received more votes than did Proposition 8, the bail and OR release provisions contained in Proposition 4 are deemed to prevail over those set forth in Proposition 8. (Cal. Const., art. II, § 10, subd. (b); *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 255 [186 Cal.Rptr. 30, 651 P.2d 274]; *People v. Barrow* (1991) 233 Cal.App.3d 721, 723 [284 Cal.Rptr. 679]; 4 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Proceedings Before Trial, § 1997, pp. 2357-2359; see also *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 987-988 [9 Cal.Rptr.2d 102, 831 P.2d 327]; *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 748-755 [274 Cal.Rptr. 787, 799 P.2d 1220]; *In re Nordin* (1983) 143 Cal.App.3d 538, 540-541 [192 Cal.Rptr. 38]; cf. *Williams v. County of San Joaquin* (1990) 225 Cal.App.3d 1326, 1332, fn. 5 [275 Cal.Rptr. 302].)

FN5 Penal Code section 1318 provides:

"(a) The defendant shall not be released from custody under an own recognizance until the defendant files with the clerk of the court or other person authorized to accept bail a signed release agreement which includes:

"(1) The defendant's promise to appear at all times and places, as ordered by the court or magistrate and as ordered by any court in which, or any magistrate before whom the charge is subsequently pending.

"(2) *The defendant's promise to obey all reasonable conditions imposed by the court or magistrate.*

"(3) The defendant's promise not to depart this state without leave of the court.

"(4) Agreement by the defendant to waive extradition if the defendant fails to appear as required and is apprehended outside of the State of California.

"(5) The acknowledgment of the defendant that he or she has been informed of the consequences and penalties applicable to violation of the conditions of release." (Italics added.)

All further references are to the Penal Code unless otherwise specified.

Pursuant to the foregoing constitutional and statutory provisions, a defendant charged with a bailable offense who seeks pretrial release from custody typically has two options: post bail and obtain release, or seek the privilege of OR release. Under section 1318, a defendant who seeks OR release may obtain such release only if he or she (1) promises to appear at all further proceedings, (2) promises not to depart from the state without leave of the court, (3) agrees to waive extradition in the event he or she fails to appear as required and is apprehended outside the State of California, and (4) promises "to obey all reasonable conditions imposed by the court or magistrate."

Petitioners contend the Court of Appeal erred, in two distinct respects, in holding that random drug testing and warrantless search and seizure conditions satisfy the "reasonable conditions" element set forth in section 1318, subdivision (a)(2). First, petitioners contend that the statute's reference to "reasonable conditions" encompasses only those conditions reasonably related to *assuring a defendant's presence in court*, and that the random drug testing and warrantless search and seizure conditions are impermissible because they do not relate to such a purpose. Second, petitioners contend that, even if section 1318 authorizes the imposition of conditions unrelated to assuring a defendant's presence in court, the statute cannot properly be interpreted to authorize the conditions at issue in the present case, which require the waiver of constitutional rights. We address each of these contentions in turn.

A.

(1) As noted, petitioners contend the random drug testing and warrantless search and seizure conditions imposed in this case fall outside the purview of the "reasonable conditions" element of section 1318, subdivision (a)(2), and therefore are invalid, because such restrictions are unrelated to assuring a defendant's appearance at subsequent court proceedings. In support of this contention, petitioners rely upon *People v. Barbarick* (1985) 168 Cal.App.3d 731, 736 [214 Cal.Rptr. 322], and *McIntosh v. Municipal Court* (1981) 124 Cal.App.3d 1083, 1085 [177 Cal.Rptr. 683], decisions that petitioners characterize as holding that OR release conditions must be reasonably related to securing a defendant's subsequent appearance in court. In response, the People contend that, to the extent the cited decisions stand for the broad proposition urged by petitioners, such holdings were abrogated in 1988 when the Legislature amended section 1318 to include the provision that OR release shall not be granted unless a defendant executes a signed release agreement that includes "[t]he defendant's promise to obey *all reasonable conditions* imposed by the court or magistrate." (§ 1318, subd. (a)(2), italics added.) Petitioners, in reply, contend that, notwithstanding its ***1142** unqualified reference to "all reasonable conditions," the statute properly should be interpreted to permit only those conditions reasonably related to assuring a defendant's appearance at future court hearings.

In interpreting statutory language, we apply well-settled rules, commencing with an examination of the language of the statute itself. (*Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 763 [280 Cal.Rptr. 745, 809 P.2d 404].) If the statute's meaning is without ambiguity, doubt, or uncertainty, the statutory language controls. (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998 [275 Cal.Rptr. 201, 800 P.2d 557].) But if the meaning of the statute's wording is unclear, we refer to its legislative history. (*Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 743 [250 Cal.Rptr. 869, 759 P.2d 504].)

As noted above, section 1318 authorizes the release of a defendant on his or her own recognizance, pursuant to the following procedure: "(a) The defendant shall not be released from custody ... until the defendant files with the clerk ... a signed release agreement which includes: [¶] (1) The defendant's promise to appear .... [¶] (2) The defendant's promise to obey all *reasonable conditions* imposed by the court or magistrate ...." (Italics added.) Because section 1318 does not define what are "reasonable conditions," or otherwise indicate what, if any, limitations should be applied to that term, we turn to the statute's legislative history.

As originally enacted in 1979, section 1318 provided for OR release simply upon a written promise to appear, to not leave the state, and to waive extradition, along with the defendant's acknowledgment that he or she was informed of the consequences and penalties for violation of these conditions. [FN6] In interpreting the original version of section 1318, the appellate courts

held that, "[i]n setting the amount of bail or other conditions of release, the primary issue, before or after conviction, is whether the detainee ***1143** will appear for subsequent court proceedings. [Citations.] .... Indeed, whether the defendant will subsequently appear is the sole issue at preconviction OR release hearings. [Citation.] Accordingly, the '... court's discretion to impose conditions upon [a preconviction] OR release is limited to conditions which are reasonably related to and attempt to insure subsequent court appearances.' (*McIntosh v. Municipal Court* (1981) 124 Cal.App.3d 1083, 1085 [177 Cal.Rptr. 683].)" (*People v. Barbarick, supra*, 168 Cal.App.3d at p. 735; see also *Van Atta v. Scott* (1980) 27 Cal.3d 424, 438 [166 Cal.Rptr. 149, 613 P.2d 210]. [FN7]) *Barbarick* held that, although "another factor the court may consider in deciding whether to release *a convicted felon* on bail is the danger to the community" (168 Cal.App.3d at p. 736, italics added), a condition that a defendant submit to search for narcotics, dangerous drugs, or marijuana, in the case of an OR release pending appeal from a *misdemeanor drug conviction*, was not "reasonably related to securing defendant's later appearance." (*Ibid.*, italics omitted.)

FN6 As enacted in 1979, former section 1318 provided:

"(a) The defendant shall not be released from custody under an own recognizance or pursuant to Section 1269d until the defendant files with the clerk of the court or other person authorized to accept bail a signed release agreement which includes:

"(1) The defendant's promise to appear at all times and places, as ordered by the court, magistrate or other person authorized by paragraph (3) of subdivision (a) of Section 1269d to release the defendant and as ordered by any court in which, or any magistrate before whom the charge is subsequently pending.

"(2) The defendant's promise not to depart this state without leave of the court.

"(3) Agreement by the defendant to waive extradition if the defendant fails to appear as required and is apprehended outside of the State of California.

"(4) The acknowledgment of the defendant that he or she has been informed of the consequences and penalties applicable to violation of the conditions of release." (Stats. 1979, ch. 873, § 12, p. 3043.)

FN7 In *Van Atta v. Scott, supra*, 27 Cal.3d 424, 438, we stated that "[t]he sole issue at the OR hearing is whether the detainee will appear for subsequent court proceedings if released," and cited, in support of that proposition, our earlier decision in *In re Underwood* (1973) 9 Cal.3d 345, 348 [107 Cal.Rptr. 401, 508 P.2d 721]. The *Underwood* decision, however, was based upon language contained in *former* article I, section 12, of the California Constitution, the bail provision that thereafter was superseded in 1982 by the passage of Proposition 4 (see *ante*, at p. 1140, fn. 4). Accordingly, insofar as the quoted statement in *Van Atta* may be understood to reflect a state constitutional limitation upon the considerations that a court or magistrate properly may take into account in determining whether to grant a defendant's request for OR release, it is clear that *Van Atta* no longer accurately embodies the state constitutional principles that govern release on bail or OR. Nothing contained in the current language of article I, section 12-which provides, in relevant part, that "[a] person may be released on his or her own recognizance in the court's discretion"-properly may be interpreted to limit a court or magistrate to imposing *only* those OR release conditions that are aimed at ensuring a defendant's appearance at future court proceedings.

In March 1988 (three years after *People v. Barbarick, supra*, 168 Cal.App.3d 731, was decided), the Attorney General sponsored and supported Assembly Bill No. 4282, which added paragraph (2) to section 1318, subdivision (a), granting the court or magistrate authority to require that, as a condition of OR release, the defendant promise to obey all reasonable conditions. (Stats. 1988, ch. 403, § 4, p. 1757.) The parties focus their arguments upon this amendment to section 1318, subdivision (a). They do not dispute the Court of Appeal's conclusion that the amendment is ambiguous

as to whether it authorizes conditions such as those challenged by petitioners, nor do they contest the appellate court's efforts to go behind the statutory language and explore its legislative history in an effort to determine the Legislature's intent. Because we agree with the parties (and with the Court of Appeal) that it is unclear from the language employed in the statute whether section 1318, subdivision (a)(2), was intended simply to assure the ***1144** future appearance of the accused, or additionally was intended to promote the integrity of the court proceedings or protect the safety of the community by encompassing waivers of Fourth Amendment rights in any or all cases, we, too, have reviewed the pertinent legislative history in an effort to discover any indications of legislative intent. (*Long Beach Police Officers Assn. v. City of Long Beach, supra*, 46 Cal.3d at p. 743; *Sand v. Superior Court* (1983) 34 Cal.3d 567, 570 [194 Cal.Rptr. 480, 668 P.2d 787].)

Viewed and analyzed in the light of basic rules relating to the interpretation of statutes, we find that, although nothing in the legislative history specifically addresses the question whether the Legislature intended to permit OR releases to be conditioned upon a waiver of Fourth Amendment rights, it is clear the Legislature intended to codify the authority of a court or magistrate, in imposing OR conditions, to weigh considerations relating to the public safety that extend beyond those intended to ensure subsequent court appearances.

In sponsoring Assembly Bill No. 4282, the Attorney General in a letter informed the bill's author that the proposed legislation "codifie[d] the court's authority to place reasonable conditions on a criminal defendant who is released upon his or her own recognizance...." The Attorney General explained the need for the "reasonable conditions" portion of the bill and its potential impact: "Existing statutes ... do not address the court's ability to impose conditions upon such release. As a result, although the judiciary has routinely imposed limitations on the defendant's behavior as a condition of own-recognizance release, these conditions vary greatly from case-to-case. Probably the most common condition is the proviso that the defendant refrain from criminal conduct while on release. In domestic violence and child molest cases it is common for the court to impose conditions to protect the victim. And when witness intimidation is a potential issue, the courts usually fashion conditions designed to protect the witness and the integrity of the judicial process. [¶] Despite this necessary, common[,] and long-standing practice, the only conditions expressly authorized by *statute* for own-recognizance release are those relating to the defendant's appearance .... (§ 1318.) [¶] AB 4282 will cure this deficiency by expressly providing that the court or magistrate may condition own-recognizance release on 'reasonable conditions.' In so doing, this bill will not only provide legislative authority and guidance for the courts, but will protect defendants from capricious release conditions." Identical letters were sent to the chairs of the Assembly Committee on Public Safety, the Senate Committee on Judiciary, and the Appropriations Committee, as well as to the Governor. *The analysis set forth in this letter was adopted virtually verbatim in the analyses of Assembly Bill No. 4282 prepared by the Assembly Committee on Public Safety and the Senate Committee on Judiciary.* ***1145**

Although the random drug testing and warrantless search and seizure conditions before us cannot be said to relate directly to the likelihood that a defendant will comply with his or her duty to attend subsequent court hearings, the conditions clearly relate to the prevention and detection of further crime and thus to the safety of the public. In this regard, the purpose of such conditions-to further public safety by seeking to prevent the commission of offenses similar to the charged offense-is identical to the purpose underlying the well-stablished examples (victim protection and prevention against witness intimidation) cited by the Attorney General in sponsoring Assembly Bill No. 4282. By enacting that bill, it therefore is clear the Legislature contemplated the authorization of conditions *unrelated* to ensuring an accused's future appearance in court, and intended to allow the court or magistrate broad discretion to impose reasonable conditions of OR release, including those related to the furtherance of public safety. [FN8]

> FN8 We reject petitioners' argument that, because the Legislature, in enacting three other statutes (§ 1203.1ab; Welf. & Inst. Code, § 729.9; and Health & Saf. Code, § 11551), expressly authorized drug testing as a condition of *probation* or *parole*, the Legislature would have included a similarly explicit provision for drug testing as a condition of OR release had it intended to permit such a

condition. In our view, the substantially broader provision added by the Legislature to section 1318-authorizing the imposition of "all reasonable conditions" upon a defendant granted OR release-provides sufficient statutory authority for conditions such as those challenged by petitioners.

We also reject petitioners' speculative argument that, because Congress codified an array of specific release conditions in 18 United States Code section 3142, the federal scheme "no doubt was known to the California Legislature when it amended [section] 1318," and that the Legislature's failure to include similarly specific release conditions therefore "was a conscious decision." Petitioners' assertion is unsupported by the legislative history of section 1318, subdivision (a)(2), and fails to address the critical question whether that statute, which specifically authorizes the imposition of "all reasonable conditions," should be interpreted as authorizing the conditions imposed upon petitioners in these proceedings.

Thus, contrary to petitioners' contention that the Legislature's amendment of section 1318 in 1988 properly should be interpreted as a codification of earlier Court of Appeal decisions suggesting that OR release conditions had to be related to assuring the defendant's appearance in court, we believe the legislative history of the 1988 amendment demonstrates that it was intended to make clear that a court or magistrate has the authority, in granting OR release, to require a defendant to promise to comply with *all* "reasonable conditions"-and not simply with those intended to assure the defendant's appearance at future court proceedings. Accordingly, we reject petitioners' contention that OR conditions requiring a defendant to agree to random drug testing or warrantless search or seizure are not "reasonable conditions" within the meaning of section 1318 simply because they do not relate to assuring the defendant's appearance in court. ***1146**

B.

Petitioners next contend that, even if section 1318, subdivision (a)(2), authorizes a court or magistrate to impose OR release conditions other than those related to assuring a defendant's appearance in court, the statute should not be interpreted to permit the imposition of conditions, such as random drug testing and warrantless search and seizure requirements, that involve a waiver of a defendant's constitutional rights. In support of their contention, petitioners cite *Frederick v. Justice Court* (1975) 47 Cal.App.3d 687 [121 Cal.Rptr. 118], a decision in which the Court of Appeal reversed a judgment of the trial court that conditioned *diversion* of the defendant's case from the criminal process upon a waiver of his right to be free from unreasonable searches and seizures. The court in *Frederick* concluded that the "lack of statutory authorization and the lack as well of a compelling necessity therefor placed the imposition of this condition of an express waiver of a constitutional right beyond the court's powers in a proceeding that is wholly and exclusively statutory." (*Id.* at p. 692; see also *Parra v. Municipal Court* (1978) 83 Cal.App.3d 690, 694 [148 Cal.Rptr. 203] [court could not require "an informal admission of guilt" as a condition of diversion]. Relying upon *Frederick* and *Parra*, petitioners argue that the imposition of release conditions that infringe upon constitutional rights is impermissible, except where the relevant statute expressly authorizes the waiver of constitutional rights and where the condition is justified by a compelling necessity.

Petitioners' reliance upon *Frederick* and *Parra* is misplaced. The diversion statutes (§ 1000 et seq.) construed by the Court of Appeal in those decisions did not include any provision authorizing a trial court to impose additional conditions upon a defendant eligible for diversion. Section 1318, subdivision (a)(2), by contrast, specifically authorizes the imposition of "all reasonable conditions" in connection with an OR release. Nothing contained within the legislative history underlying the enactment of section 1318, subdivision (a)(2), suggests the Legislature intended to preclude a court or magistrate from imposing a condition, "reasonable" under the situation presented, because of the circumstance that the condition implicates a defendant's constitutional rights. To the contrary, certain conditions cited in the committee reports that analyzed Assembly Bill No. 4282-e.g., directing a defendant to refrain from having any contact with the alleged victim-involve placing restrictions upon a defendant's constitutionally based liberty interest. Nor does the statute's legislative history support petitioners' argument that a "compelling necessity" must justify the imposition of OR release conditions.

Accordingly, we reject petitioners' contention and conclude that section 1318, subdivision (a)(2), authorizes the imposition of conditions that may ***1147** implicate a defendant's constitutional rights, provided that imposition of such conditions is reasonable under the circumstances. [FN9]

> FN9 Petitioners overlook the circumstance that, if we interpreted section 1318, subdivision (a)(2), to *preclude* a court or magistrate from conditioning OR release upon a defendant's promise to fulfill requirements unrelated to ensuring his or her appearance at future court proceedings, or upon the waiver of a constitutional right, a court or magistrate in many instances would be *less* likely to grant the request for OR release, concluding that the defendant was an inappropriate candidate for release prior to judgment in the absence of specified, reasonable conditions.

III.

Petitioners further contend that, even if random drug testing and warrantless search and seizure conditions are not necessarily barred by the applicable statute, the conditions nevertheless are constitutionally infirm, in view of their impact upon (1) the presumption of innocence to which petitioners are entitled, (2) petitioners' right of privacy, and (3) petitioners' right to equal protection of the laws. For the reasons set forth below, we reject each of these constitutional arguments.

A.

(2) Petitioners initially contend that, because they only have been charged with-and not yet convicted of-the crimes for which they were arrested, conditioning their OR release upon their agreement to submit to random drug testing and warrantless search and seizure violates the presumption of innocence to which they are entitled. Petitioners argue that, because of their status as "OR releasees," whose cases have yet to be tried, they are fundamentally different from, and entitled to greater protection than, probationers and parolees, who have been tried and convicted, and upon whom similar conditions of release have been upheld by the courts.

The United States Supreme Court rejected a claim similar to that made by petitioners in *Bell v. Wolfish* (1979) 441 U.S. 520 [60 L.Ed.2d 447, 99 S.Ct. 1861]. *Bell* involved a class action, brought on behalf of pretrial detainees and sentenced prisoners confined within New York's Metropolitan Corrections Center (MCC), that challenged various conditions and practices at MCC, including the practice of accommodating increases in the inmate population by replacing single bunks with double bunks in MCC's individual rooms and dormitories. The members of the class who were pretrial detainees alleged that the practice of "double-bunking" deprived them of their liberty without due process of law and therefore was unlawful. The lower courts agreed with this contention, relying upon the " 'presumption of innocence' as the source of the detainee's substantive right to be free from ***1148** conditions of confinement that are not justified by compelling necessity." (*Id.* at p. 532 [60 L.Ed.2d at p. 464].)

In rejecting the detainees' argument that this presumption affected the validity of the conditions of their pretrial detention, the United States Supreme Court held in *Bell*: "The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. [Citations.] It is 'an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion...." an "assumption" that is indulged in the absence of contrary evidence.' [Citation.] Without question, the presumption of innocence plays an important role in our criminal justice system. 'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.' [Citation.] *But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.*" (441 U.S. at p. 533 [60 L.Ed.2d at pp. 464-465], italics added.)

The rule set forth in *Bell v. Wolfish, supra*, 441 U.S. 520, 533 [60 L.Ed.2d 447, 464-465], mirrors established California law. (See *Ex parte Duncan* (1879) 53 Cal. 410, 411 [no presumption of innocence attaches to a pretrial determination of the amount of bail to be set]; see also *Blunt v. United States*

(D.C.App. 1974) 322 A.2d 579, 584 ["The presumption of innocence ... has never been applied to situations other than the trial itself. To apply it to the pretrial bond situation would make any detention for inability to meet conditions of release unconstitutional."].) Clearly, whether a pretrial detainee is given OR release with-or without-conditions has no bearing upon the presumption of innocence to which that person is entitled *at trial*. We therefore reject petitioners' contention that the OR release conditions challenged in the present case infringe upon the presumption of innocence to which petitioners are entitled.

B.

(3a) Petitioners next contend the imposition of warrantless drug testing and search and seizure conditions upon OR releasees violates their right to be free from unreasonable searches and seizures, guaranteed by the Fourth Amendment to the United States Constitution and by article I, section 13, of ***1149** the California Constitution, and their rights to privacy and due process of law, guaranteed by article I, sections 1 and 15, respectively, of the California Constitution. The People contend in response that, similar to probationers and parolees, OR releasees have a diminished liberty interest, and that therefore imposition of random drug testing and warrantless search and seizure conditions does not violate constitutional guarantees.

(4) The United States and California Constitutions proscribe only *unreasonable* searches and seizures. "In determining the standard of reasonableness applicable to a particular type of 'search' or 'seizure,' a court must balance 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' [Citations.]" (*Berry v. District of Columbia* (D.C. Cir. 1987) 833 F.2d 1031, 1034-1035 [266 App.D.C. 127]; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 29 [26 Cal.Rptr.2d 834, 865 P.2d 633].) We also observe that, "[i]n the search and seizure context, the article I, section 1 'privacy' clause [of the California Constitution] has never been held to establish a broader protection than that provided by the Fourth Amendment of the United States Constitution or article I, section 13 of the California Constitution." (*People v. Crowson* (1983) 33 Cal.3d 623, 629 [190 Cal.Rptr. 165, 660 P.2d 389].) (3b) Our analysis as to whether OR releasees have a constitutionally protected right to be free from the challenged conditions therefore is guided by federal constitutional principles. For the reasons set forth below, we conclude that the imposition of such conditions does not violate Fourth Amendment protections.

First, petitioners' contention that the OR release conditions challenged in the present case inevitably violate the Fourth Amendment rights of OR releasees rests upon the flawed premise that a defendant who seeks OR release has the same reasonable expectation of privacy as that enjoyed by persons not charged with any crime, and by defendants who have posted reasonable bail. Unlike persons in these latter categories, however, a defendant who is unable to post reasonable bail has no constitutional right to be free from confinement prior to trial and therefore lacks the reasonable expectation of privacy possessed by a person unfettered by such confinement. Because an incarcerated individual generally is subject to random drug testing and warrantless search and seizure in the interest of prison security, the conditions challenged in the present case do not place greater restrictions upon an OR releasee's privacy rights than the releasee would have experienced had he or she not secured OR release. Viewed from this perspective, the challenged conditions do not require an OR releasee to "waive" Fourth Amendment rights that he or she would have retained had OR release been denied. Instead, the conditions simply define the degree of liberty that the ***1150** court or magistrate, in his or her discretion, has determined is appropriate to grant to the OR releasee.

Second, petitioners' contention that random drug testing and warrantless search and seizure conditions invariably violate Fourth Amendment protections ignores the circumstance that a pretrial detainee is not required to agree to such restrictions, but rather is subject to them only if he or she consents to their imposition, in exchange for obtaining OR release. Petitioners contend that an OR releasee's consent to these conditions does not represent a true and "voluntary" consent, because the consequence of refusing to give such consent is continued incarceration. When similar conditions are imposed upon a probationer, however, it is established that the individual "consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege." (*People v. Bravo* (1987) 43 Cal.3d 600, 608 [238

Cal.Rptr. 282, 738 P.2d 336].) Similarly, when one who otherwise would be incarcerated prior to judgment is offered the opportunity to obtain OR release, he or she is not entitled to unconditional, bail-free release, but may obtain OR release only in the discretion of the court or magistrate, and only upon those reasonable conditions attached to the release. Although it may be true that a defendant who is faced with the choice of agreeing to the challenged conditions or remaining incarcerated has a considerable incentive to agree to the conditions, that circumstance, alone, does not render the consent coerced or involuntary. Just as a probationer may be required to consent to supervisory restrictions that could not be imposed upon the general public-" 'as a condition precedent to receiving the court's leniency' " (*Bravo, supra*, 43 Cal.3d at p. 610)-an individual who is unable to post bail and seeks OR release similarly may be required to consent to this type of restriction in exchange for receiving the leniency of an OR release.

Such restrictions, of course, are not of an unlimited nature, and it is clear that, in the context of an OR release, Fourth Amendment considerations place constraints upon the circumstances under which random drug testing and warrantless search and seizure conditions may be imposed. As noted above, section 1318, subdivision (a)(2), explicitly authorizes the imposition only of "reasonable conditions," and the "reasonableness" of an OR release condition that implicates Fourth Amendment rights depends upon both the intrusiveness of the state conduct authorized by the condition and the strength of the state's interest in imposing such a restriction in the particular circumstances. Numerous courts have weighed these competing considerations in evaluating the propriety of similar conditions in the context of probation. (See, e.g., *People v. Mason* (1971) 5 Cal.3d 759, 764 & fn. 2 [97 Cal.Rptr. 302, 488 P.2d 630], disapproved on other grounds in ***1151***People* v. *Lent* (1975) 15 Cal.3d 481, 486, fn. 1 [124 Cal.Rptr. 905, 541 P.2d 545] [upholding the validity of a probation condition that required a narcotics offender to submit to search as a condition of his probation, observing that the condition was "reasonably related to the probationer's prior criminal conduct and [was] aimed at deterring or discovering subsequent criminal offenses," and noting that "[t]he high recidivism rate for narcotics offenders makes the [search] condition particularly appropriate in narcotics cases"]; *People v. Bauer* (1989) 211 Cal.App.3d 937, 942 [260 Cal.Rptr. 62]; *People v. Keller* (1978) 76 Cal.App.3d 827, 831 [143 Cal.Rptr. 184], disapproved on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237 [19 Cal.Rptr.2d 520, 851 P.2d 802]; see also *United States v. Oliver* (8th Cir. 1991) 931 F.2d 463, 465 [upholding drug testing as a valid condition of a drug-dependent defendant's postconviction supervised release following defendant's conviction of possession of stolen mail used to obtain checks to finance his addiction]; *United States v. Duff* (9th Cir. 1987) 831 F.2d 176 [upholding probation officer's authority to require probationer to submit to drug testing, where probation conditions required probationer to refrain from violating any law and to follow the instructions of his probation officer, but where neither the probation conditions nor the instructions explicitly authorized drug testing]; *United States v. Williams* (7th Cir. 1986) 787 F.2d 1182 [upholding sentencing court's broad discretion in fashioning conditions of probation, including drug testing, in view of defendant's status as a repeat offender and his lengthy criminal record].)

For the reasons discussed above, we reject petitioners' contention that the Fourth Amendment and the analogous provisions of the California Constitution preclude a court or magistrate from ever conditioning OR release upon the defendant's promise to comply with random drug testing or warrantless search and seizure conditions. [FN10]

FN10 In view of our holding that imposition of OR release conditions must be reasonable under the circumstances, nothing in this opinion should be construed as providing approval of random drug testing and warrantless search and seizure conditions in all cases wherein the defendant requests OR release. As is suggested by the probation cases cited above, the reasonableness of a condition necessarily depends upon the relationship of the condition to the crime or crimes with which the defendant is charged and to the defendant's background, including his or her prior criminal conduct. (Cf. Cal. Rules of Court, rule 414 [criteria affecting probation].)

C.

(5a) Finally, petitioners contend that the OR conditions at issue in the present case are constitutionally infirm on equal protection grounds, arguing that "[t]here is no rational basis for allowing person[s]

who can afford to post bail to be released without restrictive conditions, while those who ***1152** cannot do so must give up their Fourth Amendment rights....” (6) In addressing the merits of petitioners' argument, we observe that “ '[t]he burden of establishing the unconstitutionality of a statute rests on him who assails it, and ... courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.' [Citation.]” (*Brown v. Superior Court* (1971) 5 Cal.3d 509, 520 [96 Cal.Rptr. 584, 487 P.2d 1224].) It is well settled that the equal protection clause of the Fourteenth Amendment “guarantees equal laws, not equal results.” (*Personnel Administrator of Mass.* v. Feeney (1979) 442 U.S. 256, 273 [60 L.Ed.2d 870, 883-884, 99 S.Ct. 2282].)

(5b) With these principles in mind, we assume, without deciding, that petitioners are correct in asserting that warrantless drug testing and search and seizure conditions could not be imposed upon a defendant who is able to, and does, post reasonable bail, but we conclude that, in any event, such disparate treatment does not violate principles of equal protection. On its face, section 1318 is facially neutral-it does not create wealth-based distinctions or establish any classifications whatsoever. Pursuant to section 1318, a court or magistrate may impose reasonable conditions upon any defendant, wealthy or poor, who seeks OR release. Insofar as petitioners' contention rests upon the thesis that the statute creates an impermissible wealth-based classification, because persons who can afford to post the bail set for their offense will not need to seek OR release, petitioners' argument is in essence an argument that the bail process itself is unconstitutionally discriminatory, because that process is based upon a defendant's ability to post bail. We have rejected similar contentions raised in previous cases. (See, e.g., *In re Podesto* (1976) 15 Cal.3d 921, 931-933 [127 Cal.Rptr. 97, 544 P.2d 1297].)

Nor does the statute have a discriminatory purpose. As previously noted, the legislative history underlying the 1988 amendment to section 1318 suggests that the objective of the amendment authorizing imposition of reasonable OR conditions was to further public safety. Nothing contained in this history even remotely suggests a legislative attempt to discriminate against indigent defendants. To the contrary, in view of the inability of certain defendants to post bail, the Legislature clearly had a rational basis for concluding that public safety would be enhanced if such defendants, when afforded the leniency of a bail-free release, were required to comply with those reasonable conditions that a court or magistrate, in his or her discretion, believed to be necessary in order to deter further criminal conduct. ***1153**

Accordingly, we conclude that petitioners have failed to establish that section 1318 violates the equal protection clause of either the United States Constitution or the California Constitution.

IV.

Having determined that petitioners' challenges to the decision of the Court of Appeal are without merit, we affirm the judgment of that court.

Lucas, C. J., Mosk, J., Kennard, J., Arabian, J., Baxter, J., and Werdegar, J., concurred. ***1154**

Cal. 1995.
In re York
9 Cal.4th 1133, 892 P.2d 804, 40 Cal.Rptr.2d 308

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182 Cal.App.2d 192, 6 Cal.Rptr. 182
(Cite as: 182 Cal.App.2d 192, 6 Cal.Rptr. 182)

C

District Court of Appeal, First District, Division 1, California.

Paul Lewis **JONES**, a minor, by Alfred L. **Jones**, Jr., his Guardian ad Litem, Plaintiff and Appellant,
v.
Robert **CZAPKAY**; County of San Mateo, a political subdivision of the State of California; Dr. H. D. Chope, individually, and as Director of Health and Welfare Department of the County of San Mateo, State of California; Dr. James H. Bodie, individually, and as Officer in Charge of Communicable Disease Division, Health and Welfare Department of the County of San Mateo, State of California; City of Burlingame, a municipal corporation; Dr. Malcolm H. Merrill, individually, and as Director of Public Health, State Department of Public Health, State of California; Dr. Ed Kupka, individually, and as Chief, Bureau of Tuberculosis, State Department of Public Health, State of California, Defendants and Respondents.

No. 18993.
June 27, 1960.

Action brought by one who contracted tubercular meningitis, assertedly from known tuberculosis victim, to recover for injuries sustained from the victim, from certain health officers, and from city and county. The Superior Court, County of San Mateo, Frank B. Blum, J., rendered a judgment after sustaining demurrers of certain defendants, not including the known tubercular victim, and an appeal was taken. The District Court of Appeal, Bray, P. J., held that plaintiff asserted no basis for liability against the health officers, the county or the city.

Affirmed.

West Headnotes

[1] Counties 104 88

104 Counties
104III Officers and Agents
104k87 Duties and Liabilities
104k88 k. In General. Most Cited Cases

The statute waiving sovereign immunity for county officers only for damages resulting from defective or dangerous condition of public property refers to condition of property and not to condition of persons using property and imposes no liability based upon use of property by a known tubercular victim. West's Ann.Health & Safety Code, § 2561.

[2] Officers and Public Employees 283 114

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k114 k. Liabilities for Official Acts. Most Cited Cases
(Formerly 283k14)

The test for determining whether liability attaches individually to acts of public officers depends upon whether they were either acting without scope of their authority or were acting within scope of their authority in ministerial capacity only, and, in either event, liability attaches. West's Ann.Gov.Code, §§ 1953, 1981; West's Ann.Health & Safety Code, §§ 2561, 3285(a, c–e).

[3] Health 198H 384

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk384 k. In General. Most Cited Cases
(Formerly 199k18 Health and Environment)

Statutory provision requiring health officer to post placard upon quarantined house could not be invoked to impose liability upon health officers where it was repealed before plaintiff claimed to have been infected. West's Ann.Health & Safety Code, § 2561.

[4] Officers and Public Employees 283 110

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k110 k. Duties and Performance Thereof in General. Most Cited Cases
(Formerly 283k10)

182 Cal.App.2d 192, 6 Cal.Rptr. 182
(Cite as: 182 Cal.App.2d 192, 6 Cal.Rptr. 182)

Officers and Public Employees 283 114

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k114 k. Liabilities for Official Acts. Most Cited Cases

An officer performs his duty when he exercises his discretion and if he acts within his discretion, fact that his steps turned out to be inadequate or improper does not impose liability upon him.

[5] Health 198H 384

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk384 k. In General. Most Cited Cases
(Formerly 199k18 Health and Environment)

Exposure of plaintiff to known tubercular victim was sole proximate cause of plaintiff's acquiring the disease, and any breach of duty by health officers in failing to conduct proper or adequate investigation to insure strict compliance by patient with quarantine orders could constitute only a remote cause which could not form basis for imposition of liability upon them. West's Ann.Health & Safety Code, §§ 452, 2561, 3110, 3115(a), 3285(a, c–e).

[6] Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases
(Formerly 199k24 Health and Environment)

Provisions of Health and Safety Code dealing with duties of health officers in issuing tuberculosis quarantine orders make those duties discretionary rather than mandatory. West's Ann.Health & Safety Code, §§ 452, 3110, 3115(a).

[7] Health 198H 384

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk384 k. In General. Most Cited Cases
(Formerly 199k18 Health and Environment)

Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases
(Formerly 199k18 Health and Environment)

Unless director of health and welfare department of county had mandatory duties imposed upon him with respect to protection of persons from person known to have tuberculosis, no liability could be imposed upon him for alleged failure properly to follow up quarantine order. West's Ann.Health & Safety Code, § 451.

[8] Counties 104 143

104 Counties
104VII Torts
104k143 k. Condition and Use of Public Buildings, Places, and Property. Most Cited Cases

Municipal Corporations 268 735

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k735 k. Failure to Enact or Enforce Ordinances or Regulations. Most Cited Cases

Municipal Corporations 268 847

268 Municipal Corporations
268XII Torts
268XII(E) Condition or Use of Public Buildings and Other Property
268k847 k. Nature and Grounds of Liability of Municipality as Proprietor. Most Cited Cases

The statute imposing liability upon local agencies for injuries to persons and property resulting from dangerous or defective conditions of public property makes waiver of sovereign immunity depend upon condition of property and not persons on that property

and provided no basis for imposition of liability upon city or county for failure to conduct proper or adequate investigation to insure strict compliance by tubercular victim with quarantine order or to notify citizens that he had communicable tuberculosis or to allow him to roam streets. West's Ann.Gov.Code, §§ 53050, 53051.

[9] Municipal Corporations 268 ⚿857

268 Municipal Corporations
268XII Torts
268XII(E) Condition or Use of Public Buildings and Other Property
268k857 k. Actions for Injuries. Most Cited Cases

Question as to extent of duties imposed by statute making local agencies liable for injuries resulting from dangerous or defective conditions of public property is one of law for court and not for jury. West's Ann.Gov.Code, §§ 53050, 53051.

[10] Counties 104 ⚿142

104 Counties
104VII Torts
104k142 k. Exercise of Governmental Powers in General. Most Cited Cases

Municipal Corporations 268 ⚿724

268 Municipal Corporations
268XII Torts
268XII(A) Exercise of Governmental and Corporate Powers in General
268k724 k. Governmental Powers in General. Most Cited Cases

Both county and city were acting in governmental capacity in supplying health services to citizens and county was not acting in proprietary capacity when it contracted with city for services of county's health and welfare department.

[11] Health 198H ⚿386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases
(Formerly 199k24 Health and Environment)

Statutes, providing that State Department of Health and Safety may quarantine, isolate, and disinfect persons, houses, etc., that upon being informed by health officer of any contagious or communicable disease, Department may take such measures as are necessary to ascertain nature of disease and prevent its spread, by use of term "may" impose discretionary and not mandatory powers. West's Ann.Health & Safety Code, §§ 3000, 3051, 3053.

[12] Officers and Public Employees 283 ⚿114

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k114 k. Liabilities for Official Acts. Most Cited Cases

Executive public officers are absolutely immune from civil liability in performance of duties requiring exercise of discretion or judgment.

****184 *195** Ernest O. Meyer, James A. Himmel, San Francisco, for appellant.

Keith C. Sorenson, Dist. Atty., County of San Mateo, Redwood City, L. M. Summey, Deputy Dist. Atty., Redwood City, Robert J. Popelka, San Jose, for County of San Mateo, Dr. H. D. Chope, Director of Health & Welfare Dept., County of San Mateo and Dr. James H. Bodie, Officer in Charge of Communicable Disease Division, Health & Welfare Dept., County of San Mateo.

Stanley Mosk, Atty. Gen., Robert L. Bergman, Deputy Atty. Gen., for Dr. Malcolm H. Merrill, Director of Public Health, Dr. Ed Kupka, Chief, Bureau of T–B, State Dept. of Public Health.

Ropers, Majeski & Kane, Rodwood City, for City of Burlingame.

BRAY, Presiding Justice.

Appeal by plaintiff from a judgment after order sustaining demurrers of certain defendants without leave to amend and of other defendants with leave to amend.[FN*]

FN* Although Robert Czapkay was made a

> defendant, the record shows no appearance by him in the action, nor is his position as a defendant discussed in any of the briefs. Therefore, ‘defendants' as used herein will not include him. The first count is directed against Czapkay alone, and hence will not be discussed.

Questions Presented.

Is there any liability for communication of tuberculosis from a known tubercular victim, by

(a) Doctors Chope or Bodie in their official capacities of individually;

(b) County of San Mateo or city of Burlingame;

(c) Doctors Merrill or Kupka in their official capacities or individual?

Record.

The second count of the complaint is directed against Doctors Chope and Bodie individually. It alleges that Doctor Chope is and was the Director of the Health and Welfare ***196** Department of San Mateo County and that Doctor Bodie is and was in charge of the Communicable Disease Division of said department; that for more than 6 years past, both knew that Czapkay was afflicted with infectious and contagious tuberculosis; that about 1952 Doctor Chope as director issued and had served upon Czapkay an order isolating and quarantining him to his residence in Burlingame; that said defendants failed and neglected to enforce the provisions of the California health and safety statutes pertaining to quarantine and isolation and to place to placard on Czapkay's premises as required by section 2561, Health and Safety Code, to give any notice to the citizens and residents of Burlingame, and to plaintiff, of the existence of said communicable and infectious disease, to conduct proper or adequate investigation to insure strict compliance by Czapkay with said order; that by reason of said carelessness of defendants, plaintiff's health was endangered and plaintiff Paul Jones came in immediate communication with Czapkay, causing him to contract tubercular meningitis, damaging plaintiff in the sum of $350,000.

The third count is directed against the County of San Mateo and the two doctors in their official capacity, realleges by reference the allegations of the second count, alleges that defendant county at all times maintained a Public Health Department, that by reason of the carelessness of the defendants Central Avenue and Newlands Avenue in Burlingame, and other public streets in the cities of Burlingame and San Mateo and highways in San Mateo County were rendered dangerous, hazardous and unfit for ordinary use by the public due to their exposure to infectious and contagious tuberculosis, and the health and safety of the general public and plaintiff were endangered,****185** and thereby plaintiff by coming in direct communication with Czapkay contracted tubercular meningitis.

The fourth count is directed against the city of Burlingame and the two doctors in their official capacity, and realleges the charging portions of counts two and three, and alleges that Burlingame contracted with San Mateo County for the services of its health and welfare departments and by reason of said contract said doctors were servants, agents and employees of said Burlingame, and that because of the unfitness of Burlingame's streets as alleged, plaintiff contracted tubercular meningitis.

The fifth count is directed against Doctor Merrill individually and as Director of Public Health, State Department of Public Health, and Doctor Kupka individually and as Chief ***197** of the Bureau of Tuberculosis, State Department of Public Health. It incorporates the salient allegations of the first count and then charges that for more than 6 years defendants had full knowledge and information of Czapkay's infectious and contagious tubercular condition and that in the year 1952 were notified of the order of isolation and quarantine; that Czapkay refused hospitalization and medical treatment and was isolated to his home; that defendants were aware that no placard was attached to Czapkay's premises or notice of his disease given the public; that said defendants knowing said dangerous and hazardous condition and serious health menace failed to enforce the provisions of Health and Safety Code and to give notice to the general public, or take any steps to alleviate the condition and to protect the public health, as a result of which plaintiff contracted tubercular meningitis.

Demurrers of defendants Chope, Bodie, Merrill and Kupka were sustained with leave to amend. Those of the other defendants were sustained without leave to amend.

(a) Doctors Chope and Bodie.

The first cause of action (the one against Czapkay alone) alleges that plaintiff's contact with him occurred between February and December 16, 1957, and that as a result thereof plaintiff on or about December 9, 1957, became ill and was hospitalized with tubercular meningitis on December 16, 1957. In the other counts plaintiff does not allege the date when plaintiff became infected. The only time alleged is that in 1952 the defendants knew of Czapkay's condition and the order of quarantine was made that year.

On February, 14, 1958, plaintiff filed his claim against Doctors Chope and Bodie and the San Mateo County Board of Supervisors in conformity with section 1981, Government Code. This section requires that any claim for injury 'as a result of the negligence or carelessness of any public officer or employee occurring during the course of his service or employment or as a result of the dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of any officer or employee' must be filed within 90 days 'after the accident has occurred * * *.' Section 2561, Health and Safety Code, which provided that when a house or building has been quarantined because of a communicable disease the health officer 'shall' place on it the placard described in the section, was repealed effective September 11, 1957 (Stats.1957, ch. 205, p. 848, § 1). As plaintiff did not become infected (the 'accident' did not take place) until ***198** December 9, as alleged in the first count, or at the earliest 90 days prior to the filing of his claim, which would be November 16, 1957, no liability could attach to defendants in their official capacity for failure to comply with section 2561, Health and Safety Code, as that section then was no longer in existence. Hence, no cause of action is or can be stated against said defendants in their official capacity.

[1] As said in Bettencourt v. State of California, 1956, 139 Cal.App.2d 255 257–258, 293 P.2d 472, 474: 'Generally speaking a plaintiff can bring two types of actions for tort against public officers or employees: (1) He can sue them in their ****186** private and individual capacity. This is the normal common law tort action against an individual. * * * This type of action requires as additional to the pleading of negligence, compliance only with section 1981 (the filing of a claim). (2) He can sue them in their official capacity as municipal officers or employees. This type of action requires not only the filing of a claim under section 1981 but the requirements of section 1953 must also be alleged and proved.' Section 1953 waives sovereign immunity for county officers only for damages resulting from the defective or dangerous condition of any public property. Even if the claim against defendants in their official capacity had been filed in time, 'defective or dangerous condition of any public property' refers to *condition of property* and not to the condition of persons using the property, and therefore defendants in their official capacity are immune to the charges here made. This matter of immunity will be discussed further in connection with the demurrers of the other defendants.

[2] As to their individual capacity: The complaint alleges that they failed and neglected to conduct proper or adequate investigation to insure strict compliance by Czapkay of the quarantine order issued by the Health and Welfare Department of San Mateo County. The test for determining whether liability attaches individually to the acts of public officers depends upon whether they were either acting without the scope of their authority or were acting within the scope of their authority in a ministerial capacity only. In either event liability would attach. The complaint alleges that the doctors were acting within the scope of their employment; hence the question here is, were they acting in a ministerial capacity only, and therefore might be liable, or were they exercising their discretion?

As said in 41 Cal.Jur.2d, pp. 33–34: 'It ***199** is elementary that a public officer is liable in damages to one specially injured by his neglect or refusal to perform, or by his negligent performance, of an official ministerial duty, to the extent of the special injury, regardless of intentions, whether good or bad. * * * Although an action will not generally lie against an officer if his powers are discretionary, if discretion is exercised and a course of conduct begun a failure to exercise ordinary care will give rise to liability.'

Section 3285, Health and Safety Code, provides: 'Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction and to ascertain the sources of such infections. In carrying out such investigations, each

health officer is hereby invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed:

'(a) To make such examinations as are deemed necessary' of such persons 'and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of the public health. * * *

'(c) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing * * *

'(d) * * * such order shall be served upon the person named in such order.

'(e) Upon the receipt of information that any quarantine * * * order * * * has been violated, the health officer shall advise the district attorney * * * in writing * * * of such violation * * *.'

[3] Section 3285 contains mandatory and discretionary provisions. Thus, each health officer is *directed* to use every available means to ascertain the existence of, and to investigate suspected or reported cases of tuberculosis. This is mandatory. Some discretion is given as to the type of ****187** examination to be given ('To make such examinations *as are deemed necessary*' of the suspected persons (emphasis added)); also as to whether such persons shall be isolated or quarantined or both ('and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of the public health'). Whenever the health officer determines that quarantine or isolation is necessary, he *shall* make the order ***200** (see subdivision (c)). 'Upon the receipt of information that any quarantine * * * order * * * has been violated,' he 'shall advise the district attorney * * * and shall submit to such district attorney the information in his possession relating to the subject matter * * *.' (subdivision (e)). It is not alleged in the complaint that the defendants had received any information that the quarantine order had been violated. The basis of the charge is that said defendants after the order of quarantine was issued 'failed and neglected to enforce the provisions of the health and safety statutes * * * and to place or cause to be placed, any placard whatsoever' on Czapkay's home 'as provided by Section 2561' and to give notice to the citizens or plaintiff' of the existence of said infectious and communicable disease' and 'to conduct *proper or adequate* investigation to insure strict compliance' by Czapkay with said order. (Emphasis added.) The charge that he 'failed and neglected to enforce the provisions of the health and safety statutes' is a conclusion. Thus the only factual negligence charged against said defendants is that they failed to post the placard and to conduct proper or adequate investigations to determine if the quarantine was obeyed. Section 2561, Health and Safety Code, provided that when a house is quarantined 'the health officer *shall*' post upon it the warning placard. (Emphasis added.) As we have heretofore pointed out, section 2561 was repealed before plaintiff claims to have been infected so that the failure to post would occasion no liability upon the part of said defendants.

[4] It is impossible to determine from the complaint what is meant by failure 'to conduct proper or adequate investigation.' When a health officer determines that quarantine is necessary, the terms of the quarantine are discretionary with him. Section 3285, subdivision (c), provides that the quarantine order, among other terms, shall provide 'the period of time during which the order shall remain effective * * * and such other terms and conditions as may be necessary to protect the public health.' It no where appears what the period of time or the terms of the quarantine order were. It was issued in 1952. Plaintiff claims to have been infected in 1957. There is no allegation that the order was still in effect, or that the health officer did not within his discretion conduct investigations or take steps to ensure that the quarantine order was being obeyed. The charge is that he did not take 'proper or adequate' steps. This is entirely a conclusion of law. Moreover, if he acted within his discretion,***201** the fact that the steps turned out to be inadequate or improper would not make him liable. The officer has performed his duty when he exercises his discretion.

[5] As said in Routh v. Quinn, 20 Cal.2d 488, 491, 127 P.2d 1, 3, 149 A.L.R. 215: '* * * an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member.' No such duty is shown here. In Stang v. City of Mill Valley, 38 Cal.2d 486, 240 P.2d 980, it was held that there was no liability imposed on a city, the city manager or fire chief, for failure to provide sufficient water for effective fire control. '* * * failure of

a governmental function * * * involves the denial of a benefit owing to the community as a whole, but it does not constitute a wrong or injury to a member thereof so as to give rise to a right of individual redress (Restatement of Torts, § 288), which right must be predicated upon the violation of a duty of care owed to the injured party.'

****188** In Tomlinson v. Pierce, 178 Cal.App.2d 112, 2 Cal.Rptr. 700, the complaint charged that the defendants, one a police officer, the other the chief of police, negligently failed to arrest an automobile driver whom they knew to be intoxicated and permitted him to remain at large, driving his car, as a result of which the driver collided with a car in which the plaintiffs' father was riding, causing the latter's death. In upholding the action of the trial court in sustaining a demurrer to this complaint without leave to amend, on the ground that no duty was shown to be owed the plaintiffs' father by the officers, the reviewing court said (178 Cal.App.2d at page 115, 2 Cal.Rptr. at page 702): 'As we construe the pleadings, plaintiffs' cause of action is founded upon the premise that when a police officer has knowledge that a member of society has formed the intention of committing a crime (i. e. knew that such person intended to drive and operate an automobile upon the public highways in an intoxicated condition at some future time), then for failure to make an arrest and detain such person, the officer becomes liable to all individuals for personal injury and property damage caused by this subsequent criminal act, and the failure to so arrest and detain him may be negligence on the part of the police officer. We find no support for this general proposition of law, either at common law, by statute or under the California decisions. It was held in Annala v. McLeod, 122 Mont. 498, 206 P.2d 811, 813, in an action against the sheriff for damages sustained by an individual through ***202** riot or mob action, no liability existed for his failure or neglect to carry out his duties; that under common law the sheriff 'is the conservator of the public peace and is not liable for an injury to person or property of an individual occasioned from riotous assembly or mob, unless made so by Constitution or statute.''

There is a strong similarity between the complaint in the Tomlinson case and that in our case. Both complaints charged that public officers failed to perform their duty in allowing a person whom they knew to be dangerous to the public to remain at large upon the streets, as a result of which the plaintiffs were injured. The Tomlinson case points out additionally that the sole proximate cause of the death of the plaintiffs' father was the manner in which the driver drove his car, and that if there was any breach of duty to the plaintiffs' father by the police officers, such breach was a remote, and not a proximate, cause of the death. Likewise, in our case, exposure to Czapkay was the sole proximate cause of plaintiff's acquiring the disease, and any breach of duty by defendant officers was only a remote cause. See also Rubinow v. County of San Bernardino, 169 Cal.App.2d 67, 336 P.2d 968.

[6] The sections of the Health and Safety Code (other than those hereinbefore mentioned) dealing with the duties of the health officer clearly show that his duties after issuing the quarantine order are discretionary rather than mandatory. Thus section 3110 provides that each health officer knowing or having reason to believe that any contagious, infectious or communicable disease exists in his jurisdiction 'shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.' Section 3115 provides that upon receiving information of the existence of contagious, infectious or communicable disease each health officer shall '(a) Insure the adequate isolation of each case, and appropriate quarantine of the contacts and premises.' Section 452 provides that the county health officer shall enforce and observe statutes relating to public health and orders, regulations and rules prescribed by the State Department of Public Health. Title 17, section 2624, California Administrative Code, provides that persons having communicable tuberculosis, who fail to observe the instructions of the local health officer, 'shall be placed in strict isolation at home until such time as the local health officer feels that such isolation is no longer necessary * * *'

****189 *203** [7] We have been discussing so far the liability of health officers. Doctor Chope, the Director of the Health and Welfare Department of San Mateo County, is the health officer of that county. As to Doctor Bodie, alleged to be in charge of the Communicable Disease Division of the Health and Welfare Department, Health and Safety Code, section 451, provides for an appointment of a county health officer, but we fail to find where Doctor Bodie's office is referred to in the statutes nor do we find any duties imposed upon him. As it nowhere appears that Doctor Bodie had any mandatory duties which he is alleged to

have violated, there can be no liability on his part for failure to adequately and properly follow up the quarantine.

(b) County of San Mateo and City of Burlingame.

[8] The theory upon which plaintiff attempts to hold these defendants is that plaintiff's injury resulted from 'the dangerous or defective condition' of their property and hence the sovereign immunity which otherwise cloaks a county and city for injuries resulting from their acting in a governmental capacity is waived by section 53051, Government Code. While 'public property' as used in that section includes streets and highways (§ 53050) it is a novel conception that failing 'to conduct proper or adequate investigation to insure strict compliance' by Czapkay with the quarantine order or to notify their citizens that Czapkay had communicable tuberculosis or even knowingly allowing him to roam the streets (although there is no charge that they did the latter) constitutes a dangerous and defective condition of the streets. If this is so, then any negligence of the police in allowing a dangerous criminal on the streets, or in failing to arrest a person operating a motor vehicle in a dangerous manner would constitute a dangerous and defective condition of property. The section has always been considered to mean just what it says, that it is the *condition* of *property* that determines the waiver of the immunity and not the condition of persons on that property. The public streets complained of were not dangerous or defective either structurally or by way of their general use and operation. Neither the county nor the city is an insurer of the public ways within their respective jurisdictions against moving objects not controlled by them or wrongful acts of third parties.

Campbell v. City of Santa Monica, 1942, 51 Cal.App.2d 626, 629, 125 P.2d 561, 563, held, referring to a statute similar to the present section 53051, 'But neither this statute nor ***204** any other imposes a duty upon the city to control their use so as to avoid accidents upon them. By making and enforcing ordinances regulating the use of streets and sidewalks the city exercises a governmental power, and so for any breach thereof there is no liability.' In Shipley v. City of Arroyo Grande, 1949, 92 Cal.App.2d 748, 750, 208 P.2d 51, 53, the court said: 'A city is not liable for injuries caused by motor vehicles merely because it may appear that its streets and curbs which are in no sense dangerous for careful use could possibly be made secure against peril by a more elaborate construction or by installing one of a simpler type [citation].'

Somewhat analogous was the situation in Durst v. County of Colusa, 1958, 166 Cal.App.2d 623, 333 P.2d 789. There the plaintiff was a patient at the county hospital. It was alleged that the defendant county 'so negligently and carelessly administered and performed the blood transfusions that the plaintiff was caused to and did receive blood transfusions of a type other than that of plaintiff's' to his personal injury. The plaintiff contended that the doctrine of sovereign immunity could not apply because the county employed an incompetent and unlicensed technician to perform the laboratory tests 'and thereby created a dangerous and defective condition of public property for which it is liable under section 53051 of the Government Code.' 166 Cal.App.2d at page 625, 333 P.2d at page 790. The court held that there was no merit to this contention, as clearly the action was based upon the negligence of ****190** one of the county's employees and no dangerous or defective condition of county property was involved. The same is true of plaintiff's contention here that there is involved a dangerous and defective condition of San Mateo County's property and that of the city of Burlingame. See also Grove v. County of San Joaquin, 1958, 156 Cal.App.2d 808, 320 P.2d 161, where the plaintiff, beaten by other prisoners while he was confined in the county jail, contended that the county's failure to properly supervise the prisoners to prevent such an occurrence brought the jail within the terms, dangerous and defective condition of county property in section 53051. Also see Bryant v. County of Monterey, 1954, 125 Cal.App.2d 470, 473, 270 P.2d 897, where a similar contention was made where the plaintiff was injured by a 'kangaroo court' existing in the jail. Both cases held that there was no merit to the contentions.

[9] Plaintiff contends that whether a particular case meets the requirements of the code section, is a fact determination for ***205** the jury (see Arellano v. City of Burbank, 13 Cal.2d 248, 254, 89 P.2d 113), and that therefore it was for the jury to determine whether or not a dangerous or defective condition of public property existed here. However, the question as to the extent of the duties which are imposed by the act is one of law to be determined by the court and not by the jury. 'The scope of the Public Liability Act is a question of law to be determined by the court.' Bryant v. County of Monterey, supra, 125 Cal.App.2d 470,

473, 270 P.2d 897, 899; Campbell v. City of Santa Monica, supra, 51 Cal.App.2d 626, 629, 125 P.2d 561.

[10] Plaintiff contends that the County of San Mateo was acting in a proprietary capacity in that it contracted with the city of Burlingame for the services of the county's Health and Welfare Department. This contract did not change the legal situation. Both the county and the city were acting in a governmental capacity, in supplying health services to the citizens of Burlingame. The county was acting as the agent of the city and not in a proprietary capacity.

No cause of action was stated against either San Mateo County or the city of Burlingame.

(c) Doctors Merrill and Kupka, Officially and Individually.

The discussion and holding concerning failure to post the placard hereinbefore applied to the demurrers of defendants Chope and Bodie applies to defendants Merrill and Kupka. Plaintiff contends that these defendants are liable because of section 106, Health and Safety Code. This provides that the Director of the State Department of Health and Safety is the executive officer of the department. 'He shall administer the laws and regulations of the board pertaining to public health and shall vigilantly observe sanitary and public health conditions throughout the State and shall take all necessary precautions to protect it in its sanitary and public health relations with other States and countries. He shall perform such other duties as may be prescribed by law * * *.'

[11][12] Section 3051 provides that the state department *may* quarantine, isolate, inspect and disinfect persons, houses, etc. Section 3053 provides: 'Upon being informed by a health officer of any contagious, infectious, or communicable disease the state department *may* take such measures as are necessary to ascertain the nature of the disease and *prevent* its spread.' (Emphasis added.) The use of the word 'may' in these sections makes such powers discretionary. Executive public officers are absolutely immune from civil liability in the performance of duties requiring the exercise of discretion or ***206** judgment. White v. Brinkman, 1937, 23 Cal.App.2d 307, 317, 73 P.2d 254.

As to the statutes dealing with 'health officers' hereinbefore discussed, those statutes do not apply to officers of the State Department of Public Health. Section 3000, Health and Safety Code, provides: ****191** "Health Officer,' as used in this division, includes county, city and district health officers, and city and district health boards, but does not include advisory health boards.' The discussion concerning the nonliability of Doctors Chope and Bodie applies to Doctors Merrill and Kupka. Plaintiff has failed to point out where these defendants have violated any duty to him. Hence no cause of action is stated against them.

The demurrers were properly sustained. The judgment is affirmed.

TOBRINER and DUNIWAY, JJ., concur.

Cal.App. 1960
Jones v. Czapkay
182 Cal.App.2d 192, 6 Cal.Rptr. 182

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156 Cal.App.4th 288, 67 Cal.Rptr.3d 277, 07 Cal. Daily Op. Serv. 12,431, 2007 Daily Journal D.A.R. 16,011
(Cite as: 156 Cal.App.4th 288, 67 Cal.Rptr.3d 277)

H

Court of Appeal, Second District, Division 6, California.
Robert LEVIN, as Public Health Officer, Plaintiff and Respondent,
v.
ADALBERTO M., Defendant and Appellant.

No. B195408.
Oct. 22, 2007.
Rehearing Denied Nov. 14, 2007.
Review Denied Feb. 13, 2008.

Background: County public health officer sought enforcement of civil order of detention for tuberculosis (TB) patient. The Superior Court, Ventura County, No. 243178,Ken Riley, J., ordered enforcement and later continuation of detention order. Patient appealed.

Holdings: The Court of Appeal, Yegan, Acting P.J., held that:
(1) any delay in appointment of counsel for patient was harmless error, and
(2) patient did not have a due process right to a unanimous jury verdict on proof beyond a reasonable doubt of the justification for his detention.

Affirmed.

West Headnotes

[1] Constitutional Law 92 975

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k975 k. In General. Most Cited Cases

The courts do not reach constitutional issues where it is unnecessary to do so.

[2] Appeal and Error 30 781(1)

30 Appeal and Error
30XIII Dismissal, Withdrawal, or Abandonment
30k779 Grounds for Dismissal
30k781 Want of Actual Controversy
30k781(1) k. In General. Most Cited Cases

Court of Appeal would exercise its discretion to rule on tuberculosis (TB) patient's appeal from trial court's orders enforcing and continuing civil order of detention, despite mootness, because issues presented, those being whether delay in appointment of counsel for patient was harmless error and whether patient had due process right to unanimous jury verdict on proof beyond a reasonable doubt of justification for his detention, were likely to recur and were otherwise likely to evade appellate review due to inherently temporary nature of detention orders. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Health & Safety Code § 121365(d).

[3] Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases

Any delay in appointment of counsel for tuberculosis (TB) patient at hearing on enforcement of civil order of detention was harmless error, since public defender was appointed at enforcement hearing, which was first day of initial 90-day period of detention, and trial court reviewed factual basis for detention at 90-day review hearing. West's Ann.Cal.Health & Safety Code §§ 121366, 121368.
See 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, 368.

[4] Constitutional Law 92 4331

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)14 Environment and Health
92k4331 k. Public Health. Most Cited Cases

156 Cal.App.4th 288, 67 Cal.Rptr.3d 277, 07 Cal. Daily Op. Serv. 12,431, 2007 Daily Journal D.A.R. 16,011
(Cite as: 156 Cal.App.4th 288, 67 Cal.Rptr.3d 277)

Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases

Tuberculosis (TB) patient did not have a due process right at civil detention order enforcement hearing to a unanimous jury verdict on proof beyond a reasonable doubt of his unwillingness to complete prescribed course of medication and to follow infection control precautions, which justified detention order. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Health & Safety Code §§ 121365(e)(2), 121366 et seq.

****278** Kenneth I. Clayman, Public Defender and Michael C. McMahon, Certified AppellateLaw Specialist, for Defendant and Appellant.

Noel A. Klebaum, County Counsel, County of Ventura an John E. Polich, Deputy County Counsel, for Plaintiff and Respondent.

YEGAN, Acting P.J.

***292** Adalberto M. appeals from the trial court's orders enforcing and extending a Civil Order of Detention for Tuberculosis treatment issued against him by the Public Health Officer of Ventura County requiring that he be detained while he completes a course of treatment for tuberculosis. (Health & Saf.Code, §§ 121365, subd. (d), 121366.) [FN1] He contends the orders are "void" because the trial court deprived him of due process and equal protection by 1. failing to appoint counsel to represent him before an initial hearing, and 2. failing to require a unanimous jury verdict using the reasonable doubt burden of proof on the questions of whether he could be relied upon to complete the course of treatment and follow infection control precautions. (§ 121365, subd. (e)(1).)

FN1. All statutory references are to the Health & Safety Code unless otherwise stated.

[1] Appellant has a statutory right to be represented by counsel at the hearing to enforce the Civil Order of Detention for Tuberculosis. (§ 121366.) [FN2] The trial ***293** court erred by conducting the initial hearing on August 29, 2006, without first appointing counsel or inquiring of appellant personally whether he wished to be represented by counsel. The remedy for that violation, however, is not a declaration that the initial order detaining appellant is "void." The remedy is to appoint counsel and to hold a new hearing on the question of whether appellant's detention and treatment should continue. The trial court has already cured its error by appointing counsel to represent appellant and conducting the November 20, 2006 hearing at which it reviewed the basis for appellant's detention and treatment. Here, the delay in appointing counsel was harmless. We further conclude that appellant had no due process, equal protection, or statutory right to a jury trial, unanimous verdict, or to a reasonable doubt burden of proof. Accordingly, we affirm.

FN2. Appellant contends that he has a constitutional right to counsel. The courts do not reach constitutional issues where, as here, it is unnecessary to do so. (See e.g., *People v. Leonard* (1983) 34 Cal.3d 183, 187, 193 Cal.Rptr. 171, 666 P.2d 28.)

Facts

In early August 2006, Adalberto M., a 37–year old homeless man with a history ****279** of heroin and methamphetamine use, was admitted to the Ventura County Medical Center (VCMC) after testing positive for tuberculosis (TB). TB is a highly contagious and potentially fatal disease. The next day, the director of Ventura County's tuberculosis program, Dr. Kurt Cook, issued an Order of Isolation directing appellant to stay in a motel room the county provided for him while he completed taking a course of medication. Appellant agreed to, and signed, the isolation order. Public health staff took him to a motel and stocked the room with food, drinks, a refrigerator and a microwave oven. Appellant stayed there for about six days at the county's expense. Then, he checked out, forsaking his free room, board, and medicine. He did so to purchase illegal drugs.

About one week later, appellant was having trouble breathing and sought treatment at the Santa Paula Hospital. He was taken back to VCMC by ambulance where he refused to resume taking his tuberculosis medication. On August 23, 2006, Dr. Cook issued a Civil Order of Detention pursuant to which

appellant was prevented from leaving the hospital. Appellant demanded to be released and reacted violently when hospital security guards prevented his departure, breaking a window and assaulting the security guards. He actually spat on two security guards.[FN3]

> FN3. In addition to the disgusting and degrading aspect of spitting on another person, appellant's sputum carried a potential of infecting the guards with tuberculosis. Appellant's recalcitrance culminating in the spitting incident is the obvious reason why the public health officer could not again trust appellant in a motel setting. Appellant was the architect of his own confinement. (See *infra* p. 280.)

On August 29, 2006, the trial court held an ex parte hearing on the public health officer's application to enforce the Civil Order of Detention. The ***294** application was accompanied by a declaration from Dr. Robert Levin, the Public Health Officer for Ventura County. Dr. Levin declared that appellant was provided with a copy of Dr. Cook's August 23, 2006 Civil Order of Detention. According to Dr. Levin, appellant "did not request legal counsel or otherwise object to detention." At the August 29 hearing, appellant was not represented by counsel and did not appear. He was still confined in the hospital for treatment. The trial court granted the application, extending appellant's detention for 90 days. Immediately after it had ordered appellant detained for 90 days, the trial court appointed the Public Defender's office to represent him and set a review hearing for November 13, 2006. The public defender did not seek reconsideration or any relief whatsoever until the next scheduled hearing.

At the November 2006 review hearing, county counsel, appearing for the Public Health Officer, contended that appellant's continued detention was authorized pursuant to section 121365, subdivision (e) because, although appellant was no longer contagious, his prior refusal of treatment and attempt to leave isolation demonstrated that he could not be relied upon to complete the treatment without observation. The particular strain of tuberculosis with which appellant is infected was resistant to one of the most common tuberculosis antibiotics. According to Dr. Levin, "this makes absolute adherence to the remainder of his treatment mandatory. If [appellant] is not fully compliant he will be at high risk for the development of multi-drug resistant TB which poses a dire threat to the community at large." Appellant and his counsel were both present at the November hearing. Appellant testified that, if released, he would comply with the treatment plan because he understood that he would get sick again if he stopped ****280** taking the pills. Based upon his recent recalcitrance, the trial court found clear and convincing evidence that appellant could not be relied upon to complete the course of medication if released. It renewed the detention order for another 90 days, to February 27, 2007. Appellant filed this appeal.

Statutory Framework

"Pulmonary tuberculosis is an infectious and communicable disease ... [and is] dangerous to the public health." (§ 121360; see also *Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1118, 116 Cal.Rptr.2d 7.) Section 121365 directs the local health officer in each jurisdiction to "use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections." When the health officer determines that "the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease," or a person reasonably suspected to have ***295** the disease, the health officer "may issue any orders he or she deems necessary to protect the public health or the health of any other person, and may make application to a court for enforcement of the orders." (*Id.*)

These orders may include a mandate that a person submit to a TB test or examination (§ 121365, subd. (a)), complete an appropriate course of treatment and follow required infection control measures (§ 121365, subd. (b)), or submit to "directly observed therapy" for the disease. (§ 121365, subd. (c).) A TB patient may be ordered confined to his or her residence (§ 121365, subd. (g)), excluded from his or her workplace, or excluded from any other place "when the local health officer determines that the place cannot be maintained in a manner adequate to protect others against the spread of tuberculosis disease." (§ 121365, subd. (f).)

Here, the public health officer detained appellant pursuant to section 121365, subdivision (d). This subdivision permits "An order for the removal to,

detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur: [¶] (1) The person has infectious tuberculosis disease.... [¶] (2) The local health officer finds, based on recognized infection control principles, that there is a substantial likelihood the person may transmit tuberculosis to others because of his or her inadequate separation from others."

Subdivision (e) of section 121365 permits the detention of a tuberculosis patient where the local health officer determines: "(2) There is a substantial likelihood, based on the person's past or present behavior, that he or she cannot be relied upon to participate in or complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, follow required infection control precautions for tuberculosis disease. The behavior may include, but is not limited to, refusal or failure to take medication for tuberculosis disease, refusal or failure to keep appointments or treatment for tuberculosis disease, refusal or failure to complete the treatment for tuberculosis disease, or disregard for infection control precautions for active tuberculosis disease." (*Id.*) The Public Health Officer relied on this subdivision at the November 20 hearing to support appellant's continued detention.

Section 121366 allows the local health officer to detain a tuberculosis patient in a hospital or other appropriate facility, pursuant to subdivisions (a), (d) or (e) of section 121365, without a prior court order. When a detained tuberculosis patient requests****281** release, however, the local health officer "shall make an application for a court order authorizing the continued detention within 72 hours after the request...." The application must include a request for an expedited hearing. "After the request for release, ***296** detention shall not continue for more than five business days in the absence of a court order authorizing detention. However, in no event shall any person be detained for more than 60 days without a court order authorizing the detention. The local health officer shall seek further court review of the detention within 90 days following the initial court order authorizing detention and thereafter within 90 days of each subsequent court review." (§ 121366.) The local health officer must prove the "particularized circumstances" necessitating detention "by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by counsel and upon request of the person, counsel shall be provided." (*Id.*)

Section 121367 mandates that the local health officer's orders be in writing and be personally served on the affected person. Among other things, the order must identify the legal authority under which it is made, the individualized circumstances necessitating the order, less restrictive treatment options that were either considered and rejected or attempted and unsuccessful, the period of time during which the order remains in effect and other conditions necessary to protect the public health. (§ 121367, subd. (a)(1)–(4).) The order must inform the affected person of his or her right to request release and provide the name and telephone number of the person to whom that request may be made. (§ 121367, subd. (b)(1).) It must inform the person that a court will review the order within 60 days, even if they do not request release. (§ 121367, subd. (b)(2).) The person must be informed of his or her right to be represented by counsel and that counsel will be appointed on request. (§ 121367, subd. (b)(4).) Finally, the order must be accompanied by a separate written notice of the right to request release and the procedure for doing so, the right to counsel, and the right to supply the addresses and telephone numbers of not more than two people to receive notice of the person's detention. (§ 121367, subd. (b)(5).)

The confinement of a person, such as appellant, who is detained pursuant to section 121365, subdivision (d) may not be continued after he or she "ceases to be infectious or after the local health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis disease after his or her release from detention." (§ 121368, subd. (b).) A person detained pursuant to section 121365, subdivision (e), "shall not continue to be detained after he or she has completed an appropriate course of medication." (§ 121368, subd. (c).) The person is entitled to an interpreter if necessary. (§ 121369, subd. (a).)

***297** *Mootness*

[2] Appellant's counsel informs the court that appellant has completed his course of treatment and has been released from detention as mandated by section 121365, subdivision (d). Appellant contends, and respondent agrees, that although his appeal arguably has become moot, we should reach the issues he has raised. We concur. The issues presented are

likely to recur and, because the course of treatment for tuberculosis typically lasts six to nine months, detention orders such as those issued in this case will likely expire before an appeal can be decided. (See, e.g., ****282***Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1011, fn. 5, 36 Cal.Rptr.2d 40, 884 P.2d 988; *Conservatorship of Joel E.* (2005) 132 Cal.App.4th 429, 434, 33 Cal.Rptr.3d 704.) Accordingly, we exercise our inherent discretion to determine the merits of this appeal. (*Conservatorship of Manton* (1985) 39 Cal.3d 645, 647, fn. 1, 217 Cal.Rptr. 253, 703 P.2d 1147.)

Appointment of Counsel

[3] Appellant contends the trial court violated his due process and equal protection rights by authorizing his detention without first appointing counsel to represent him. Section 121366 provides: "Any person who is subject to a detention order shall have the right to be represented by counsel and upon the request of the person, counsel shall be provided." The trial court erred when it failed either to appoint counsel for appellant or obtain his personal waiver of that right.[FN4] It cured the error, however, when it appointed the Public Defender to represent appellant and then reviewed the need for appellant's continued detention at the November hearing.

> FN4. Dr. Levine testified that appellant received a copy of the order for his detention and did not request counsel. We cannot equate a "failure" to request counsel with a waiver of the right to counsel.

Appellant asserts that, because the trial court first detained appellant and then appointed counsel to represent him at the August 29 hearing, it never acquired personal jurisdiction over him and its subsequent orders are "void." He even sought habeas corpus relief. It is unclear from the record and oral argument just what remedy appellant was seeking. But in any event, physical release was certainly not appropriate. It is sufficient to now conclude that counsel should be appointed and given the opportunity to be heard before the trial court makes any order for detention for tuberculosis treatment. Delay in the appointment of counsel, as occurred here, does not necessarily irreparably prejudice the patient or taint subsequent proceedings.

A proceeding to detain and treat a tuberculosis patient is not identical, and in our view, not even similar to a criminal proceeding in which a formal ***298** plea or an interim finding or order acquires some finality and a presumption of correctness. An order of detention may be re-issued as often as necessary to protect the public health, but no single order can last longer than 90 days without court review. In addition, the order of detention must, as a matter of law, be rescinded as soon as the patient completes the course of treatment or "ceases to be infectious or after the local health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis disease after his or her release from detention." (§ 121368, subd. (b), (c).)

Here, counsel was appointed to represent appellant long before the initial 90–day period expired. As indicated, counsel was appointed on the very first day of the 90 day period. Nothing prevented appellant's counsel from making an earlier request for his release based on his non-infectious status or other changed circumstances. Moreover, at the November hearing the trial court reviewed the factual basis for appellant's detention rather than relying on findings made before counsel was appointed. In these circumstances, we conclude appellant was not prejudiced by the delay in appointing counsel and the trial court's error was harmless.

Unanimous Jury Trial and Proof Beyond a Reasonable Doubt

[4] Appellant contends he has a due process right to a unanimous jury verdict ****283** on proof beyond a reasonable doubt of his inability or unwillingness "to participate in or complete an appropriate prescribed course of medication ... and, if necessary, follow required infection control precautions ...." (§ 121365, subd. (e)(2).) He notes that unanimous jury verdicts are required in proceedings for the involuntary civil commitment of mentally ill or gravely disabled persons (Welf. & Inst.Code, § 5350, subd. (c)), and were also required for commitments under the former Mentally Disordered Sex Offender Act. (Former Welf. & Inst.Code, § 6300 et seq.) Jury trials are also afforded to parolees identified as mentally disordered offenders (Pen.Code, §§ 2966, subd. (b), 2972, subd. (a)), and to prisoners identified as sexually violent predators. (Welf. & Inst.Code, § 6603).[FN5]

> FN5. Appellant sees no difference between

> these exemplar statutory schemes and the confinement of recalcitrant tuberculosis patients. We do. Those persons described in the exemplar schemes who have been afforded more procedural protections are capable of harming society, but not a in medical way. Tuberculosis, by contrast, is a severe infectious disease. The Centers for Disease Control and Prevention (CDC) estimate that "virtually all new infections in the country today are contracted through the aerosol route from infected patients who are coughing and dispersing infective droplet nuclei into the air." (Cole and Cook, (1998) *Characterization of Infectious Aerosols in Health Care Facilities: An Aid to Effective Engineering Controls and Preventive Strategies*, 26 Am. Journal of Infection Control 453.) This is hardly surprising, when one considers that, "A cough can generate some 3000 droplet nuclei, as can talking for 5 minutes. A sneeze can generate as many as 40,000 droplets ...[,]" containing infectious tuberculosis bacilli. These droplets are, of course, dispersed into the air which we all breathe creating a fertile environment for new infections. (*Id.* at p. 455, fn. omitted.) This certainly differentiates appellant from those persons described in the exemplar schemes.

***299** The procedural protections offered by these statutes are, however, a matter of legislative preference rather than federal constitutional mandate. In fact, the United States Supreme Court has never held that due process requires either a jury trial or proof beyond a reasonable doubt in the analogous context of the civil commitment of a mentally ill or sexually dangerous person. *Kansas v. Hendricks* (1997) 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501, noted that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety. [Citations.] We have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." (*Id.* at pp. 356–357, 117 S.Ct. 2072, 138 L.Ed.2d 501.)

Those "proper procedures and evidentiary standards" do not, at least as a matter of federal constitutional law, include a requirement of trial by jury. "There is no clearly established Supreme Court law which holds that due process requires a jury trial in civil commitment proceedings...." (*Poole v. Goodno* (8th Cir.2003) 335 F.3d 705, 710–711.) To the contrary, the Ninth Circuit holds that "due process does not require a jury trial" in a civil commitment proceeding against a criminal defendant found incompetent to stand trial. (*United States v. Sahhar* (9th Cir.1990) 917 F.2d 1197, 1207; see also *Carty v. Nelson* (9th Cir.2005) 426 F.3d 1064, 1073, 1075–1076 [California's SVP Act does not violate Sixth or Fourteenth Amendments to the United States Constitution].)

Nor has the United States Supreme Court mandated proof beyond a reasonable doubt in civil commitment proceedings. In *Addington v. Texas* (1979) 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323, a case involving the indefinite detention of ****284** mentally ill persons, the Court held that "due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence[,]" (*id.* at p. 427, 99 S.Ct. 1804), but does not "require states to apply the strict, criminal standard[ ]" of proof beyond a reasonable doubt. (*Id.* at p. 431, 99 S.Ct. 1804.) Accordingly, the Court settled on the "clear and convincing evidence" standard of proof, which it described as "a middle level of burden of proof that strikes a fair balance between the rights of the ***300** individual and the legitimate concerns of the state." (*Id.* at p. 431, 99 S.Ct. 1804; see also *Jones v. United States* (1983) 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 [due process satisfied by use of preponderance of the evidence standard in federal commitment proceeding against insanity acquittee].)

As the Supreme Court noted in *Vitek v. Jones* (1980) 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552, the fact that a person is involuntarily detained for medical treatment "does not justify dispensing with due process requirements." (*Id.* at p. 496, 100 S.Ct. 1254.) *Vitek* held that, when a prisoner is being transferred to a state mental hospital for treatment, due process requires that the prisoner be given written notice, an opportunity to be heard before a neutral decision maker, the ability to review and challenge the evidence supporting the transfer, a written statement of reasons for the decision, legal counsel and timely notice of these rights. (*Id.* at pp. 494–495, 100 S.Ct. 1254.) The Supreme Court reasoned these procedures

were required because "The question whether an individual is mentally ill and cannot be treated in prison 'turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists.' *Addington v. Texas*, 441 U.S. at 429, 99 S.Ct. at 1811.... It is precisely '[t]he subtleties and nuances of psychiatric diagnoses' that justify the requirement of adversary hearings. *Id.* at 430, 99 S.Ct. at 1811." (*Id.*, at p. 495, 100 S.Ct. 1254.)

The California Supreme Court reached a similar conclusion in *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 152 Cal.Rptr. 425, 590 P.2d 1, a case arising under the Lanterman–Petris–Short Act (LPS Act), Welf. & Inst.Code, § 5350, et seq. The LPS Act provides that a gravely disabled person is entitled to a jury trial before a conservator is appointed or reappointed to care for the person. (§ 5350, subd. (d).) In *Roulet*, our Supreme Court considered whether the jury's verdict had to be unanimous and whether the reasonable doubt standard applied. It held that the "due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet, supra*, 23 Cal.3d at p. 235, 152 Cal.Rptr. 425, 590 P.2d 1.) The court reasoned these protections were required because a conservatorship involved deprivations of liberty, including involuntary confinement in a mental hospital, that closely resembled imprisonment and "placed a lasting stigma on [the conservatee's] reputation." (*Id.* at 223, 152 Cal.Rptr. 425, 590 P.2d 1.)

More recently, our Supreme Court "has recognized, however, that the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and that not all of the safeguards required in the former are ***301** appropriate to the latter." (*Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538, 53 Cal.Rptr.3d 856, 150 P.3d 738.) Indeed, the LPS Act itself permits a mentally ill and imminently dangerous person to be involuntarily committed for "successive periods of increasingly longer duration ...," before the right to a jury trial attaches. An initial detention****285** of 72 hours may be obtained without judicial review of any sort. (Welf. & Inst.Code, § 5150.) After that, commitments of 14 days and 30 days are available, each requiring "a certification hearing before an appointed hearing officer.... ([Welf. & Inst.Code,] §§ 5256, 5256.1, 5262, 5270.15, 5275, 5276.) A 180–day commitment requires a superior court order. ([Welf. & Inst.Code,] § 5301.)" (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1009, 36 Cal.Rptr.2d 40, 884 P.2d 988.) After these temporary commitments have lapsed, the LPS Act "authorizes the appointment of a conservator for up to one year for a person determined to be gravely disabled as a result of a mental disorder and unable or unwilling to accept voluntary treatment. ([Welf. & Inst.Code,] § 5350.) The proposed conservatee is entitled to demand a jury trial on the issue of his or her grave disability, and has a right to counsel at trial, appointed if necessary." (*Id.*, fn. omitted.) All of these statutory provisions, including those which permit involuntary commitment for up to 180 days without a jury trial, pass state constitutional muster. (*Conservatorship of Ben C., supra*, 40 Cal.4th at pp. 542–543, 53 Cal.Rptr.3d 856, 150 P.3d 738.)

Tuberculosis differs from mental illness in ways that justify fewer procedural safeguards, not more. Unlike tuberculosis, mental illness is not contagious. Tuberculosis can be definitively and objectively diagnosed, treated and pronounced cured. The disease is diagnosed by studying sputum cultures for the presence of tuberculosis organisms. It is treated with a six- or nine-month course of powerful antibiotics. Treatment may occur in a hospital or in a non-institutional setting, such as a motel room or the patient's own home. The disease is considered cured when the course of antibiotics has been completed and the sputum cultures show no tuberculosis organisms for eight weeks. No such certainty is available in the diagnosis or treatment of mental illness and some involuntarily committed people are subjected to indefinite hospitalization in environments that may resemble prisons more closely than hospitals. (*Vitek v. Jones, supra*, 445 U.S. at pp. 494–495, 100 S.Ct. 1254; *Addington v. Texas, supra*, 441 U.S. at p. 429, 99 S.Ct. 1804.)

Nevertheless, the tuberculosis control statutes at issue here provide all of the process due under *Vitek, supra* and *Conservatorship of Ben C., supra*. Patients are entitled to written notice of the basis for their detention and their right to counsel, their right to request release, and the availability of judicial review of the detention order. (§ 121367.) The trial court must review an order for the detention of a tuberculosis patient at least every 90 days and the patient must be released as soon as the conditions necessitating de-

tention have been ***302** addressed. (§ 121366; 121368, subd. (b).) Proof by clear and convincing evidence is required before a patient can be detained for treatment. (§ 121366.)

If due process does not require a jury trial or proof beyond a reasonable doubt for the temporary, 180–day civil commitment of a mentally ill person, it cannot require those procedures before a contagious and recalcitrant tuberculosis patient is detained for treatment of a similar duration. The procedures mandated by sections 121365 through 121369 satisfy federal and state due process requirements. *(Vitek v. Jones, supra,* 445 U.S. at pp. 494–495, 100 S.Ct. 1254; *Addington v. Texas, supra,* 441 U.S. at p. 431, 99 S.Ct. 1804; *Carty v. Nelson, supra,* 426 F.3d at pp. 1073–1075; *Conservatorship of Ben C., supra,* 40 Cal.4th at pp. 552–553, 53 Cal.Rptr.3d 856, 150 P.3d 738.) The trial court did not err in denying appellant's requests for a jury trial and proof beyond a reasonable doubt.

****286** *Conclusion*

There is an irony in this case which cries out for comment. Appellant contests his confinement for treatment that not only improved his health, but saved his life. His recalcitrance was both foolish and selfish. By leaving isolation, appellant put the entire community at risk. Except for a delay in the appointment of counsel, which could have been remedied by a motion for reconsideration, appellant was treated with fairness, care and compassion at every stage of his encounters with public health authorities, the police, and the courts. He was provided with medical care, room and board, an attorney and a meaningful opportunity to be heard in court, all at public expense. The public health officer "bent over backwards" to help him and safeguard the community. It was an uncontroverted medical fact that appellant had tuberculosis and, in the expert opinion of his doctor, posed a medical threat to the community if not confined. No rational judge or jury, in good conscience, under any standard of proof, could release appellant into the community until he was no longer a danger. We can find no fault on the part of those people who were trying to help appellant and simultaneously protect the other citizens of Ventura County from the spread of tuberculosis.

We do not intend to chill the right to appeal. But abstract notions of the process due to an individual, such as a jury trial, unanimous verdict, or proof beyond a reasonable doubt, must be considered in light of the factual circumstances under which these rights are claimed. The factual scenario presented here makes a poor foundation to support an expansion of the process due to a tuberculosis patient. It must be emphasized that the rights appellant seeks to engraft on the extant statutory scheme have not previously been recognized by judicial precedent.

***303** The judgment (order to continue civil detention pursuant to Health & Safety Code section 121365, subdivision (e)) is affirmed.

We concur: COFFEE and PERREN, JJ.

Cal.App. 2 Dist.,2007.
Robert Levin, as Public Health Offier v. Adalberto M.
156 Cal.App.4th 288, 67 Cal.Rptr.3d 277, 07 Cal. Daily Op. Serv. 12,431, 2007 Daily Journal D.A.R. 16,011

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199 Cal.App.3d 774, 245 Cal.Rptr. 166
(Cite as: 199 Cal.App.3d 774)

MENEFEE & SON et al., Plaintiffs and Appellants,
v.
DEPARTMENT OF FOOD AND AGRICULTURE et al., Defendants and Respondents

No. C000765.

Court of Appeal, Third District, California.
Mar 18, 1988.

SUMMARY

Plaintiffs sought judicial relief through injunction and/or writ of mandate from the seizure of their crops pursuant to Food & Agr. Code, § 12648, which permits the director of the Department of Food and Agriculture to seize and destroy crops that have been treated with an unauthorized economic poison. The trial court denied relief. (Superior Court of Sacramento County, No. 341855, James Timothy Ford, Judge.)

The Court of Appeal reversed and remanded with directions to enter judgment for plaintiffs, holding that Food & Agr. Code, § 12648, is unconstitutional, both on its face and as applied to plaintiffs, for failing to provide the minimum procedural due process guarantees of notice and an opportunity to be heard. Although some emergencies may justify a summary seizure of property, and contaminated food is a matter frequently requiring emergency seizure, in such circumstances the opportunity for a hearing may be postponed but not eliminated, the court held, and not only does § 12648 fail to limit its application to emergencies, it also fails to provide for any hearing whatsoever. The fact that a crop owner may institute a judicial proceeding for the return of the crop is no substitute for the requirement that an owner be accorded a fair hearing on the merits of the seizure. The court held that despite the egregiousness of the alleged misconduct and the apparent lack of a meritorious defense, the department's decision to seize the crops pursuant to § 12648 was void, and plaintiffs were entitled to a judgment in their favor. (Opinion by Sparks, J., with Puglia, P. J., and Marler, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Agriculture § 9--Seizure of Contaminated Crops--Owner's Constitutional Rights.

A crop owner's interest in growing crops is a significant property interest that is protected by the procedural due process aspects of the state Constitution (Cal. Const., art. I, § 7), and neither the egregiousness of the owner's alleged misconduct nor the apparent lack of a meritorious defense can obviate the requirement that the owner be accorded the minimum due process protections with respect to seizure of crops for alleged violation of administrative regulations.

(2) Constitutional Law § 107--Procedural Due Process--Deprivation of Property Interests.

The procedural requirements necessary to satisfy due process necessarily vary according to the competing interests of the government and the citizen. Due process essentially guarantees a fundamentally fair decisionmaking process, and thus, at a minimum, requires notice and an opportunity for a hearing, which normally must precede even a temporary deprivation of a property interest. In some emergency situations the legitimate and overriding interests of the government may permit summary action; however, even then the opportunity for a hearing may be postponed but not eliminated. The fact that the affected party may institute a judicial action is not a sufficient opportunity for a hearing under procedural due process doctrine; otherwise, a party whose property has been taken would have the additional financial burden of instituting an action for the property's return.

[See **Am.Jur.2d,** Constitutional Law, § 813.]

(3) Agriculture § 9--Seizure of Contaminated Crops--Procedural Due Process--Failure to Provide for Preseizure Notice and Hearing.

Food & Agr. Code, § 12648, which permits the director of the Department of Food and Agriculture to seize crops treated with an unregistered economic poison without affording the grower prior notice or opportunity to be heard and without any requirement that authorization be obtained from a neutral judicial officer, does not meet the minimum constitutional requirements of procedural due process. Contaminated food is a matter that may frequently require

emergency seizure, but § 12648 is not limited in its application to emergency situations and instead broadly applies to any misuse of chemicals. The fact that summary seizure may be necessary in some instances does not validate a statute that permits ex parte seizure without any attempt to focus on the extraordinary circumstances justifying summary seizure.

(4) Agriculture § 9--Seizure of Contaminated Crops--Procedural Due Process--Failure to Provide for a Hearing.

Food & Agr. Code, § 12648, which permits the director of the Department of Food and Agriculture to seize crops treated with an unregistered economic poison, does not meet the minimum constitutional requirements of procedural due process, since it does not provide the crop owner with any hearing, either before or after the seizure. The owner is entitled to an opportunity to be heard on the merits of the taking, and the fact that the owner may institute a judicial proceeding for the return of the crop is no substitute for the requirement of a fair hearing on the merits of a seizure of property.

(5) Agriculture § 9--Seizure of Contaminated Crops--Procedural Due Process--Requirement That Owner File Suit to Contest Seizure.

Food & Agr. Code, § 12648, which permits the director of the Department of Food and Agriculture to seize crops treated with an unregistered economic poison, unconstitutionally compels the crop owner rather than the department to institute an action to review the seizure, giving the owner only 30 days to do so and providing no form of compensation in the event the deprivation proves to have been wrongful. The statute does not require notice of the type of proceeding that may be instituted, or provide for the type of judicial proceeding that would be essential to provide due process. If a judicial proceeding is the owner's first and only opportunity to have a hearing on the merits of the seizure, then the statute must require the department to bear the burden of proof on all issues.

[See **Cal.Jur.3d,** Agriculture, § 19.]

(6) Agriculture § 9--Seizure of Contaminated Crops--Procedural Due Process--Requirement That Owner File Suit to Contest Seizure--Sufficiency of Judicial Proceedings.

Food & Agr. Code, § 12648, which permits the director of the Department of Food and Agriculture to seize crops treated with an unregistered economic poison, was unconstitutional as applied to plaintiffs, who, in the absence of any notice and hearing provisions in the statute were compelled to bring an action for injunctive relief and/or writ of mandate to contest the seizure of their crops. Although these appeared to be logical remedies in the absence of any guidance from the statute, the trial court applied the abuse of discretion standard, which is inappropriate when the owner's appearance before the court is the first and only opportunity to contest the merits of the department's decision to seize a crop. As a result, the department was never required to appear before an impartial hearing officer and carry the burden of proving the facts on which it relied in seizing plaintiffs' crop, and, therefore, plaintiffs were denied the minimum due process to which they were entitled before the government could interfere with their property interests.

COUNSEL

Turner & Sullivan, Robert J. Sullivan, Mary A. O'Gara, Elizabeth Ufkes Olivera and Marily Peatman Lerner for Plaintiffs and Appellants.

John K. Van de Kamp, Attorney General, R. H. Connett, Assistant Attorney General, and William D. Cunningham, Deputy Attorney General, for Defendants and Respondents.

SPARKS, J.

In this appeal we are called upon to determine the constitutionality of Food and Agriculture Code section 12648. This section purports to empower the Director of the Department of Food and Agriculture, without a hearing and under nonemergency circumstances, to seize and destroy a crop or commodity which has been treated with an unauthorized economic poison and thereafter shifts the burden to the grower to bring a lawsuit within 30 days to contest the seizure. We hold that the challenged statute deprives the grower of procedural due process and consequently is unconstitutional.

This case arose when the director issued an order of seizure pursuant to the challenged section against plaintiffs' lettuce and endive crops. The order declared that plaintiffs' field containing the crops was a public nuisance and that it was seized and any harvest prohibited. Plaintiffs timely filed a lawsuit in which they sought judicial relief through injunction and/or writ of

mandate. They raised a number of challenges to Food and Agriculture Code section 12648 (all further statutory references are to this code unless otherwise stated) and the specific order in their case. Plaintiffs reiterate these challenges on appeal and contend that section 12648 is unconstitutional on ***778** its face and as applied in this case, and that the order of the director was the result of an unconstitutional search and seizure. [FN1]

> FN1 In a peripheral contention, plaintiffs also argue that the order constituted an abuse of discretion. In part, this contention rests on their constitutional claims. Aside from those concerns, plaintiffs contend that the finding of economic advantage was arbitrary and capricious because the order was tardy, failed to consider the public interest, and was unnecessary in light of other available civil and criminal penalties. To the extent that this contention does not rest on their constitutional claims, we find it to be without merit.

We find it unnecessary to resolve the constitutional validity of the search and seizure because we find the due process challenge to the statute to be dispositive. Section 12648 fails to provide the minimal due process protections required by the state Constitution and the order issued pursuant to it is void. We therefore reverse the judgment and direct that a new and different judgment be entered in favor of plaintiffs.

Factual and Procedural Background

The essential facts are not in dispute. The plaintiffs, Menefee & Son, Jerry Menefee and Menefee Hill Ranch Company, are the owners and operators of a field in Madera County consisting of approximately 76 acres. In January 1986 plaintiffs planted this field, called number 6, with lettuce and endive for the purpose of producing seed. [FN2] After the field was planted horned-lark birds began to attack the buds of the young seedlings. Jerry Menefee met with representatives of the Madera County Agricultural Commissioner and was advised he should use strychnine treated grain to control the birds. The treatment requires the fields to be prebaited with cracked corn and when the birds are accustomed to eating the corn to substitute strychnine treated corn. In early February 1986, the Menefee field was treated with strychnine laced corn with the assistance of the county commissioner's office. Good results were obtained, and Menefee was advised to contact the commissioner's office for further treatment if it became necessary.

> FN2 When a field is planted for seed the crop itself is not sold for consumption. Rather. the seed is harvested and sold to a dealer, who in turn sells the seed to farmers who produce crops which are sold for consumption. Plaintiffs submitted declarations from various experts which tended to show that any danger from the use of unauthorized chemicals on the crops would be dissipated since the crops were grown for seed rather than for consumption. We have no occasion to resolve that controversy.

On February 19, 1986, a biologist employed by Merced County advised Madera County officials that he overheard Jerry Menefee in a two-way radio conversation with someone named Jack. Menefee stated he had used Thimet on a lettuce field for bird control. Thimet is toxic to birds but is not ***779** authorized for use in bird control. It is also not authorized for application in lettuce or endive fields. On February 20, George Tipton, a deputy agricultural commissioner, went to the Menefee field to investigate. Thimet has a strong skunk-like odor, and as Tipton walked into the field he detected such a distinctive odor. He also observed granular material on the ground which resembled Thimet. When Menefee and his foreman came to the field Tipton spoke with them about the bird problem, but did not mention anything about the suspected use of Thimet. The following day Tipton returned to the field and took a soil sample. The sample proved positive for the presence of Thimet. On February 28, Tipton returned to the field for another soil sample. This sample proved positive for the presence of Furadan. Furadan, like Thimet, is a poison which is toxic to birds but which is not authorized for bird control or for use in lettuce and endive fields.

On June 12, 1986, the director issued an order pursuant to section 12648. The order states that the director found evidence plaintiffs had used Thimet and Furadan on field number 6 in violation of the permitted uses of those economic poisons. The order states the use of those poisons resulted in or could result in the creation of an unfair business advantage to plaintiffs in that (1) plaintiffs did not have to spend the time and effort to obtain a permit for the use of

strychnine for bird control, (2) they remained outside the permit system which places restrictions of the use of restricted materials, and (3) they had Thimet and Furadan on hand and saved the expense of purchasing an approved material. The director declared field number 6 a public nuisance, seized it and prohibited harvest, and specified that if no action was filed within 30 days the crop could be ordered destroyed. [FN3]

> FN3 The order, like section 12648 itself, did not give plaintiffs any right to contest its issuance administratively. However, it did advise plaintiffs that they could petition the director for a reduction of the total acreage and the director could, at his discretion, grant a reduction upon a clear showing that the application of chemicals was limited to an identifiable portion of the field.

On July 8, 1986, the director agreed to extend the time for plaintiffs to file an action to September 1, 1986. Plaintiffs' complaint for an injunction and/or writ of mandate was filed on July 25, 1986. The trial court issued a temporary restraining order which permitted plaintiffs to harvest the seed crop but which restrained them from selling, transferring, encumbering, or removing any part of the crop from the confines of field 6 pending a hearing for an injunction.

On August 8, 1986, the director adopted an amended order in the matter. The amended order adds a finding that the use of Thimet and Furadan resulted or reasonably could have resulted in the creation of a hazard to ***780** human health. The basis for this finding was, essentially, that since those chemicals are not registered for use with lettuce and endive they must be presumed unsafe. The order also states that exposure to Furadan can create a health hazard to field workers.

Following a hearing the trial court dissolved the temporary restraining order and denied injunctive relief and the petition for a writ of mandate. Pursuant to stipulation of the parties the court entered an order which allowed plaintiffs to harvest and store the lettuce and endive seed with appropriate restrictions pending the result of this appeal. This appeal then followed.

Discussion

At the time this dispute arose section 12648 provided: "Notwithstanding any other provision of this code, if the director finds evidence that a crop, commodity, or site has been treated with an economic poison not registered pursuant to Chapter 2 (commencing with Section 12751) for use on the crop, commodity, or site and the treatment has resulted in, or could reasonably result in, the creation of a hazard to human health or an unfair business advantage, the crop or commodity may be declared by the director to be a public nuisance and may be seized and held to prevent harvest and sale. The director shall hold the crop or commodity for 30 days, and if no action has been filed to contest the seizure, the director may order that the crop or commodity be destroyed." [FN4]

> FN4 Section 12648 was amended effective January 1, 1987. (Stats. 1986, ch. 697, § 1.) The amended version provides that the director may take action "upon making a finding" of the improper use of an economic poison and "upon making a further finding" that the use could result in a hazard to human health or an unfair business advantage.
>
> An "economic poison" is defined as including any of the following: "(a) Any spray adjuvant. [¶] (b) Any substance, or mixture of substances which is intended to be used for defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating any and all insects, fungi, bacteria, weeds, rodents, or predatory animals or any other form of plant or animal life which is, or which the director may declare to be, a pest, which may infest or be detrimental to vegetation, man, animals or households, or be present in any environment whatsoever." (§ 12753.)

In making his order in this case the director expressly disclaimed an intent to rely upon other provisions of law which empower him to prevent the harvesting and use of crops after an improper chemical application and limited his order to the provisions of section 12648.

(1) Although due process of law is guaranteed by both the the federal and state Constitutions, we have no occasion to reach the federal question. ***781** By its terms, article I, section 7 of the California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law." There

can be no dispute that plaintiffs' interest in their growing crops is an interest that is protected by the procedural due process aspects of the state Constitution. (See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 206 [124 Cal.Rptr. 14, 539 P.2d 774].) Since a significant property interest is at stake, neither the egregiousness of the alleged misconduct nor the apparent lack of a meritorious defense can obviate the requirement that the plaintiffs be accorded minimal due process protections. (*Carrera* v. *Bertaini* (1976) 63 Cal.App.3d 721, 727 [134 Cal.Rptr. 14].)

(2) The procedural requirements that are necessary to satisfy due process necessarily vary according to the competing interests of the government and the citizen. (*Ibid*.) "Although 'due process' encompasses a broad range of safeguards, in essence the concept guarantees a fundamentally fair decision-making process." (*People* v. *Ramos* (1984) 37 Cal.3d 136, 153 [207 Cal.Rptr. 800, 689 P.2d 430].) Thus, at a minimum, due process requires notice and an opportunity for a hearing. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 307 [138 Cal.Rptr. 53, 562 P.2d 1302].) Normally notice and an opportunity for a hearing must precede even a temporary deprivation of a property interest. (*Skelly* v. *State Personnel Bd., supra*, 15 Cal.3d at pp. 215-216.) However, in some emergency situations the legitimate and overriding interests of the government may permit summary action. (*Ibid*.; *Carrera v. Bertaini, supra*, 63 Cal.App.3d at p. 728.) In such circumstances the opportunity for a hearing may be postponed but not eliminated. (*Kash Enterprises, Inc. v. City of Los Angeles, supra*, 19 Cal.3d at p. 308.) And the fact that the affected party may institute a judicial action is not a sufficient opportunity for a hearing. As the high court emphasized in *Kash Enterprises*, "[n]ot one of the scores of recent procedural due process decisions, however, suggests that the availability of a collateral judicial remedy can sustain a seizure procedure which provides absolutely no hearing whatsoever, either before or after the taking. Acceptance of [that argument] would in effect read out almost all of the protections afforded by a contemporary procedural due process doctrine, and would place on the party whose property has been taken the additional financial burden of instituting an action for the property's return." (*Id*., at p. 309; citations omitted.)

(3) When section 12648 is measured against these minimum constitutional requirements it suffers from glaring deficiencies. It permits the director to seize the property of a person without any notice or opportunity to be heard and without any requirement that authorization be obtained from a ***782** neutral judicial officer. (See *Sokol v. Public Utilities Commission* (1966) 65 Cal.2d 247, 255-256 [53 Cal.Rptr. 673, 418 P.2d 265].) To be sure, contaminated food is a matter which frequently requires emergency seizure. (*Carrera* v. *Bertaini, supra*, 63 Cal.App.3d at p. 728.) But the challenged statute makes no effort to limit its application to emergency situations and instead broadly applies to any misuse of chemicals without regard to whether an emergency appears. The mere fact that summary seizure may be necessary in some instances does not validate a statute that permits ex parte seizure without any attempt to narrowly draw into focus the extraordinary circumstances in which summary seizure may be required. (*Skelly v. State Personnel Bd., supra*, 15 Cal.3d at p. 216; *Randone v. Appellate Department* (1971) 5 Cal.3d 536, 541 [96 Cal.Rptr. 709, 488 P.2d 13].) The facts of this case amply demonstrate this deficiency. Although the department had notice of the use of Thimet and Furadan by plaintiffs in February 1986 and had scientific confirmation of the presence of Thimet and Furadan in the field 6 soil by early March, no action was taken by the department until June 12, 1986. [FN5] Any claim that this case presents extraordinary circumstances justifying summary seizure would be specious.

> FN5 In fact the delay of the department is one of plaintiffs' primary complaints in this matter. Plaintiffs were under contract to provide 76 acres of lettuce and endive seed to Ferry-Morse Seed Company. They assert that if they had been promptly notified of the problem when the department first discovered it they could have had the option of simply discing the field and planting an alternative crop, and could have used another field to fulfill the contract to grow lettuce and endive seed. The department's delay not only meant that plaintiffs spent time and money caring for the crop which the department now seeks to destroy, it also placed them too far into the growing season to select any other alternatives.

(4) Bad as the failure to provide preseizure notice and a hearing may be, an even greater deficiency arises from the failure to provide any hearing what-

soever. Although the statute authorizes the seizure of a grower's property, "it does not accord the owner the most basic safeguard demanded by due process - an opportunity to be heard on the merits of the taking, either before or after the taking." (*Kash Enterprises, Inc.* v. *City of Los Angeles*, *supra*, 19 Cal.3d at p. 309.) The fact that an owner may institute a judicial proceeding for the return of the property is simply no substitute for the requirement that an owner be accorded a fair hearing on the merits of the seizure. (*Ibid*.; see *In re Harris* (1968) 69 Cal.2d 486, 490 [72 Cal.Rptr. 340, 446 P.2d 148].)

(5) In any event, even if we concluded that the availability of a judicial action could serve as a substitute for an administrative hearing, we would still find section 12648 deficient. It compels the owner to institute the action ***783** rather than the department. (*Ibid*.; see *Carrera v. Bertaini*, *supra*, 63 Cal.App.3d at p. 729.) It gives the owner just 30 days to institute an action or his crop will be destroyed and provides no form of compensation in the event the deprivation of property proves to have been wrongful. (*Skelly* v. *State Personnel Bd.*, *supra*, 15 Cal.3d at p. 209.) The statute does not require notice of the type of proceeding which may be instituted. (*In re Harris*, *supra*, 69 Cal.2d at p. 490.) And, even more critically, it does not provide for the type of judicial hearing which would be essential to provide due process. In short, if a judicial proceeding is the owner's first and only opportunity to have a hearing on the merits of the seizure, then it is essential that the department be required to bear the burden of proof on all issues and the statute must so provide.

(6) In this case plaintiffs instituted an action for injunctive relief and/or writ of mandate, which appear to be logical remedies in the absence of statutory guidance. The trial court, doubtless accustomed to reviewing administrative decisions, applied the usual test for review of such decisions, the abuse of discretion standard. As the trial court recognized, this is a stringent standard which makes it very difficult for the applicant to obtain relief. However, such a standard of "review" is wholly inappropriate when the owner's appearance before the court is his first and only opportunity to contest the merits of the department's decision to seize his property. The result of the proceedings in this case is that to the date of this decision the department has not yet been required to appear before an impartial hearing officer and carry the burden of proving any of the facts upon which it relies in seizing the Menefee crop. It follows that the plaintiffs have not yet been accorded the minimal due process to which they are entitled before the government may interfere with their property interests.

For these reasons we conclude that section 12648 is unconstitutional both on its face and as applied in this case. [FN6] The director's decision to seize the Menefee crops pursuant to section 12648 is void. The plaintiffs are entitled to a judgment in their favor requiring the director to vacate his decision to seize the crops, and to take no further action against the plaintiffs pursuant to section 12648. ***784**

> FN6 Our decision does not deprive the department or the director of the power to protect the public from contaminated food or to enforce economic poison regulations. Other provisions of law enable the director to seize any lot of produce which contains spray residue or other deleterious ingredients. (§ 12601 et seq.) And the violation of pesticide regulations can subject the violator to substantial criminal or civil penalties. (§§ 12996, 12998.)

The judgment is reversed and the cause is remanded to the trial court with directions to enter judgment in favor of plaintiffs in accordance with the views expressed in this opinion.

Puglia, P. J., and Marler, J., concurred.

Cal.App.3.Dist.
Menefee & Son v. Department of Food & Agriculture
199 Cal.App.3d 774, 245 Cal.Rptr. 166

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C

Superior Court of New Jersey, Law Division,
Essex County.
The CITY OF NEWARK, A Municipal Corporation of the State of New Jersey and Bobi Ruffin, Director, Newark Department of Health & Human Services,
Plaintiff,
v.
J.S., Defendant.

Decided Nov. 8, 1993.

City sought involuntary commitment of homeless person suffering from tuberculosis (TB). The Superior Court, Law Division, Essex County, Goldman, J.S.C., held that: (1) tuberculosis civil commitment statute would not be declared invalid, but, rather, would be construed to include rights required by contemporary standards of due process and by the Americans with Disabilities Act (ADA); (2) city established that patient presented significant risk to others unless isolated and that hospital confinement was least restrictive mode of isolation; but (3) patient would not be ordered to provide sputum samples or to take his medication as directed.

So ordered.

West Headnotes

[1] Constitutional Law 92 3902

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3902 k. Police power, relationship to due process. Most Cited Cases
(Formerly 92k253.1)

Parameters of due process require analysis of both individual and governmental interests involved and consequences and avoidability of risks of error and abuse, in determining validity of exercise of police power. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 3902

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3902 k. Police power, relationship to due process. Most Cited Cases
(Formerly 92k253.1)

In examining validity of exercise of police power under due process clause, hardly any individual interest is higher than liberty interest of being free from confinement; consequences of error and abuse are great for both state and individual. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 **Mental** Health
92k4337 k. **Commitment** and proceedings therefor. Most Cited Cases
(Formerly 92k255(5))

Person subject to **civil commitment** has due process **right** to notice, **counsel**, to be afforded opportunity to present opposing evidence and argument, and to cross-examine witnesses. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 **Mental** Health
92k4337 k. **Commitment** and proceedings therefor. Most Cited Cases
(Formerly 92k255(5))

Illness alone cannot be basis for confinement, under due process clause; rather, to justify confinement, it must be shown that person is likely to pose danger to self or to others. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 4337

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4337 k. Commitment and proceedings therefor. Most Cited Cases
(Formerly 92k255(5))

Proofs required for civil commitment to be valid under due process must show that there is substantial risk of dangerous conduct within foreseeable future, and proofs must be shown by clear and convincing evidence. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 4338

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)15 Mental Health
92k4338 k. Confinement and conditions thereof. Most Cited Cases
(Formerly 92k255(5))

To satisfy due process clause, terms of confinement as result of illness must minimize infringements on liberty and enhance autonomy; periodic reviews are required, and lesser forms of restraint must be used when they would suffice to fulfill government interests. U.S.C.A. Const.Amend. 14.

[7] Civil Rights 78 1023

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. Communicable diseases. Most Cited Cases
(Formerly 78k107(4))

Person who has no clinical symptoms but who is discriminated against because of latent tuberculosis is protected by ADA, as being "disabled." Americans with Disabilities Act of 1990, §§ 3(2)(B, C), 101(3), 103(b), 42 U.S.C.A. §§ 12102(2)(B, C), 12111(3), 12113(b).

[8] Civil Rights 78 1023

78 **Civil Rights**
78I **Rights** Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. **Communicable** diseases. Most Cited Cases
(Formerly 78k107(4))

ADA and underlying regulations required that health officer seeking to infringe upon diseased person's liberty by imposing **detention**, confinement, isolation, or quarantine must first establish, by clear and convincing evidence, that person poses significant risk of transmitting disease to others, with serious consequences. Americans with Disabilities Act of 1990, §§ 3(2)(B, C), 101(3), 103(b), 42 U.S.C.A. §§ 12102(2)(B, C), 12111(3), 12113(b).

[9] Civil Rights 78 1023

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. Communicable diseases. Most Cited Cases
(Formerly 78k107(4))

While opinions by public health authorities must be respected in determining whether commitment violates ADA, their decision must be based upon latest knowledge of the epidemiology, virology, bacteriology and public health; no court can substitute its judgment for those authorities brought to its attention or for evidence before it, and public health decisions must be accorded due deference, but such deference is not appropriate if those powers are exercised in arbitrary, unreasonable manner, and courts must guard against risk that governmental action may be grounded in popular myths, irrational fears, or noxious fallacies rather than well-founded science. Americans

with Disabilities Act of 1990, §§ 3(2)(B, C), 101(3), 103(b), 42 U.S.C.A. §§ 12102(2)(B, C), 12111(3), 12113(b).

[10] Civil Rights 78 1023

78 **Civil Rights**
78I **Rights** Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. **Communicable** diseases. Most Cited Cases
(Formerly 78k107(4))

Best way to guard against risk that **civil commitment** may be grounded in popular myths, irrational fears, or noxious fallacies, rather than well-founded science, is to demand individualized, fact-specific determination as to person under consideration, which is key to decision making under ADA. Americans with Disabilities Act of 1990, §§ 3(2)(B, C), 101(3), 103(b), 42 U.S.C.A. §§ 12102(2)(B, C), 12111(3), 12113(b).

[11] Civil Rights 78 1023

78 **Civil Rights**
78I **Rights** Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1023 k. **Communicable** diseases. Most Cited Cases
(Formerly 78k107(4))

"Reasonable accommodation" requirement under ADA requires that least restrictive means be used to achieve clearly defined public health goal, in determining whether **commitment** is proper for person with infectious disease. Americans with Disabilities Act of 1990, § 101(3), 42 U.S.C.A. § 12111(3).

[12] Mental Health 257A 36

257A **Mental** Health
257AII Care and Support of **Mentally** Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons subject to control or treatment. Most Cited Cases

Illness alone cannot be basis for involuntary **commitment**, and persons may not be confined merely because they present risk of future conduct that is socially undesirable; rather, court must find that risk of infliction of serious bodily injury upon another is probable in reasonably foreseeable future. N.J.S.A. 30:4-27.2, subd. i.

[13] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons subject to control or treatment. Most Cited Cases

History, actual conduct, and recent behaviors must be considered in determining whether involuntary commitment is justified based on illness. N.J.S.A. 30:4-27.2, subd. i.

[14] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons subject to control or treatment. Most Cited Cases

"Dangerous conduct" required for involuntary commitment based upon illness is not the same as criminal conduct, and involves not merely violation of social norms, but significant injury to persons or substantial destruction of property. N.J.S.A. 30:4-27.2, subd. i.

[15] Mental Health 257A 36

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak36 k. Persons subject to control or treatment. Most Cited Cases

Evaluation of risk of infliction of serious bodily injury, as required for involuntary commitment based upon illness, involves considering likelihood of dan-

gerous conduct, seriousness of harm that would ensue if such conduct took place, and its probability within reasonably foreseeable future; past conduct is important evidence of future conduct, and if person is only dangerous with regard to certain individuals, likelihood of contact with such individuals must be taken into account. N.J.S.A. 30:4-27.2, subd. i.

[16] Constitutional Law 92 3900

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3897 Discrimination and Classification
92k3900 k. Reasonableness, rationality, and relationship to object. Most Cited Cases
(Formerly 92k251.3)

Constitutional concept of due process is designed to prevent irrational discrimination by ensuring a forum that can hear opposing perspectives and by insisting that distinctions are rationally based. U.S.C.A. Const.Amends. 5, 14.

[17] Civil Rights 78 1017

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1017 k. In general. Most Cited Cases
(Formerly 78k107(1))

ADA is designed to avoid risk of stereotyping, bigotry, and prejudice by demanding individualized determination before any adverse action is taken against any person with disability. Americans with Disabilities Act of 1990, §§ 2-514, 42 U.S.C.A. §§ 12101-12213.

[18] Mental Health 257A 32

257A Mental Health
257AII Care and Support of Mentally Disordered Persons
257AII(A) Custody and Cure
257Ak32 k. Constitutional and statutory provisions. Most Cited Cases

New Jersey laws regarding civil commitments are designed to meet due process demands, and yet provide mechanism for those unusual cases where public safety demands commitment.

[19] Health 198H 358

198H Health
198HII Public Health
198Hk355 Constitutional, Statutory, and Regulatory Provisions
198Hk358 k. Validity. Most Cited Cases
(Formerly 199k24 Health and Environment)

New Jersey statute regarding commitment of those with tuberculosis, which was enacted in 1912, would be construed so as to include those rights necessitated by contemporary standards of due process and by ADA, and thus, statute would not be declared unconstitutional; statute, which was first enacted in 1912, had provisions requiring notice and judicial hearing, and required proof that person be actual menace to community or to members of household. U.S.C.A. Const.Amends. 5, 14; N.J.S.A. 30:9-57; Americans with Disabilities Act of 1990, §§ 2-514, 42 U.S.C.A. §§ 12101-12213.

[20] Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases
(Formerly 199k24 Health and Environment)

City established that homeless person with tuberculosis presented significant risk to others unless isolated and that hospital confinement was least restrictive mode of isolation, and thus, temporary confinement would be permitted, at least until person had shown three negative sputum tests demonstrating that TB was no longer active. U.S.C.A. Const.Amends. 5, 14; N.J.S.A. 30:9-57; Americans with Disabilities Act of 1990, §§ 2-514, 42 U.S.C.A. §§ 12101-12213.

[21] Health 198H 358

198H Health
198HII Public Health
198Hk355 Constitutional, Statutory, and

Regulatory Provisions
198Hk358 k. Validity. Most Cited Cases
(Formerly 199k24 Health and Environment)

Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases
(Formerly 199k24 Health and Environment)

In absence of specific procedures for **civil commitments** of patients suffering from tuberculosis, Superior Court would utilize well established procedures for **civil commitments** of **mentally** ill, to prevent having to declare tuberculosis statute unconstitutional under due process clause; although some of **mentally** ill **civil commitment** procedures might not apply to **commitment** of those with contagious diseases, such rules were only available mechanism to use. U.S.C.A. Const.Amends. 5, 14; N.J.S.A. 30:4-27.1 to 30:4-27.23, 30:9-57; R. 4:74-7.

[22] Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases
(Formerly 199k24 Health and Environment)

Patient civilly committed based on his tuberculosis had right to refuse treatment even if unwise, including giving of sputum and taking of medication, but refusal to provide samples could result in inability to satisfy conditions of release, which included no longer suffering from active TB; however, if patient cooperated, provided samples, and took medication willingly, then, upon this improvement, city would have difficult time proving that he needed confinement because he was uncooperative. N.J.S.A. 30:9-57.

[23] Health 198H 386

198H Health
198HII Public Health
198Hk383 Contagious and Infectious Diseases
198Hk386 k. Quarantine. Most Cited Cases
(Formerly 199k24 Health and Environment)

In order to fulfill requirement for civil commitment of one suffering from infectious disease of using "least restrictive alternative," public health officials will usually have to show that they attempted step-by-step interventions, beginning with voluntary directly observed therapy, supplemented by incentives, such as food or money reward for taking medication, and enablers, such as travel assistance, with commitment an absolute last resort. N.J.S.A. 30:9-57.

****267 *184** Lauren McGlynn, for plaintiff (Michelle Hollar-Gregory, Corporation Counsel for the City of Newark, attorney).

Paula Levy, for defendant (Zulima Farber, Public Advocate of New Jersey, attorney).

OPINION

GOLDMAN, J.S.C.

This case presents novel issues surrounding a resurging public health catastrophe, ****268** tuberculosis (TB). It requires a review of New Jersey's TB control statute to determine if it fulfills due process requirements and if it complies with the Americans with Disabilities Act of 1990 (ADA), 42 *U.S.C.A.* §§ 12101-12213. Specifically, I must decide if there is statutory authority to involuntarily commit a person with TB to a hospital and, if so, the standards and procedures that would allow such a commitment.

I hold that there is such authority and that the standards and procedures applicable to involuntary civil commitments must be followed in applications to commit persons with TB. If those procedures are scrupulously adhered to and the least restrictive means of treatment is determined, the requirements of both due process and the ADA will be fulfilled. I further hold that the procedures employed here complied with due process and the ***185** ADA, and that the plaintiff, City of Newark (Newark), proved the need for J.S.'s commitment.

On October 22, 1993, Newark filed a verified complaint with the emergent duty judge and obtained a temporary commitment order and an order to show cause. Newark sought a final order "committing [J.S.] to [a local hospital] until the State Commissioner of Health shall be satisfied that the person has recovered to the extent that he will not be a menace to the community or to members of his household or that the

person will so conduct himself that he will not constitute such a menace." This opinion amplifies oral findings rendered at the conclusion of the commitment hearing.[FN1]

> FN1. On November 8, 1993, I heard the return of the order to show cause, which was a commitment hearing. Newark's application was then limited to seeking J.S.'s confinement while he was receiving treatment for active TB. J.S. opposed any confinement and was represented by counsel.
>
> This hearing was conducted in chambers so that a speaker telephone could enable all those present to be heard by those in the hospital. A similar device was set up in J.S.'s hospital room. A court reporter was able to listen to and record the testimony from both sites. Most witnesses, including J.S.'s admitting physician, a pulmonary disease specialist, social worker, floor nurse, infectious control nurse, and the hospital vice-president and chief of social work, all testified from J.S.'s room. One witness, Kenneth Shilkret, Chief of the Tuberculosis Control Program of the New Jersey Department of Health, testified in chambers. All witnesses were sworn and cross-examined by J.S.'s counsel. Throughout the hearing J.S. interrupted proceedings to demand an opportunity to present his "side," but his counsel properly wanted to wait until Newark finished its presentation. When it was J.S.'s turn to testify, he refused to do so and voluntarily absented himself from further proceedings, which then consisted of my decision that was then rendered in open court.

The defendant, J.S., is a 40-year-old African-American male suffering from TB and HIV disease. Hospital authorities requested that Newark intervene when J.S. sought to leave the hospital against medical advice. J.S. was found dressed in street clothes, sitting in the hospital lobby. Once he wandered to the pediatrics ward. He had a prior history of disappearances and of releases against medical advice, only to return via the emergency room when his health deteriorated. Allegedly, J.S. failed to follow ***186** proper infection control guidelines or take proper medication when in the hospital and failed to complete treatment regimens following his release. In March of 1993 J.S. had been discharged and deposited in a taxicab, which was given the address of a shelter to which he was to be driven. J.S. was given an appointment at a TB clinic a bus trip away from the shelter. J.S.'s Supplemental Security Income check was being delivered to another hospital, so he had no money. He did not keep his TB clinic appointment and was labeled as "non-compliant."

A sputum sample confirmed that J.S. had *active* TB.[FN2] TB is a communicable disease caused by a bacteria or bacilli complex, mycobacterium (M.) tuberculosis. One of the ****269** oldest diseases known to affect humans, it was once known as consumption or the great "white plague" because it killed so many people. Human infection with M. tuberculosis was a leading cause of death until antituberculous drugs were introduced in the 1940s. While it can affect other parts of the body, such as lymph nodes, bones, joints, genital organs, kidneys, and skin, it most often attacks the lungs. It is transmitted by a person with what is called *active* TB by airborne droplets projected by coughing or sneezing. When the organism is inhaled into the lungs of another, TB infection can result. Usually this happens only after close and prolonged contact with a person with *active* TB. Most of those who become infected do not manifest any symptoms because the body mounts an appropriate immune response to bring the infection under control; however, those infected display a positive ***187**tuberculin skin test. The infection (sometimes called *latent* TB) can continue for a lifetime, and infected persons remain at risk for developing *active* TB if their immune systems become impaired.

> FN2. Whether a person has *active* TB and is infectious can be determined by analyzing a smear of sputum (a substance expelled from the lungs) by staining the smear (for immediate analysis) or by culturing the bacilli (which can take longer but is more sensitive). Chest x-rays may reveal the presence of disease but not its contagiousness. Glassroth, Robins & Snider, *Tuberculosis in the 1980s*, 302 New Eng.J.Med. 1441-43 (1980). Unless set forth otherwise, the sources for the medical information in this opinion were the expert testimony before me and the contents of U.S. Congress, Office of Technology As-

sessment publication, *The Continuing Challenge of Tuberculosis*, OTA-H-574 (September, 1993).

Typical symptoms of *active* TB include fatigue, loss of weight and appetite, weakness, chest pain, night sweats, fever, and persistent cough. Sputum is often streaked with blood; sometimes massive hemorrhages occur if TB destroys enough lung tissue. Fluid may collect in the pleural cavity. Gradual deterioration occurs. If *active* TB is not treated, death is common.

Only persons with *active* TB are contagious. That active state is usually easily treated through drugs. Typically a short medication protocol will induce a remission and allow a return to daily activities with safety. A failure to continue with medication may lead to a relapse and the development of MDR-TB (multiple drug resistant TB), a condition in which the TB bacilli do not respond to at least two (isoniazid and rifampin) of the primary treatments, so that the active state is not easily cured and contagiousness continues for longer periods.

Death often results because it takes time to grow cultures and to determine the drugs to which the organism is sensitive. By the time that discovery is made, it may be too late, particularly for a person whose immune system has been compromised by a co-morbidity such as HIV disease. For that reason a wide range of drugs, currently four or five, is tried initially while the cultures are grown and sensitivities detected, particularly if MDR-TB is suspected. Once sensitivities are discovered, medication can be adjusted so that ineffective drugs are eliminated and at least two effective drugs are always used. Medical treatment protocols have been established by the United States Centers for Disease Control and Prevention (CDC) and the American Thoracic Society. These protocols are being used for J.S. as they are for all patients under the supervision of New Jersey's Tuberculosis Control Program.

Active TB of the lungs is considered contagious and requires immediate medical treatment, involving taking several drugs. ***188** Usually, after only a few days of treatment, infectiousness is reduced markedly. After two to four weeks of treatment, most people are no longer contagious and cannot transmit TB to others even if they cough or sneeze while living in close quarters. Usually exposure over a prolonged time is required, and less than thirty per cent (30%) of family members living closely with an infected person and unprotected by prophylactic drugs will become infected by the patient with *active* TB. On the other hand, transmission has been known to occur with as little as a single two-hour exposure to coughing, sneezing, etc., of a person with *active* TB. To cure TB, however, continued therapy for six to twelve months may be required. Failure to complete the entire course of therapy risks a relapse and the development of MDR-TB.

MDR-TB results when only some TB bacilli are destroyed and the surviving bacilli develop a resistance to standard drugs and thus become more difficult to destroy. This resistance may involve several drugs and directly results from a patient's failure to complete therapy. There have been no reports of TDR-TB (totally drug resistant TB) in New Jersey, so J.S. can be cured if effective drugs are found in time.

TB is more serious in persons with impaired immune systems, which can result from poor health, chronic abuse of alcohol or ****270** drugs, old age, chemotherapy for cancer, or HIV infection. Such persons are more likely to develop *active* TB if they already harbor the TB bacilli. By way of example, ninety per cent of persons with *latent* TB (these persons are neither sick nor contagious) and with an intact immune system will never develop *active* TB during their entire lives. On the other hand persons with HIV disease with *latent* TB will develop *active* TB at the rate of eight per cent per year.

The human immunodeficiency virus is the cause of acquired immune deficiency syndrome (AIDS). HIV infection weakens the body's natural ability to fight disease. As the immune system deteriorates, those infected with HIV may become clinically ill ***189** with many serious illnesses. These are called opportunistic diseases and include pneumonia, some forms of cancer, fungal and parasitic diseases, certain viral diseases, direct damage to the nervous system, and TB. Persons infected with HIV are at much greater risk of developing active TB if they have latent TB. Once a person with HIV disease develops one of these opportunistic diseases, that person is classified as having AIDS.

New Jersey's statutory scheme for dealing with

TB dates from 1912 when the predecessor to *N.J.S.A.* 30:9-57 was first adopted.[FN3] Only minor amendments have been made since 1917.[FN4]

FN3. The 1912 statute provided: "11. If any person fails to obey any of said rules or regulations ["for the care of persons suffering from tuberculosis, and for the prevention and spread of such disease"], the offender may be committed to the county hospital by any judge of the Court of Common Pleas...." In *L.* 1917, *c.* 172, provisions requiring two days' notice of the time and place of the hearing were required to be served on the person whose commitment was sought.

FN4. *N.J.S.A.* 30:9-57 provides: "A person with communicable tuberculosis who fails to obey the rules or regulations promulgated in accordance with R.S. 26:4-70 by the State Department of Health for the care of tubercular persons and for the prevention of the spread of tuberculosis, or who is an actual menace to the community or to members of his household, may be committed to a hospital or institution, designated by the State Commissioner of Health with the approval of the Commissioner of Human Services for the care and custody of such person or persons by the Superior Court, upon proof of service upon him of the rules and regulations and proof of violation thereafter, or upon proof by the health officer of the municipality in which the person resides, or by the State Commissioner of Health or his authorized representative, that he is suffering from tuberculous, and is an actual menace to the community, or to members of his household. Two days' notice of the time and place of hearing shall in all cases be served upon the person to be committed. Proof of such service shall be made at the hearing. The court may also make such order for the payment for care and treatment as may be proper. The superintendent or person in charge of said hospital or institution to which such person has been committed shall detain said person until the State Commissioner of Health shall be satisfied that the person has recovered to the extent that he will not be a menace to the community or to members of his household or that the person will so conduct himself that he will not constitute such a menace."

This law allows me to enter an order committing a person to a hospital if he or she is "suffering from" TB and "is an actual ***190** menace to the community." Notice of the hearing is required and was provided. Neither the statute nor the implementing regulation, *N.J.A.C.* 8:57-1.10, provides any guidance on the procedures to follow when such applications are made, nor what standards are to be used in issuing such orders. There is no case law in New Jersey providing guidance on these and many other related issues.

The regulatory schemes in other jurisdictions vary widely. Gostin, *Controlling the Resurgent Tuberculosis Epidemic: A 50-State Survey of TB Statutes and Proposals for Reform,* 269 J.Am.Med.Assoc. 255 (1993). There are older schemes like that in New Jersey which provide little or no guidance. There are those that provide detailed procedural details to guarantee due process while still allowing detention, isolation, quarantine, or confinement in the most extreme cases.[FN5]

FN5. Isolation and quarantine are similar. "Isolation" means isolation of the infected while "quarantine" means isolation of the healthy who have been exposed to the infected but who are not yet ill themselves. Confinement and commitment are techniques to accomplish the desired isolation. Detention is a temporary commitment.

New York City's health code amendments, 24 *R.C.N.Y.* § 11.47 (1993), are important because the magnitude of Newark's TB problem****271** is exceeded only by New York City.[FN6] They are also notable because they recognize that other means short of isolation may be available to promote adherence to therapy regimens. They authorize the Commissioner of Health (Commissioner) to order adherence with the threat of isolation only after disobedience to less confining restrictions. 24 *R.C.N.Y.* § 11.47(f)(1)(iii).

FN6. Former HHS Secretary Joseph Califano colorfully describes the synergy of plagues affecting New York City in *Three-Headed Dog from Hell: The Staggering Public Health Threat Posed by AIDS, Substance*

> *Abuse and Tuberculosis*, Wash. Post, December 21, 1992, at A22. The City of Newark has been similarly ravaged.

Procedurally, New York provides for automatic release unless the Commissioner obtains an order permitting continued detention. 24 *R.C.N.Y.* § 11.47(e). Even where a person has not ***191** requested release, court review and approval is required whenever detention may last more than 60 days. *Id.* Periodic judicial review is required in all instances, and the Commissioner must prove by clear and convincing evidence that detention is necessary. *Id.* Details even require assistance for those needing language interpreters and those with hearing or vision impairments. 24 *R.C.N.Y.* § 11.47(h).

Newark's attempt to protect the health of its citizenry is an archetypical expression of police power. *Ogden v. Gibbons*, 22 *U.S.* (9 *Wheat*) 1, 6 *L.Ed.* 23 (1824) (*dicta* that a state has the power "to provide for the health of its citizens" by quarantine). *Cf.*, *Jacobson v. Massachusetts*, 197 *U.S.* 11, 25 *S.Ct.* 358, 49 *L.Ed.* 643 (1905) (compulsory vaccinations upheld against substantive due process challenge because societal interest in health can overcome individual rights). The claim of "disease" in a domestic setting has the same kind of power as the claim of "national security" in matters relating to foreign policy. Both claims are very powerful arguments for executive action. Both claims are among those least likely to be questioned by any other branch of government and therefore subject to abuse. The potential abuse is of special concern when the other interest involved is the confinement of a human being who has committed no crime except to be sick.

[1][2] Due process limits police power. The Fourteenth Amendment requires "that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Trust Co.*, 339 *U.S.* 306, 317, 70 *S.Ct.* 652, 656, 94 *L.Ed.* 865, 873 (1950). The parameters of due process require an analysis of both the individual and governmental interests involved and the consequences and avoidability of the risks of error and abuse. *Mathews v. Eldridge*, 424 *U.S.* 319, 335, 96 *S.Ct.* 893, 903, 47 *L.Ed.*2d 18, 33 (1976). Here the clash of competing interests is at its peak. Hardly any state interest is higher than protecting its citizenry from disease. Hardly any individual interest is higher ***192** than the liberty interest of being free from confinement. The consequences of error and abuse are grave for both the state and the individual.

[3][4][5][6] The United States Supreme Court has recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 *U.S.* 418, 425, 99 *S.Ct.* 1804, 1809, 60 *L.Ed.*2d 323 (1979). Our Supreme Court in *In re S.L.*, 94 *N.J.* 128, 462 *A.*2d 1252 (1983) had occasion to collect authority on what this meant. A person has the right to notice, counsel, and must be afforded the opportunity to present opposing evidence and argument, and to cross examine witnesses. *In re S.L.*, *supra*, 94 *N.J.* at 137, 462 *A.*2d 1252, citing *Vitek v. Jones*, 445 *U.S.* 480, 100 *S.Ct.* 1254, 63 *L.Ed.*2d 552 (1980). Illness alone cannot be the basis for confinement. *O'Connor v. Donaldson*, 422 *U.S.* 563, 95 *S.Ct.* 2486, 45 *L.Ed.*2d 396 (1975). To justify confinement it must be shown that the person is likely to pose a danger to self or to others. *State v. Krol*, 68 *N.J.* 236, 257, 344 *A.*2d 289 (1975). The proofs must show that there is a "substantial risk of dangerous conduct within the foreseeable future." *Id.*, at 260, 344 *A.*2d 289. These proofs must be shown by clear and convincing evidence. ****272***Addington v. Texas*, *supra*, 441 *U.S.* at 434, 99 *S.Ct.* at 1813, 60 *L.Ed.*2d at 335. The terms of confinement must minimize the infringements on liberty and enhance autonomy. *State v. Krol*, *supra*, 68 *N.J.* at 257-58, 344 *A.*2d 289. Periodic reviews are required. *State v. Fields*, 77 *N.J.* 282, 390 *A.*2d 574 (1978). Lesser forms of restraint must be used when they would suffice to fulfill the government interests. *In re S.L.*, *supra*, 94 *N.J.* at 138, 462 *A.*2d 1252.

Covington v. Harris, 419 *F.*2d 617 (D.C.Cir.1969), held that a court must satisfy itself that there were no less restrictive alternatives available to the "drastic curtailment" of rights inherent in the civil confinement of a person. Quoting *Shelton v. Tucker*, 364 *U.S.* 479, 488, 81 *S.Ct.* 247, 252, 5 *L.Ed.*2d 231 (1960) the court described the following "axiom of due process":

> ***193** Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative ab-

ridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

[419 *F.*2d at 623]

Greene v. Edwards, 164 W.Va. 326, 263 *S.E.*2d 661 (1980) is particularly useful in helping to decide the issues here. A writ of habeas corpus was sought following Greene's involuntary confinement pursuant to the West Virginia Tuberculosis Control Act,[FN7] a statute similar to, but more detailed than, *N.J.S.A.* 30:9-57. The West Virginia Department of Health (W.Va. DOH) filed a petition, alleging that Greene was suffering from active TB, was a health menace to others, and needed commitment. Greene was given notice of the hearing but not advised that he was entitled to counsel. Counsel was later appointed, but proceedings continued without a recess to allow Greene an opportunity to confer with his attorney.

FN7. *W.Va.Code* § 26-5A-5 provides: "If such practicing physician, public health officer, or chief medical officer having under observation or care any person who is suffering from tuberculosis in a communicable state is of the opinion that the environmental conditions of such person are not suitable for proper isolation or control by any type of local quarantine as prescribed by the state health department, and that such person is unable or unwilling to conduct himself and to live in such a manner as not to expose members of his family or household or other persons with whom he may be associated to danger of infection, he shall report the facts to the department of health which shall forthwith investigate or have investigated the circumstances alleged. If it shall find that any such person's physical condition is a health menace to others, the department of health shall petition the circuit court of the county in which such person resides, or the judge thereof in vacation, alleging that such person is afflicted with communicable tuberculosis and that such person's physical condition is a health menace to others, and requesting an order of the court committing such person to one of the state tuberculosis institutions. Upon receiving the petition, the court shall fix a date for hearing thereof and notice of such petition and the time and place for hearing thereof shall be served personally, at least seven days before the hearing, upon the person who is afflicted with communicable tuberculosis, and that such person is a source of danger to others, the court shall commit the individual to an institution maintained for the care and treatment of persons afflicted with tuberculosis ..."

***194** Although these proceedings conformed to the explicit statutory requirements, the court granted the petitioner's writ of habeas corpus. The court found that the statutory scheme did not meet due process requirements, which provide that no person shall be deprived of life, liberty, or property without due process of law. *Greene v. Edwards, supra*, 263 *S.E.*2d at 662.

Analogizing Greene's rights to those of a person whose commitment is sought for reasons of an alleged mental illness, the court concluded that, because "liberty is a right of the very highest nature," procedural due process safeguards already granted to those who were mentally ill should be afforded to all persons whose confinement is sought because of TB. It listed Greene's rights:

(1) An adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel and, if indigent, the right to appointed counsel; (3) the right to be present to cross-examine, to confront, and to represent the witnesses; (4) the standard of proof to be by clear, cogent, and convincing evidence; and (5) the right to a verbatim****273** transcript of the proceedings for purposes of appeal.

[*Greene v. Edwards*, 263 *S.E.*2d at 663].

Greene was not released. The writ was stayed to permit new proceedings in compliance with the listed rights. Similarly, in *State v. Krol, supra*, 68 *N.J.* at 255, 344 *A.*2d 289, while our Supreme Court declared the statutory scheme unconstitutional, it also adopted a set of interim rules, many of which eventually became part of a subsequently enacted statutory scheme for the commitment of the mentally ill. *State v. Krol, supra*, 68 *N.J.* at 255-56, 344 *A.*2d 289.

[7] The ADA also limits discrimination by government. Title II, 42 *U.S.C.A.* § 12131, applies the

ADA to all governmental agencies. "[N]o qualified individual with a disability shall, by reason of such disability, be ... subjected to discrimination by any such entity." 42 *U.S.C.A.* § 12132. At first blush one might not consider involuntary confinements as subject to the ADA. Usually we think of discrimination in employment, housing, schools, transportation, public accommodations and the like. Yet for government***195** to try to confine someone based upon his or her illness alone is as wrongful an act of discrimination as denying him or her a service from government. If public entities are barred from subjecting disabled persons to discrimination, can it be seriously doubted but that they are barred from involuntarily confining them?

Whether someone with TB is disabled was answered by *School Board of Nassau County, Florida v. Arline*, 480 *U.S.* 273, 107 *S.Ct.* 1123, 94 *L.Ed.*2d 307 (1987). In *Arline* the primary issue was whether a person with TB could be considered a "handicapped individual" within the meaning of the Rehabilitation Act of 1973, as amended, 29 *U.S.C.A.* § 701. In the ADA "disability" was used by Congress instead of "handicap" to reflect currently accepted terminology. The ADA's definition of "disability" was intended to be the same as the definition of "handicapped" under the Rehabilitation Act and the Fair Housing Act. "Section-by-Section Analysis" of ADA, 56 *Fed.Reg.* 35,696 (1991). Thus, the *Arline* analysis applies to the ADA.

In *Arline*, a school teacher had latent TB for twenty years but then had three relapses into active TB within two years. Following her last relapse and allegedly fearful of another, the school board fired Ms. Arline. The board claimed that it was concerned about the potential risk to children if she should have another relapse. The United States joined with the school board and argued that the "mere belief that an individual is contagious-whether reasonable or not" justified the exclusion of the handicapped. The argument was that the reason for the discrimination was the fear of contagion rather than the disability. The Supreme Court responded to this argument forcefully:

> We do not agree with petitioners that, in defining a handicapped individual under § 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant such as this. Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment.
>
> ***196** Nothing in the legislative history of § 504 suggests that Congress intended such a result. That history demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual.
>
> [480 *U.S.* at 282, 107 S.Ct. at 1128, 94 *L.Ed.*2d at 317]

Allowing fears to justify adverse treatment would render § 504 meaningless and would honor the most appalling prejudice in our society. The Supreme Court explained: "[s]ociety's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Arline, supra*, 480 *U.S.* at 284, 107 *S.Ct.* at 1129, 94 *L.Ed.*2d at 319. Noting the grave problem faced by Ms. Arline, the Court went on to say: "[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness." *Id.* The inability to make ****274** any distinction between a disease and its contagiousness was followed in 28 *C.F.R.* § 35.104 (1993) which explicitly mandates that tuberculosis be deemed a disability under the ADA.

The ADA is remedial legislation designed to eliminate a long history of discrimination. 42 *U.S.C.A.* § 12101. Persons with HIV disease, alcoholism, epilepsy and emotional illness are equally covered, although there are unfounded myths associated with those conditions. While a person currently using illegal drugs is not "disabled," once in a rehabilitation program or once rehabilitated, he or she is covered under the ADA. 42 *U.S.C.A.* § 12114; 28 *C.F.R.* § 35.131(a)(2)(i)-(iii) (1993). A person is covered if that person has a "record" of or is "regarded" as disabled even if there is no actual disability. 42 *U.S.C.A.* § 12102(2)(B) and (C). Thus a person who has no clinical symptoms but is discriminated against because of latent TB is nonetheless protected by the ADA. *Arline, supra*, 480 *U.S.* at 281, 107 *S.Ct.* at 1127, 94 *L.Ed.*2d at 317; 28 *C.F.R.* § 35.104 (1993).

Congress intended the ADA to apply to communicable diseases when it provided that to be protected by the ADA a person must be "qualified" and defined "qualified" as one who does "not pose a direct threat to the health or safety of others ..." 42 *U.S.C.A.* § 12113(b). This standard of "direct threat" means that discrimination***197** is permissible only if necessary to avoid a significant risk to other persons, a risk that cannot be eliminated by a reasonable accommodation. 42 *U.S.C.A.* § 12111(3).

[8] Accordingly, the ADA and its regulations require that a health officer seeking to infringe upon a diseased person's liberty by imposing detention, confinement, isolation or quarantine, must first establish, by clear and convincing evidence, that the person poses a significant risk of transmitting disease to others with serious consequences. This is not materially different from the words of *N.J.S.A.* 30:9-57, which requires proof that J.S. "is an actual menace to the community ..."

[9] While opinions of public health authorities must be respected, their decisions must be based upon the latest knowledge of epidemiology, virology, bacteriology, and public health. No court can substitute its medical judgment for those authorities brought to its attention or by the evidence before it. Public health decisions must be accorded due deference, *Arline, supra*, 480 *U.S.* at 288, 107 *S.Ct.* at 1131, 94 *L.Ed.*2d at 321 ("[C]ourts normally should defer to the reasonable medical judgments of public health officers.") Nonetheless, such deference is not appropriate if those powers are exercised in an "arbitrary, unreasonable" manner. *Jacobson, supra*, 197 *U.S.* at 28, 25 *S.Ct.* at 362, 49 *L.Ed.* at 650. Courts must guard against the risk that governmental action may be grounded in popular myths, irrational fears, or noxious fallacies rather than well-founded science.[FN8]

> FN8. That these fears are real is explained by Susan Sontag in *Illness as Metaphor* (1978), which collected the literature on TB, thought "to be an insidious implacable theft of a life." She explains how the hero's mother in Stendahl's *Armand* (1927) refuses to say "tuberculosis" because she fears that simply uttering the word will make her son sicker. Ms. Sontag explains further that TB has been used as a metaphor for all that is "unqualifiedly and unredeemably wicked.... Hitler, in his first political tract, an anti-semitic diatribe written in September 1919, accused the Jews of producing a 'racial tuberculosis among nations.' " Sontag, *supra*, at 5-7, 9, 13, 15-16, 19, 38, 44, 61-62, 83.
>
> The isolation of the chronically ill and of those perceived to be contagious appears across cultures and centuries, as does the development of complex and often ***198** pernicious mythologies about the nature, cause and transmission of illness. Tuberculosis is no exception.
>
> [*Arline, supra*, 480 *U.S.* at 284, 107 *S.Ct.* at 1129, 94 *L.Ed.*2d at 319, n. 12].

[10][11] The best way to guard against such risks is to demand an individualized, fact-specific determination as to the person under consideration. This is the key to all decision-making under the ADA. As explained by the 11th Circuit decision which *Arline, supra*, affirmed:

> The court is obligated to scrutinize the evidence before determining whether the [government's] justifications reflect a well-****275** informed judgment grounded in careful and open-minded weighing of the risks and the alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.
>
> [*Arline v. School Board of Nassau County*, 772 *F.*2d 759, 765 (11th Cir.1985).]

Thus proof that this specific person (and not similar persons) poses a significant risk to others, a risk that may not be merely speculative, theoretical, remote or even "elevated," is required. *H.R.Rep. No. 485*, 101st Cong., 2d Sess., pt. III (Report of the Judiciary Committee) at 51 (1989), U.S.Code Cong. & Admin.News 1990, pp. 267, 474. In addition, the least restrictive means should be used to achieve the clearly defined public health goal. This is precisely what, in this context, "reasonable accommodation" means within the ADA. 42 *U.S.C.A.* § 12111(3) (only those significant risks which cannot be eliminated by reasonable accommodation can be considered "direct threats"). "A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or

her job if reasonable accommodation will not eliminate that risk." *Arline, supra,* 480 *U.S.* at 287, 107 *S.Ct.* at 1131, 94 *L.Ed.*2d at 320, n. 16.

N.J.S.A. 30:4-27.1 to -27.23 was adopted in 1987 to codify much of what *State v. Krol, supra,* 68 *N.J.* 236, 344 *A.*2d 289, *State v. Fields, supra,* 77 *N.J.* 282, 390 *A.*2d 574, and *Addington v. Texas, supra,* 441 *U.S.* 418, 99 *S.Ct.* 1804, 60 *L.Ed.*2d 323, required. That statute provides a comprehensive set of procedures and standards reflecting modern ideas of mental health treatment and modern concepts of constitutional law. *See Senate Revenue, Finance and* ***199** *Appropriations Committee Statement on Assembly Bill No. 1813* (*L.* 1987 *c.* 116).

Some provisions establish procedures to enhance fairness and to reduce the risks of error and abuse. Persons whose confinement is sought must be provided counsel. *R.* 4:74-7(c). Such persons are entitled to adequate notice of the hearing (*N.J.S.A.* 30:4-27.13(a)) and discovery before the hearing. *R.* 4:74-7(d); *N.J.S.A.* 30:4-27.13. The hearing must be held expeditiously to avoid unnecessary confinement. *R.* 4:74-7(i); *N.J.S.A.* 30:4-27.12. The hearing must be held *in camera* if requested to protect privacy interests. *N.J.S.A.* 30:4-27.14e. Prior to the hearing an independent examination paid for by the committing authority must be provided upon request. *R.* 4:74-7(d). The person sought to be confined has the right to be present, to cross-examine witnesses and to present testimony. *N.J.S.A.* 30:4-27.14(b)-(d); *R.* 4:74-7(e). The hearing must be on the record. *R.* 1:2-2. Evidence must be under oath. *N.J.R.E.* 603. Periodic court reviews are mandated. *N.J.S.A.* 30:4-27.16. All proofs must be shown by clear and convincing evidence. *N.J.S.A.* 30:4-27.15a.

[12][13][14][15] There are additional requirements. Illness alone cannot be a basis for involuntary commitment. *In re S.L.* 94 *N.J.* 128, 137-138, 462 *A.*2d 1252 (1983). Persons may not be confined merely because they present a risk of future conduct which is socially undesirable. *State v. Krol, supra,* 68 *N.J.* at 259, 344 *A.*2d 289. A court must find that the risk of infliction of serious bodily injury upon another is probable in the reasonably foreseeable future. *N.J.S.A.* 30:4-27.2i. *State v. Krol, supra,* 68 *N.J.* at 260, 344 *A.*2d 289 explains more. History, actual conduct and recent behaviors must be considered. Dangerous conduct is not the same as criminal conduct. Dangerous conduct involves not merely violations of social norms but significant injury to persons or substantial destruction of property. The evaluation of the risk involves considering the likelihood of dangerous conduct, the seriousness of the harm that would ensue if such conduct took place, and its probability within the reasonably foreseeable future. ***200** A person's past conduct is important evidence of future conduct. If a person is only dangerous with regard to certain individuals, the likelihood of contact with such individuals must be taken into account.

As shown earlier, many commentators have suggested that the most apt analogy for commitments for medical reasons is the model of civil commitments for mental illness. This was the analogy seized upon by the ****276** West Virginia Supreme Court in *Greene, supra,* 263 *S.E.*2d 661. Professor George J. Annas recently similarly referred to the problem of TB:

> The closest legal analogy is provided by court cases that have reviewed the constitutionality of state statutes permitting the involuntary commitment of mental patients on the basis that they have a disease that causes them to be dangerous.
>
> [Annas, *Control of Tuberculosis-The Law and the Public's Health,* 328 New Eng.J. of Med. 585, 586 (1993).]

[16][17][18] It ought not be surprising that whatever may be the source, the conclusion is very much the same. The constitutional concept of due process is designed to prevent irrational discrimination by ensuring a forum that can hear opposing perspectives and by insisting that distinctions are rationally based.

> The decisive consideration where personal liberty is involved is that each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a "class" to which he may be assigned.
>
> [*State v. Krol, supra,* 68 *N.J.* at 255, 344 *A.*2d 289.]

Similarly, the ADA is designed to avoid the risk of stereotyping, bigotry and prejudice by demanding an individualized determination before any adverse

action is taken against a person with any disability. Finally, New Jersey laws regulating civil commitments are designed to meet due process demands, yet provide a mechanism for these unusual cases where public safety demands commitment.

Gostin also explains the synthesis between constitutional adjudication, the ADA, and the mental illness analogy. Gostin, *supra*, ***201** 289 J.Am.Med.Assoc. at 258-259. He refers to the problem of forcing directly observed therapy (DOT) under the ADA: [FN9]

> FN9. Directly observed therapy (DOT) is a controversial system by which therapy is assured by having medication taken when the patient is directly observed by a health care worker. This can occur by having the worker go to the patient's home or by having the patient come to a treatment site for medication. For patients who no longer have active TB, continued therapy is the true public health goal. In those cases confinement is merely the most extreme and drastic of mechanisms to assure that medicine is taken. Because therapy may only be required two or three times a week, it is easy to understand why confinement is so drastic a remedy.

> Consequently, health departments should use *compulsory* DOT only as a last resort; conceptually, it should be used as a less restrictive alternative to isolation or commitment. Directly observed therapy without the person's consent should be based on an individualized determination that the person is unable or unwilling to comply with the plan of treatment and poses a significant risk of transmission. Generalizations or stereotypes about the person's class or status such as being poor, homeless or a drug user would not provide a sufficient basis for DOT without consent. Objective evidence of noncompliance, such as recent behavior, would be required under the significant risk standard [of the ADA].

[19] Thus, it becomes possible to reconcile public health concerns, constitutional requirements, civil liberties, and the ADA all simultaneously. Good public health practice considers human rights so there is no conflict. Since coercion is a difficult and expensive means to enforce behaviors, voluntary compliance is the public health goal. Compliance is more likely when authorities demonstrate sensitivity to human rights. "Society achieved a precarious understanding in the HIV epidemic that respect for human rights was required in order to protect the public health." Gostin, *supra*, 289 J.Am.Med.Assoc. at 259.

That these interests are reconcilable does not mean that any one case will be easy to reconcile. Any individualized balancing process is a challenge. But it does mean that the principles by which that process is governed can be made clear and without conflict or contradiction. Moreover, to the extent that current laws regarding the commitment of those with TB are so ancient that they fail to meet modern standards of due process or the mandates of the ADA, it is the responsibility of our courts to ***202** ensure that there are procedures to ensure the rights of individuals****277** whose proposed confinement invokes the judicial process. *State v. Krol, supra*, 68 *N.J.* 236, 344 *A.*2d 289; *State v. Fields, supra*, 77 *N.J.* 282, 390 *A.*2d 574; *Greene v. Edwards, supra*, 263 *S.E.*2d 661. There is no need to declare the New Jersey TB control statute (*N.J.S.A.* 30:9-57) unconstitutional so long as it is interpreted to be consistent with the Constitution. There is no reason to find it in violation of the ADA so long as it is interpreted to be consistent with the ADA. It must be remembered that this statute was first enacted in 1912, yet it had provisions requiring notice and a judicial hearing. The statute required proof that the person be "an actual menace to the community or to members of his household." The Legislature intended to permit the confinement of someone with TB but only under circumstances consistent with due process. Many of the rights we now recognize were unheard of in 1912. The ADA did not exist. Declaring the statute unconstitutional and leaving citizens of New Jersey with no shield against the rare person with TB who poses a true significant risk to others would be the true frustration of legislative intent. Therefore I construe *N.J.S.A.* 30:9-57 so as to include those rights necessitated by contemporary standards of due process and by the ADA. Such a construction effectuates the legislative intent.

[20] The first step of the individualized analysis required here is to define precisely what Newark seeks. During the active phase of TB, isolation of J.S., as opposed to confinement or imprisonment, is what is required. If J.S. lived in a college dormitory with other roommates, different quarters would have to be found

for him. If J.S. lived in a private home and could be given a private bedroom or others in the household could be given prophylactic antibiotic therapy, confinement to his own home might be appropriate. J.S. is homeless, and a shelter where he would risk infecting others, including those with impaired immune systems, would probably be the worst place for him to stay. Brudney and Dobkin, *Resurgent Tuberculosis in New York City: ***203** Human Immunodeficiency Virus, Homelessness, and the Decline of Tuberculosis Control Programs*, 144 Am.Rev. of Respiratory Dis. 745 (1991); McAdam, *The Spectrum of Tuberculosis In a New York City Men's Shelter Clinic*, Chest (April, 1990); Torres, et al., *Human Immunodeficiency Virus Infection Among Homeless Men in a New York City Shelter: Association with Mycobacterium Tuberculosis Infection*, 16 Annals of Internal Med. (Oct. 1990).

Because *active* TB can be serious and can be potentially contagious by repeated contact, there are few options for the homeless with *active* TB.[FN10] As Professor Annas said:

> FN10. The defendant has not argued here that some state action has caused his homelessness and put him in the very position that results in the need for confinement. If J.S. would suggest some other alternative to hospitalization that would impose less restrictions but would achieve the same public health objective, then Newark would have the burden of showing why this less restrictive alternative was not selected.

> Although these safeguards [constitutional rights] may seem impressive, in fact the only issues likely to concern a judge in a tuberculosis commitment proceeding are two factual ones: Does the person have active tuberculosis, and does the person present a danger of spreading it to others? Since it is unlikely that any case will be brought by public health officials when the diagnosis is in doubt, the primary issues will be the danger the patient presents to others and the existence of less restrictive alternatives to confinement that might protect the public equally well.
>
> [Annas, *supra*, at 328 New Eng.J. of Med. 586.]

I find that the answers to the questions posed by Professor Annas have been provided by Newark and have been established by clear and convincing evidence. There is no question but that J.S. has active TB. There is no question but that he poses a risk to others who may be in contact with him, particularly in close quarters. Because he is homeless, there is no suggestion of any other place he could stay that would be less restrictive than a hospital.

The hearing I conducted was designed to comport to all the requirements of due process and with all the requirements of a commitment hearing under *N.J.S.A.* 30:4-27.1 ****278** to -27.23. I believe my conclusions also satisfy the ADA and *Arline*, that judicial decisions in this area be based upon, "(a) the nature of the risk ***204** how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm." 480 *U.S.* at 288, 107 *S.Ct.* at 1131, 94 *L.Ed.*2d at 321.

I find that J.S. presents a significant risk to others unless isolated. Hospital confinement is the least restrictive mode of isolation proposed to me. The only request at this time is that J.S. be confined until he has shown three negative sputum tests [FN11] demonstrating that his TB is no longer active. This is narrow, limited, and very reasonable, but because the time period for treatment is indefinite, I will initially set an initial court review to be held in three weeks, on Tuesday, November 30, 1993, at 1:30 p.m., unless J.S. has earlier been determined to have gone into remission from active TB. In that event J.S. will be released immediately unless Newark seeks confinement for another reason.

> FN11. Confirmed by the opinion of J.S.'s physician that he is clinically improved. This is the long time standard of the CDC *Guideline for the Prevention of TB Transmission in Hospitals*, HHS Publication No. (CDC) 82-8371 at 5 (1982).

At the November 30, 1993, hearing, Newark will have the burden of proving the need for further confinement; however, unless there is a change in condition, I will consider the evidence presented on November 8, 1993 along with whatever updates may be necessary. Only updated information need be presented. If there is no change, then the current order

will likely continue. Obviously J.S. will also have the opportunity to present evidence; however, discovery shall be provided by each side to the other and to me at least one week in advance of the hearing date.

[21] In the interim I will utilize the well-established procedures New Jersey has in place for civil commitments of the mentally ill. *N.J.S.A.* 30:4-27.1 to -27.23; *R.* 4:74-7. Although some procedures may not apply to the confinement of those with contagious diseases like TB, until and unless a more specific law is enacted, the only available and constitutional mechanism is to use ***205** these tested mental health statutes, court rules, and the case law thereunder. This is certainly preferable to declaring *N.J.S.A.* 30:9-57 unconstitutional and leaving no authority whatsoever to fulfill an essential public police power.

Thus, the order of commitment will incorporate by reference the patient's rights as set forth in the laws regarding civil commitments, to the extent feasible and practical. Those provisions relating only to mental health issues need not apply. *N.J.S.A.* 30:4-27.11d(c) explains that rights that are medically contraindicated may be avoided if there are proper written orders by J.S.'s physician. For example, the provisions regarding the opportunities to see visitors must be accomplished according to established hospital procedures for infection control. His right to outdoor activities may have to be curtailed if he refuses to wear his mask. The hospital may not have safe and suitable facilities for extended visits with persons of the opposite sex. I will not interfere with medical judgment, but I will remain available on short notice to resolve any disputes.

[22] Newark also wanted J.S. ordered to provide sputum samples and take his medication as prescribed. The testimony was that a forced sputum sample requires a bronchoscopy, a procedure involving sedation and requiring separate informed consent because of its risks. No facts were shown to justify such a diagnostic procedure where it might cause harm to J.S. As to continued treatment, testimony showed that the medications were quite toxic, dangerous, and some required painful intramuscular administration. J.S. is being asked to take many pills causing numerous side effects, including nausea and pain. The efficacy of the drugs will be unknown until receipt of sensitivity reports.

These facts cannot justify a remedy as broad as Newark seeks. J.S. has the right to refuse treatment even if this is medically unwise. ****279***Matter of Farrell*, 108 *N.J.* 335, 347, 529 *A.*2d 404 (1987) (people have the right of self-determination regarding their own bodies). He must remain isolated until he is no longer contagious. Contagiousness cannot be assessed unless he gives sputum samples.***206** While he can refuse to provide sputum samples and refuse bronchoscopy, his release from isolation may be delayed, as he will be unable to satisfy the conditions of release. The same is true with his refusal to take medication. If he refuses, he may not get better. If J.S. continues to suffer from active TB, he will be unable to satisfy the conditions of release.

[23] On the other hand if J.S. cooperates with his caregivers, provides sputum samples, and takes his medication willingly, then upon his improvement, Newark will have a difficult time proving that he needs confinement because he is not cooperative.[FN12] His in-hospital conduct will go a long way towards demonstrating his ability to follow medical therapy once released and will be considered if after his active TB is cured, J.S.'s confinement is sought because his alleged failure to follow continued therapy will make him a future risk.[FN13] I would then have to consider an order analogous to those permitted under *N.J.S.A.* 30:4-27.15c, which would simply require J.S. to take his medication.[FN14]

FN12. In order to fulfill the requirement of using the least restrictive alternative, public health officials will usually have to show that they attempted step-by-step interventions, beginning with voluntary DOT, supplemented by incentives (*e.g.*, food or money as a reward for taking medication) and enablers (*e.g.*, travel assistance). Commitment is an absolute last resort.

FN13. The CDC in its *Morbidity and Mortality Weekly Report* of February 5, 1993, report on the South Carolina experience, which suggested that "non-adherent" patients can be treated without confinement. On the other hand, the New York City experience shows that "even an approach as intense as confinement does not ensure that patients will be cured."

FN14. This is precisely what subsequently happened here. At the November 30, 1993, review hearing, Newark presented additional expert testimony and J.S.'s updated medical records showing the situation unchanged. But thereafter, J.S. began to take his medication faithfully and his active TB was arrested. On January 10, 1994, J.S. was released from confinement pursuant to a consent order in which he agreed to DOT and agreed to being committed again if he failed to take his medicine. This consent order was approved in open court in J.S.'s presence as there was no longer any need for isolation once he no longer suffered from active TB.

N.J.Super.L.,1993.
City of Newark v. J.S.
279 N.J.Super. 178, 652 A.2d 265, 3 A.D. Cases 1834, 9 A.D.D. 322, 6 NDLR P 88

END OF DOCUMENT

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property (Refs & Annos)

➡ **Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<This amendment is further displayed in five separate documents according to subject matter,>

<see USCA Const Amend. V-Capital Crimes>

<see USCA Const Amend. V-Double Jeopardy>

<see USCA Const Amend. V-Self Incrimination>

<see USCA Const Amend. V-Due Process>

<see USCA Const Amend. V-Just Compensation>

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END OF DOCUMENT

United States Code Annotated Currentness
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

➡ AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

Current through P.L. 112-28 approved 8-12-11

END OF DOCUMENT

Effective: January 8, 2002

United States Code Annotated Currentness
Title 29. Labor
Chapter 16. Vocational Rehabilitation and Other Rehabilitation Services (Refs & Annos)
Subchapter V. Rights and Advocacy (Refs & Annos)

➡ § 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of--

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

CREDIT(S)

(Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394; Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub.L. 99-506, Title I, § 103(d)(2)(B), Title X, § 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub.L. 100-259, § 4, Mar. 22, 1988, 102 Stat. 29; Pub.L. 100-630, Title II, § 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub.L. 102-569, Title I, § 102(p)(32), Title V, § 506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub.L. 103-382, Title III, § 394(i)(2), Oct. 20, 1994, 108 Stat. 4029; Pub.L. 105-220, Title IV, § 408(a)(3), Aug. 7, 1998, 112 Stat. 1203; Pub.L. 107-110, Title X, § 1076(u)(2), Jan. 8, 2002, 115 Stat. 2093.)

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Effective: January 8, 2002

United States Code Annotated Currentness
Title 29. Labor
Chapter 16. Vocational Rehabilitation and Other Rehabilitation Services (Refs & Annos)
Subchapter V. Rights and Advocacy (Refs & Annos)
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(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

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Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

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The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

CREDIT(S)

(Pub.L. 93-112, Title V, § 504, Sept. 26, 1973, 87 Stat. 394; Pub.L. 95-602, Title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987; Pub.L. 99-506, Title I, § 103(d)(2)(B), Title X, § 1002(e)(4), Oct. 21, 1986, 100 Stat. 1810, 1844; Pub.L. 100-259, § 4, Mar. 22, 1988, 102 Stat. 29; Pub.L. 100-630, Title II, § 206(d), Nov. 7, 1988, 102 Stat. 3312; Pub.L. 102-569, Title I, § 102(p)(32), Title V, § 506, Oct. 29, 1992, 106 Stat. 4360, 4428; Pub.L. 103-382, Title III, § 394(i)(2), Oct. 20, 1994, 108 Stat. 4029; Pub.L. 105-220, Title IV, § 408(a)(3), Aug. 7, 1998, 112 Stat. 1203; Pub.L. 107-110, Title X, § 1076(u)(2), Jan. 8, 2002, 115 Stat. 2093.)

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END OF DOCUMENT

Effective: January 1, 2009

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
§ 12101. Findings and purpose

(a) Findings

The Congress finds that--

(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities

the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(9) Redesignated (8)

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

CREDIT(S)

(Pub.L. 101-336, § 2, July 26, 1990, 104 Stat. 328; Pub.L. 110-325, § 3, Sept. 25, 2008, 122 Stat. 3554.)

Current through P.L. 112-28 approved 8-12-11

END OF DOCUMENT

Effective: January 1, 2009

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
➡ **§ 12102. Definition of disability**

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major life activities

(A) In general

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major bodily functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as having such an impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of construction regarding the definition of disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(iii) As used in this subparagraph--

(I) the term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

(II) the term "low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image.

CREDIT(S)

(Pub.L. 101-336, § 3, July 26, 1990, 104 Stat. 329; Pub.L. 110-325, § 4(a), Sept. 25, 2008, 122 Stat. 3555.)

Current through P.L. 112-28 approved 8-12-11

END OF DOCUMENT

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 42. The Public Health and Welfare
Chapter 126. Equal Opportunity for Individuals with Disabilities (Refs & Annos)
Subchapter II. Public Services (Refs & Annos)
Part A. Prohibition Against Discrimination and Other Generally Applicable Provisions
➡ **§ 12132. Discrimination**

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

CREDIT(S)

(Pub.L. 101-336, Title II, § 202, July 26, 1990, 104 Stat. 337.)

Current through P.L. 112-28 approved 8-12-11

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Constitution of the State of California 1879 (Refs & Annos)
Article I. Declaration of Rights (Refs & Annos)

➡ § 7. Due process and equal protection; pupil school assignment or transportation; privileges and immunities

Sec. 7. (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at this 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

CREDIT(S)

(Added Nov. 4, 1974. Amended Nov. 6, 1979.)

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Constitution of the State of California 1879 (Refs & Annos)
Article I. Declaration of Rights (Refs & Annos)
§ 15. Criminal Cases; Speedy Public Trial; Compel Attendance of Witnesses; Appearance and Defense; Counsel; Depositions; Double Jeopardy; Self-Incrimination; Due Process

➡ § 15. Criminal cases; speedy public trial; compel attendance of witnesses; appearance and defense; counsel; depositions; double jeopardy; self-incrimination; due process

Sec. 15. The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

CREDIT(S)

(Added Nov. 5, 1974.)

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective: January 1, 2010

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 2. Licensing Provisions (Refs & Annos)
Chapter 2. Health Facilities (Refs & Annos)
Article 1. General (Refs & Annos)
➡ **§ 1250. Definitions**

As used in this chapter, "health facility" means any facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer, and includes the following types:

(a) "General acute care hospital" means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services. A general acute care hospital may include more than one physical plant maintained and operated on separate premises as provided in Section 1250.8. A general acute care hospital that exclusively provides acute medical rehabilitation center services, including at least physical therapy, occupational therapy, and speech therapy, may provide for the required surgical and anesthesia services through a contract with another acute care hospital. In addition, a general acute care hospital that, on July 1, 1983, provided required surgical and anesthesia services through a contract or agreement with another acute care hospital may continue to provide these surgical and anesthesia services through a contract or agreement with an acute care hospital. The general acute care hospital operated by the State Department of Developmental Services at Agnews Developmental Center may, until June 30, 2007, provide surgery and anesthesia services through a contract or agreement with another acute care hospital. Notwithstanding the requirements of this subdivision, a general acute care hospital operated by the Department of Corrections and Rehabilitation or the Department of Veterans Affairs may provide surgery and anesthesia services during normal weekday working hours, and not provide these services during other hours of the weekday or on weekends or holidays, if the general acute care hospital otherwise meets the requirements of this section.

A "general acute care hospital" includes a "rural general acute care hospital." However, a "rural general acute care hospital" shall not be required by the department to provide surgery and anesthesia services. A "rural general acute care hospital" shall meet either of the following conditions:

(1) The hospital meets criteria for designation within peer group six or eight, as defined in the report entitled Hospital Peer Grouping for Efficiency Comparison, dated December 20, 1982.

(2) The hospital meets the criteria for designation within peer group five or seven, as defined in the report entitled Hospital Peer Grouping for Efficiency Comparison, dated December 20, 1982, and has no more than 76 acute care beds and is located in a census dwelling place of 15,000 or less population according to the 1980 federal census.

(b) "Acute psychiatric hospital" means a health facility having a duly constituted governing body with overall ad-

ministrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care for mentally disordered, incompetent, or other patients referred to in Division 5 (commencing with Section 5000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code, including the following basic services: medical, nursing, rehabilitative, pharmacy, and dietary services.

(c) "Skilled nursing facility" means a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis.

(d) "Intermediate care facility" means a health facility that provides inpatient care to ambulatory or nonambulatory patients who have recurring need for skilled nursing supervision and need supportive care, but who do not require availability of continuous skilled nursing care.

(e) "Intermediate care facility/developmentally disabled habilitative" means a facility with a capacity of 4 to 15 beds that provides 24-hour personal care, habilitation, developmental, and supportive health services to 15 or fewer persons with developmental disabilities who have intermittent recurring needs for nursing services, but have been certified by a physician and surgeon as not requiring availability of continuous skilled nursing care.

(f) "Special hospital" means a health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical or dental staff that provides inpatient or outpatient care in dentistry or maternity.

(g) "Intermediate care facility/developmentally disabled" means a facility that provides 24-hour personal care, habilitation, developmental, and supportive health services to persons with developmental disabilities whose primary need is for developmental services and who have a recurring but intermittent need for skilled nursing services.

(h) "Intermediate care facility/developmentally disabled-nursing" means a facility with a capacity of 4 to 15 beds that provides 24-hour personal care, developmental services, and nursing supervision for persons with developmental disabilities who have intermittent recurring needs for skilled nursing care but have been certified by a physician and surgeon as not requiring continuous skilled nursing care. The facility shall serve medically fragile persons with developmental disabilities or who demonstrate significant developmental delay that may lead to a developmental disability if not treated.

(i)(1) "Congregate living health facility" means a residential home with a capacity, except as provided in paragraph (4), of no more than 12 beds, that provides inpatient care, including the following basic services: medical supervision, 24-hour skilled nursing and supportive care, pharmacy, dietary, social, recreational, and at least one type of service specified in paragraph (2). The primary need of congregate living health facility residents shall be for availability of skilled nursing care on a recurring, intermittent, extended, or continuous basis. This care is generally less intense than that provided in general acute care hospitals but more intense than that provided in skilled nursing facilities.

(2) Congregate living health facilities shall provide one of the following services:

(A) Services for persons who are mentally alert, persons with physical disabilities, who may be ventilator dependent.

(B) Services for persons who have a diagnosis of terminal illness, a diagnosis of a life-threatening illness, or both. Terminal illness means the individual has a life expectancy of six months or less as stated in writing by his or her attending physician and surgeon. A "life-threatening illness" means the individual has an illness that can lead to a possibility of a termination of life within five years or less as stated in writing by his or her attending physician and surgeon.

(C) Services for persons who are catastrophically and severely disabled. A person who is catastrophically and severely

disabled means a person whose origin of disability was acquired through trauma or nondegenerative neurologic illness, for whom it has been determined that active rehabilitation would be beneficial and to whom these services are being provided. Services offered by a congregate living health facility to a person who is catastrophically disabled shall include, but not be limited to, speech, physical, and occupational therapy.

(3) A congregate living health facility license shall specify which of the types of persons described in paragraph (2) to whom a facility is licensed to provide services.

(4)(A) A facility operated by a city and county for the purposes of delivering services under this section may have a capacity of 59 beds.

(B) A congregate living health facility not operated by a city and county servicing persons who are terminally ill, persons who have been diagnosed with a life-threatening illness, or both, that is located in a county with a population of 500,000 or more persons may have not more than 25 beds for the purpose of serving persons who are terminally ill.

(C) A congregate living health facility not operated by a city and county serving persons who are catastrophically and severely disabled, as defined in subparagraph (C) of paragraph (2) that is located in a county of 500,000 or more persons may have not more than 12 beds for the purpose of serving persons who are catastrophically and severely disabled.

(5) A congregate living health facility shall have a noninstitutional, homelike environment.

(j)(1) “Correctional treatment center” means a health facility operated by the Department of Corrections and Rehabilitation, the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, or a county, city, or city and county law enforcement agency that, as determined by the state department, provides inpatient health services to that portion of the inmate population who do not require a general acute care level of basic services. This definition shall not apply to those areas of a law enforcement facility that houses inmates or wards that may be receiving outpatient services and are housed separately for reasons of improved access to health care, security, and protection. The health services provided by a correctional treatment center shall include, but are not limited to, all of the following basic services: physician and surgeon, psychiatrist, psychologist, nursing, pharmacy, and dietary. A correctional treatment center may provide the following services: laboratory, radiology, perinatal, and any other services approved by the state department.

(2) Outpatient surgical care with anesthesia may be provided, if the correctional treatment center meets the same requirements as a surgical clinic licensed pursuant to Section 1204, with the exception of the requirement that patients remain less than 24 hours.

(3) Correctional treatment centers shall maintain written service agreements with general acute care hospitals to provide for those inmate physical health needs that cannot be met by the correctional treatment center.

(4) Physician and surgeon services shall be readily available in a correctional treatment center on a 24-hour basis.

(5) It is not the intent of the Legislature to have a correctional treatment center supplant the general acute care hospitals at the California Medical Facility, the California Men's Colony, and the California Institution for Men. This subdivision shall not be construed to prohibit the Department of Corrections and Rehabilitation from obtaining a correctional treatment center license at these sites.

(k) “Nursing facility” means a health facility licensed pursuant to this chapter that is certified to participate as a provider of care either as a skilled nursing facility in the federal Medicare Program under Title XVIII of the federal Social Security Act or as a nursing facility in the federal Medicaid Program under Title XIX of the federal Social Security

Act, or as both.

(l) Regulations defining a correctional treatment center described in subdivision (j) that is operated by a county, city, or city and county, the Department of Corrections and Rehabilitation, or the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, shall not become effective prior to, or if effective, shall be inoperative until January 1, 1996, and until that time these correctional facilities are exempt from any licensing requirements.

(m) "Intermediate care facility/developmentally disabled-continuous nursing (ICF/DD-CN)" means a homelike facility with a capacity of four to eight, inclusive, beds that provides 24-hour personal care, developmental services, and nursing supervision for persons with developmental disabilities who have continuous needs for skilled nursing care and have been certified by a physician and surgeon as warranting continuous skilled nursing care. The facility shall serve medically fragile persons who have developmental disabilities or demonstrate significant developmental delay that may lead to a developmental disability if not treated. ICF/DD-CN facilities shall be subject to licensure under this chapter upon adoption of licensing regulations in accordance with Section 1275.3. A facility providing continuous skilled nursing services to persons with developmental disabilities pursuant to Section 14132.20 or 14495.10 of the Welfare and Institutions Code shall apply for licensure under this subdivision within 90 days after the regulations become effective, and may continue to operate pursuant to those sections until its licensure application is either approved or denied.

CREDIT(S)

(Added by Stats.1973, c. 1202, p. 2564, § 2. Amended by Stats.1974, c. 1444, p. 3151, § 1; Stats.1976, c. 854, p. 1950, § 34, eff. Sept. 9, 1976; Stats.1978, c. 1221, § 1, eff. Sept. 27, 1978; Stats.1978, c. 1226, § 1.5; Stats.1980, c. 676, p. 1937, § 152; Stats.1980, c. 569, p. 1558, § 1; Stats.1981, c. 714, p. 2675, § 213; Stats.1981, c. 743, p. 2908, § 3; Stats.1983, c. 695, § 1, eff. Sept. 11, 1983; Stats.1983, c. 1003, § 1; Stats.1984, c. 497, § 2, eff. July 17, 1984; Stats.1985, c. 1496, § 4; Stats.1986, c. 1111, § 1; Stats.1986, c. 1320, § 1; Stats.1986, c. 1459, § 1.5; Stats.1987, c. 1282, § 2; Stats.1988, c. 1478, § 3, eff. Sept. 28, 1988; Stats.1988, c. 1608, § 1.3; Stats.1989, c. 1393, § 1, eff. Oct. 2, 1989; Stats.1990, c. 1227 (A.B.3413), § 1, eff. Sept. 24, 1990; Stats.1990, c. 1329 (S.B.1524), § 3.5, eff. Sept. 26, 1990; Stats.1992, c. 697 (S.B.1559), § 11; Stats.1992, c. 1163 (S.B.1570), § 1; Stats.1992, c. 1164 (S.B.1003), § 1; Stats.1992, c. 1369 (A.B.3027), § 5, eff. Oct. 27, 1992, operative Jan. 1, 1993; Stats.1993, c. 589 (A.B.2211), § 84; Stats.1993, c. 70 (S.B.86), § 7, eff. June 30, 1993; Stats.1993, c. 930 (S.B.560), § 1; Stats.1993, c. 931 (A.B.972), § 1; Stats.1993, c. 932 (S.B.910), § 1, eff. Oct. 8, 1993; Stats.1993, c. 932 (S.B.910), § 1.7, eff. Oct. 8, 1993, operative Jan. 1, 1994; Stats.1995, c. 749 (A.B.1177), § 6, eff. Oct. 10, 1995; Stats.2000, c. 451 (A.B.1731), § 2; Stats.2001, c. 685 (A.B.1212), § 1; Stats.2005, c. 333 (A.B.1346), § 2; Stats.2005, c. 443 (S.B.666), § 2; Stats.2009-2010, 4th Ex.Sess., c. 5 (A.B.5), § 2, eff. July 28, 2009; Stats.2009, c. 298 (A.B.1540), § 2.)

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

CHAPTER 205

An act to repeal Sections 112, 114, 252.6, 252.7, 301, 375, 376, 377, 401, 451.5, 453, 455, 478, 486, 505, 506, 507, 508, 509, 28477, and 28714, and Article 7 (Sections 410-414, inclusive) of Chapter 2 of Part 1 of Division 1; Article 3 (Sections 491-493, inclusive) of Chapter 1 of Part 2 of Division 1; Chapter 4 (Sections 800-811, inclusive) of Part 2 of Division 1, Chapters 1 (Sections 1700-1703, inclusive) and 6 (Sections 2500-2603, inclusive) of Division 3, Division 4 (Sections 3099-3342, inclusive), Division 16 (Sections 21000-21409, inclusive), and Chapter 3 (Sections 24380-24385, inclusive) of Division 20, of the Health and Safety Code; to amend and renumber Sections 116, 204, 212, 302, 303, and 304 of said code; to amend Sections 211, 300, 374, 400, 450, 500, 502, 1602, 1603, 1605, 1622, 3701, 3702, 3801, 3901, 3954, 4001, 4002, 25003, 26235, 26366.5, 26472, 26541, 26542, 26586.5, 28224, and 28295, and the title of Article 3, Chapter 2, Part 1, Division 1, and the title of Article 5, Chapter 2, Part 1, Division 1, and the title of Division 3, of said code; to add Article 7 (Section 410) to Chapter 2, Part 1, Division 1, Chapter 6 (Sections 1685 and 1686) to Division 2, Division 4 (Sections 3000-3355, inclusive), to said code; relating to the preservation of the public health and safety, including the health and safety of persons, the custody and disposition of dead bodies, the safety and protection of property, and matters incidental thereto.

(Prepared pursuant to Senate Resolution 101, General Session of 1955, to revise and consolidate the public health statutes.)

In effect September 11, 1957

[Approved by Governor April 23, 1957. Filed with Secretary of State April 24, 1957.]

The people of the State of California do enact as follows:

Repeals

SECTION 1. Sections 112, 114, 252.6, 252.7, 301, 375, 376, 377, 401, 451.5, 453, 455, 478, 486, 505, 506, 507, 508, 509, 28477, and 28714, and Article 7 (Sections 410-414, inclusive) of Chapter 2 of Part 1 of Division 1, Article 3 (Sections 491-493, inclusive) of Chapter 1 of Part 2 of Division 1, Chapter 4 (Sections 800-811, inclusive) of Part 2 of Division 1, Chapters 1 (Sections 1700-1703, inclusive) and 6 (Sections 2500-2603, inclusive) of Division 3, Division 4 (Sections 3099-3342, inclusive), Division 16 (Sections 21000-21409, inclusive), and Chapter 3 (Sections 24380-24385, inclusive) of Division 20, of the Health and Safety Code are repealed.

SEC. 2. Section 204 of the Health and Safety Code is renumbered and amended to read:

Biological products

375. It may prepare or purchase biological products and distribute them at cost.

SEC. 3. Section 211 of said code is amended to read:

Special investigations

211. It shall cause special investigations of the sources of morbidity and mortality and the effects of localities, employ-

ments, conditions and circumstances on the public health and it shall perform such other duties as may be required in procuring information for state and federal agencies regarding the effects of these conditions on the public health.

SEC. 4. Section 116 of said code is amended and renumbered to read:

213. With the approval of the Department of Finance, and for use in the furtherance of the work of the State Department of Public Health, the director may accept (a) grants of interest in real property, and (b) gifts of money from public agencies or from organizations or associations organized for scientific, educational or charitable purposes. Gifts

SEC. 5. The title of Article 3, Chapter 2, Part 1, Division 1, of said code is amended to read:

Article 3. Child Health

SEC. 5.5. Section 300 of said code is amended to read:

300. The State Department of Public Health shall maintain a program of child health. Child health program

SEC. 6. Section 302 of said code is renumbered and amended to read:

301. The department may investigate, and disseminate educational information relating to, conditions affecting the health of the children of this State. Same· Powers

SEC. 6.1. Section 303 of said code is renumbered and amended to read:

302. This article does not give the department power to force compulsory medical or physical examination of children Same Limitation

SEC. 6.2. Section 304 of said code is renumbered and amended to read:

303. Upon request the department shall advise all public officers, organizations, and agencies interested in the health and welfare of children in the State. Same· Advisory function

SEC. 6.3. The title of Article 5, Chapter 2, Part 1, Division 1, of said code is amended to read:

Article 5. Laboratory

SEC. 7. Section 374 of said code is amended to read:

374. The State Department of Public Health shall maintain a laboratory and such branch laboratories as may be necessary to perform the microbiological, physical and chemical analyses required to meet the responsibilities of the department. Laboratory

SEC. 8. Section 400 of said code is amended to read:

400. The State Department of Public Health shall maintain a program of sanitary engineering. Sanitary engineering

SEC. 9. Article 7, comprising Section 410, is added to Chapter 2 of Part 1 of Division 1 of said code, to read:

Article 7. Epilepsy

Epilepsy reports

410. The State Department of Public Health shall define epilepsy for the purposes of the reports hereinafter referred to:

(1) All physicians shall report immediately to the local health officer in writing, the name, age, and address of every person diagnosed as a case of epilepsy or similar disorders characterized by lapses of consciousness.

(2) The local health officer shall report in writing to the state department the name, age, and address, of every person reported to it as a case of epilepsy.

(3) The state department shall report to the State Department of Motor Vehicles the names, ages, and addresses, of all persons reported as cases of epilepsy by the physicians and local health officers.

(4) Such reports shall be for the information of the State Department of Motor Vehicles in enforcing the provisions of the Vehicle Code of California, and shall be kept confidential and used solely for the purpose of determining the eligibility of any person to operate a motor vehicle on the highways of this State.

SEC. 10. Section 450 of said code is amended to read:

County health ordinances, etc.

450 The board of supervisors of each county shall take such measures as may be necessary to preserve and protect the public health in the unincorporated territory of the county, including, if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws, and provide for the payment of all expenses incurred in enforcing them.

SEC. 11. Section 500 of said code is amended to read:

City ordinances, etc.

500. The governing body of a city shall take such measures as may be necessary to preserve and protect the public health, including the regulation of sanitary matters in the city, and including if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws.

SEC. 12. Section 502 of said code is amended to read:

Health officer

502. Every governing body of a city shall appoint a health officer, except when the city has made other arrangements, as specified in this code, for the county or district health officer to exercise the same powers and duties within the city, as are conferred upon health officers thereof by law.

SEC. 13. Section 212 of said code is amended and renumbered to read:

Safety and sanitation standards

1422. Notwithstanding the provisions of Section 1415 of this code, with the exception of subdivision (c) thereof, the state department shall prescribe, promulgate and enforce minimum standards of safety and sanitation in the physical plant, and of diagnostic, therapeutic and laboratory facilities for public medical institutions, other than federal medical institutions, University of California hospitals, and clinics, and other than institutions for mental disease, and all of such public medical institutions shall be subject to the provisions of Chapter 2 of Division 2 of the Health and Safety Code.

This section shall be operative only during such times as the Federal Social Security Act and the rules of the Department of Health, Education and Welfare promulgated thereunder require that such standards shall be established and maintained in order for this State to receive reimbursement from the Federal Government for public assistance payments made to or in behalf of patients in public medical institutions.

SEC. 14. Section 1602 of said code is amended to read:

Biologics. Distributors

1602. No person shall distribute biologics produced other than:

(a) In a laboratory licensed by the United States Department of Health, Education and Welfare, Public Health Service.

(b) In a laboratory licensed by the United States Department of Agriculture, Agricultural Research Service, Animal Inspection and Quarantine Branch.

(c) Under the provisions of this chapter.

SEC. 15. Section 1603 of said code is amended to read:

Same. Storage, etc

1603. The state department shall make rules and regulations governing the storage and transportation of all biologics by whomsoever produced and governing the production, standards of potency and truthful advertising of all biologics except those produced under license from any of the following:

(a) United States Department of Health, Education and Welfare, Public Health Service.

(b) United States Department of Agriculture, Agricultural Research Service, Animal Inspection and Quarantine Branch.

SEC. 16. Section 1605 of said code is amended to read:

Same Licensing

1605. No person shall engage in the business of preparing biologics in this State, except under a license issued by the state department or the United States Department of Health, Education and Welfare, Public Health Service or the United States Department of Agriculture, Agricultural Research Service, Animal Inspection and Quarantine Branch.

SEC. 17. Section 1622 of said code is amended to read:

Exceptions

1622. Nothing in this chapter shall be considered to be in conflict with Division 21, Chapter 2, of this code and all provisions of Division 21, Chapter 2, shall apply to biologics within the meaning of this chapter, except that the provisions of such chapter of such division shall not apply to products of:

(a) A laboratory licensed by the United States Department of Health, Education and Welfare, Public Health Service.

(b) A laboratory licensed by the United States Department of Agriculture, Agricultural Research Service, Animal Inspection and Quarantine Branch.

SEC. 18. Chapter 6, consisting of Sections 1685 and 1686, is added to Division 2 of said code, to read:

CHAPTER 6. AUDIOMETRISTS

Employment by city, etc.

1685. The governing body of a city, county, city and county or school district may employ one or more school audiometrists, each of whom shall be registered with the State Board of Public Health and possess such qualifications as

may at the date of registration be prescribed by the said state board.

The school audiometrist shall give audiometric tests with instruments meeting the standards established by the American Standards Association. Subject to Section 16483 of the Education Code, such tests may be administered to school and preschool children in school buildings and other places as are or may be used by schools for otologic examinations, and in official public health otological diagnostic clinics.

Registration. Certificates

1686. The State Board of Public Health shall, subject to the provisions of Section 1685, issue certificates of registration to school audiometrists. The said state board shall prescribe such qualifications as may be necessary for the testing of the hearing of school children.

Candidates for registration who present evidence of satisfactory experience of at least two years in the testing of hearing of school children in public or parochial schools or other tax maintained institutions of this State, or who present evidence of having satisfactorily completed a course in audiometry in a recognized university, college or institute in this State, may be issued certificates of registration without further examination.

The said state board shall require a registration fee not to exceed three dollars ($3).

SEC. 19. The title of Division 3 of said code is amended to read:

DIVISION 3. PEST ABATEMENT

SEC. 20. Division 4, comprising Sections 3000 to 3355, inclusive, is added to said code, to read:

DIVISION 4. COMMUNICABLE DISEASE PREVENTION AND CONTROL

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

"Health officer"

3000. "Health officer," as used in this division, includes county, city, and district health officers, and city and district health boards, but does not include advisory health boards.

"Venereal diseases"

3001. As used in this division, "venereal diseases" means syphilis, gonorrhea, chancroid, lymphopathia venereum, and granuloma inguinale.

CHAPTER 2. FUNCTIONS OF STATE DEPARTMENT

Quarantine Places

3050. The state department may establish and maintain places of quarantine or isolation.

Same Persons, etc.

3051. The state department may quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, other property, places, cities, or localities, whenever in its judgment such action is necessary to protect or preserve the public health.

Destruction of contaminated objects, animals, etc

3052. The state department may destroy such objects as bedding, carpets, household goods, furnishings, materials, clothing, or animals, when ordinary means of disinfection are considered unsafe, and when the property is in its judgment, an imminent menace to the public health.

Investigation

3053. Upon being informed by a health officer of any contagious, infectious, or communicable disease the state department may take such measures as are necessary to ascertain the nature of the disease and prevent its spread. To that end, the state department may, if it considers it proper, take possession or control of the body of any living person, or the corpse of any deceased person.

Chapter 3. Functions of Health Officers

Prevention of epidemic or recurrence

3110. Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the Board of Public Health, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his jurisdiction, shall take such measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.

Orders, etc., of state department

3111. Each health officer shall enforce all orders, rules, and regulations concerning quarantine or isolation prescribed or directed by the state department.

Quarantine Places

3112. Each health officer, whenever required by the state department, shall establish and maintain places of quarantine or isolation that shall be subject to the special directions of the state department.

Limitation

3113. No quarantine shall be established by a county or city against another county or city without the written consent of the state department.

State department directives

3114. Whenever in the judgment of the state department it is necessary for the protection or preservation of the public health, each health officer shall, when directed by the state department, do the following:

(a) Quarantine or isolate and disinfect persons, animals, houses or rooms, in accordance with general and specific instructions of the state department.

(b) Destroy bedding, carpets, household goods, furnishings, materials, clothing, or animals, when ordinary means of disinfection are considered unsafe, and when the property is, in the judgment of the state department, an imminent menace to the public health.

When the property is destroyed pursuant to this section, the governing body of the locality in which the destruction occurs may make adequate provision for compensation in proper cases for those injured thereby.

Strict isolation, etc

3115. Upon receiving information of the existence of contagious, infectious, or communicable disease for which the state department may from time to time declare the need for strict isolation or quarantine, each health officer shall:

(a) Insure the adequate isolation of each case, and appropriate quarantine of the contacts and premises

(b) Follow local rules and regulations, and all general and special rules, regulations, and orders of the state department, in carrying out the quarantine or isolation.

3116. When quarantine or strict isolation is established by a health officer, all persons shall obey his rules, orders, and regulations.

Persons

3117. A person subject to quarantine or strict isolation, residing or in a quarantined building, house, structure, or other shelter, shall not go beyond the lot upon which the building, house, structure, or other shelter is situated, nor put himself in immediate communication with any person not subject to quarantine, other than the physician, the health officer or persons authorized by the health officer.

Schools

3118. No instructor, teacher, pupil, or child who resides where any contagious, infectious, or communicable disease exists or has recently existed, which is subject to strict isolation or quarantine of contacts, shall be permitted by any superintendent, principal, or teacher of any college, seminary, or public or private school to attend the college, seminary, or school, except by the written permission of the health officer.

Raising of quarantine

3119. No quarantine shall be raised until every exposed room, together with all personal property in the room, has been adequately treated, or, if necessary, destroyed, under the direction of the health officer; and until all persons having been under strict isolation are considered noninfectious.

Diseases transmitted by milk, dairies, etc.

3120. When there occurs in the household of any dairy worker, milkman, milk dealer, milk distributor, creamery worker, or pasteurizing plant operator, a case or a suspected case of diphtheria, salmonellosis, shigellosis (dysentery), typhoid fever, streptococcal infection, or any other disease known to be or suspected of being transmitted by milk, the sale or distribution of milk from those premises shall be prohibited unless written authorization for its sale or distribution is given by the health officer.

A case or suspected case of any disease known to be transmitted by milk which occurs in the household of any of the above-mentioned persons, shall be reported immediately to the health officer.

Reports Epidemic

3121. In the case of a local epidemic of disease, the health officer shall report at such times as are requested by the state department all facts concerning the disease, and the measures taken to abate and prevent its spread.

Diseases

3122. Each health officer shall immediately report by telegraph or telephone to the state department every discovered or known case or suspect case of those diseases designated for immediate reporting by the state department. Within 24 hours after investigation each health officer shall make such reports as the state department may require.

Quarantine, etc State department rules

3123. The state department may establish a list of reportable diseases and this list may be changed at any time by the

state department. Those diseases listed as reportable shall be properly reported as required to the state department by the health officer.

The state department may from time to time adopt and enforce rules and regulations requiring isolation (strict or modified) or quarantine for any of the contagious, infectious, or communicable diseases if in the opinion of the state department such action is necessary for the protection of the public health.

The health officer may require isolation (strict or modified) or quarantine for any case of contagious, infectious, or communicable disease when such action is necessary for the protection of the public health.

Reports Health officer

3124. Each health officer, other than a county health officer, in the county shall transmit to the county health officer at least weekly in writing a report showing the number and character of infectious, contagious, or communicable diseases reported, and their location.

Physician, etc

3125. All physicians, nurses, clergymen, attendants, owners, proprietors, managers, employees, and persons living, or visiting any sick person, in any hotel, lodginghouse, house, building, office, structure, or other place where any person is ill of any infectious, contagious, or communicable disease, shall promptly report that fact to the health officer, together with the name of the person, if known, the place where he is confined, and the nature of the disease, if known.

CHAPTER 4. VENEREAL DISEASE

Article 1. Prevention and Control

Program

3180. The state department shall develop and review plans and provide leadership and consultation for, and participate in, a program for the prevention and control of venereal disease.

Department cooperation with physicians, etc

3181. The state department shall cooperate in the prevention, control, and cure of venereal diseases with physicians and surgeons; medical schools: public and private hospitals, dispensaries, and clinics; public and private school, college and university authorities; penal and charitable institutions; reform and industrial schools; detention homes; federal, state, local and district health officers, and boards of health, and all other health authorities; institutions caring for the mentally ill; and with any other persons, institutions, or agencies.

Investigations, etc

3182. The state department shall investigate conditions affecting the prevention and control of venereal diseases and approved procedures for such prevention and control, and shall disseminate educational information relative thereto.

Education and publicity

3183. The state department shall conduct such educational and publicity work as it may deem necessary; and, from time to time, shall cause to be issued, free of charge, copies of such rules and regulations, pamphlets, and other literature as it deems reasonably necessary.

Clinics, etc. 3184. The state department may establish, maintain, and subsidize clinics, dispensaries, and prophylactic stations for the diagnosis, treatment, and prevention of venereal diseases, and may provide medical, advisory, financial, or other assistance to such clinics, dispensaries, and stations as may be approved by it. No clinic, dispensary, or prophylactic station shall be approved unless it meets the requirements of the board and complies with its rules and regulations.

Rural counties and cities 3185. The state department may furnish treatment for a case or for a group of cases in rural counties or cities upon the recommendation of the local health officer if adequate facilities for such treatment are not available in the county or city.

Acute cases 3186. Any state agency conducting a public hospital shall admit acute venereal disease cases, when, in the opinion of the state department or the local health officer having jurisdiction, persons infected with venereal disease may be a menace to public health.

Physician to submit specimen 3187. The state department may require any physician in attendance on a person infected or suspected of being infected with a venereal disease infection to submit such specimens as may be designated for examination, when in its opinion such procedure is reasonably necessary to carry out the provisions and purposes of this article.

Place of examinations 3188. The examination may be made in the state laboratory or in a local public health laboratory designated by the state department or in a clinical laboratory which is under the immediate supervision and direction of a clinical laboratory technologist or a licensed physician and surgeon

Additional examination 3189. Nothing in this article limits any person's freedom to have additional examinations made elsewhere than specified in this article.

Diseased persons information 3190. Every diseased person shall give all information required by this article, including the name and address of any person from whom the disease may have been contracted and to whom the disease may have been transmitted.

Periodic examination 3191. Every diseased person shall from time to time submit to approved examinations to determine the condition of the disease.

Control measures 3192. If any person subject to proper venereal disease control measures discontinues any control procedure required by this article, the agency administering the procedure prior to such discontinuance shall make reasonable efforts to determine whether such person is continuing to comply with the procedure elsewhere.

Report of cases failing to comply 3193. If it appears reasonably likely that such person is not complying with such procedure elsewhere, the agency which was administering the procedure prior to the discontinuance shall make all reasonable efforts to induce such person to comply; and if it thereafter appears reasonably likely that he has failed to comply, shall report his name and address to

the local health officer or board of health, or to the state department where there is no such local health officer or board.

Local health officers

3194. It is the duty of the local health officers to use every available means to ascertain the existence of cases of infectious venereal diseases within their respective jurisdictions, to investigate all cases that are not, or probably are not, subject to proper control measures approved by the board, to ascertain so far as possible all sources of infection, and to take all measures reasonably necessary to prevent the transmission of infection.

Inspection and quarantine

3195. Local health officers may inspect and quarantine any place or person when such procedure is necessary to enforce the rules and regulations of the board or the state department.

Prosecution by district attorney

3196 It is the duty of the district attorney of the county in which a violation of this article may occur to prosecute the person accused of the violation.

Competent testimony

3197. In any prosecution for a violation of any provision of this article, or any rule or regulation of the board made pursuant to this article, or in any quarantine proceeding authorized by this article, or in any habeas corpus or other proceeding in which the legality of such quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom such prosecution or other proceeding was instituted, and the provisions of subsections 1 and 4 of Section 1881 of the Code of Civil Procedure shall not be applicable to or in any such prosecution or proceeding.

Violations Misdemeanor

3198. Any person who refuses to give any information to make any report, to comply with any proper control measure or examination, or to perform any other duty or act required by this article, or who violates any provision of this article or any rule or regulation of the state board issued pursuant to this article, or who exposes any person to or infects any person with any venereal disease; or any person infected with a venereal disease in an infectious state who knows of such condition and who marries or has sexual intercourse, is guilty of a misdemeanor.

Exception

3199. Nothing in this article shall be construed to interfere with the freedom of any adherent of teachings of any well-recognized religious sect, denomination, or organization to depend exclusively upon prayer for healing in accordance with the teachings of such religious sect, denomination, or organization. Any such person, along with any person treating him, shall be exempt from all provisions of this article regarding venereal diseases, except that the provisions of this code and the rules and regulations of the board regarding compulsory reporting of communicable diseases and the quarantine of such diseases, and regarding callings in which a person with venereal disease may not engage, shall apply.

Article 2. Prenatal Syphilitic Tests

"Approved laboratory"

3220. "Approved laboratory" as used in this article means a laboratory approved by the state department, or any other laboratory the director of which is licensed by the state department according to law.

"Standard laboratory blood test"

3221. "Standard laboratory blood test" as used in this article means a test for syphilis approved by the state department.

Blood specimen

3222. Every licensed physician and surgeon or other person engaged in prenatal care of a pregnant woman, or attending such woman at the time of delivery, shall obtain or cause to be obtained a blood specimen of such woman at the time of the first professional visit or within 10 days thereafter.

Submission for test

3223. The blood specimen thus obtained shall be submitted to an approved laboratory for a standard laboratory test for syphilis.

Designation of specimen

3224. In submitting a specimen to a laboratory the physician shall designate it as a prenatal test or a test following recent delivery.

Report form

3225. The state department shall issue a "prenatal test laboratory report form" to be distributed upon application to all laboratories approved to do tests required by this article.

Same: Triplicate copies

3226. Any laboratory doing a test required by this article shall prepare the report in triplicate.

The original shall be transmitted by the laboratory doing the test to the physician submitting the specimen.

The duplicate shall be forwarded at weekly intervals to the state department.

The triplicate shall be retained by the laboratory in its file, and shall be open at any time for inspection by an authorized representative of the state department.

Reports confidential

3227 All laboratory reports are confidential, and are not open to public inspection.

Accuracy of test

3228. In case of question concerning the accuracy of a test required by this article, it is mandatory upon the state department to accept specimens for checking purposes from any district in the State.

Violation Misdemeanor

3229. Any licensed physician and surgeon, or other person engaged in attendance upon a pregnant woman or a recently delivered woman, or any representative of a laboratory who violates any provision of this article, is guilty of a misdemeanor. However, a licensed physician and surgeon, or other person engaged in attendance upon a pregnant or recently delivered woman, whose request for a specimen is refused, is not guilty of a misdemeanor for failure to obtain it.

CHAPTER 5. TUBERCULOSIS

Program

3279. The department shall maintain a program for the control of tuberculosis and shall administer the funds made available by the State for the care of tuberculosis patients.

Pulmonary tuberculosis: Proper expenses

3280. Pulmonary tuberculosis is an infectious and communicable disease, dangerous to the public health, and all proper expenditures that may be made by any county, pursuant to this chapter, are necessary for the preservation of the public health of the county.

Health officer

3285. Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction and to ascertain the sources of such infections. In carrying out such investigations, each health officer is hereby invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed:

(a) To make such examinations as are deemed necessary of persons reasonably suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of the public health.

(b) Follow local rules and regulations, and all general and special rules, regulations, and orders of the state department in carrying out such quarantine or isolation.

(c) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be isolated, the period of time during which the order shall remain effective, the place of isolation or quarantine, and such other terms and conditions as may be necessary to protect the public health.

(d) Upon the making of an isolation or quarantine order as provided in this section, a copy of such order shall be served upon the person named in such order.

(e) Upon the receipt of information that any quarantine or isolation order, made and served as herein provided, has been violated, the health officer shall advise the district attorney of the county in which such violation has occurred, in writing, and shall submit to such district attorney the information in his possession relating to the subject matter of such isolation or quarantine order, and of such violation or violations thereof.

Exception

3286. No examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination or organization and claims exemption on such ground, except that the provisions of this code regarding compulsory reporting of communicable diseases and isolation and quarantine shall apply where there is probable cause to suspect that such person is infected with the disease in a communicable stage. Such person shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he can be safely

quarantined and/or isolated in his own home or other suitable place of his choice.

Records

3287. The department may inspect and have access to all records of all institutions and clinics, both public and private, where tuberculosis patients are treated.

Advice

3288. The department may advise officers of state educational, correctional, and medical institutions regarding the control of tuberculosis and the care of tuberculosis patients.

Subsidy

3294. Each city, county, or group of counties may establish and maintain a tuberculosis ward, hospital, or sanatorium for the treatment of persons suffering from tuberculosis. Each city or county that establishes and maintains a tuberculosis ward, hospital, or sanatorium shall receive from the State the sum provided in Section 3300, and each county that participates jointly with one or more other counties in the establishment and maintenance of a tuberculosis ward, hospital, or sanatorium shall receive from the State the sum specified in Section 3300, for persons suffering from tuberculosis, cared for therein at public expense, who are unable to pay for their support and who have no relatives legally liable and financially able to pay for their support; except that the city or county is not entitled to receive this state aid unless the tuberculosis ward, hospital, or sanatorium conforms to the regulations of and is approved by the state department.

Pay patients

The hospitals shall be allowed to receive pay patients.

Leased facilities for violation of order

3295. The state department shall lease any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer as provided in Section 3351 of the Health and Safety Code. The county referring such person for such care shall not be eligible to receive subsidy for such person under the provisions of this chapter, and the State shall deduct from the subsidy payments to be made to such county an amount computed at the rate of three dollars ($3) for each patient-day the person is cared for in such facility.

Burial expenses

3296. Whenever any person confined in any state institution, as provided in Section 3351 of this code, subject to the jurisdiction of the Director of Corrections, dies, and any personal funds or personal property of such person remains in the hands of the Director of Corrections, such funds may be applied in an amount not exceeding three hundred dollars ($300) to the payment of expenses relating to burial; provided, however, that if no such funds are available, the State Department of Public Health shall reimburse the Director of Corrections for such expenses in an amount not exceeding three hundred dollars ($300).

Release

3297. If the place of confinement of a person confined under the provisions of Section 3351 is in a county other than the county in which he was convicted, upon release he shall be released in the custody of the sheriff of the county in which he was convicted, and the sheriff shall forthwith return him to the place where he was convicted. The sheriff shall prior to the

return of the person notify the health officer having jurisdiction of the area to which he will be returned of the date he will reach said area.

State aid for city or county

3298. Each city or county shall receive from the State the sum provided in Section 3300 of this code for each person suffering from tuberculosis, cared for at public expense in private hospitals or sanatoriums under contract with the city or county or who is unable to pay for his support and who has no relative legally liable and financially able to pay for his support; except that the city or county is not entitled to receive this state aid unless the tuberculosis ward, hospital or sanatorium conforms to the regulations of and is approved by the state department.

The hospitals and sanatoriums shall be allowed to receive pay patients.

Subsidy report

3299. The medical superintendent of each hospital for which state aid is received under this chapter shall render semiannually to the state department a report under oath showing, for the period covered by the report:

(a) The number of patients suffering from tuberculosis cared for at public expense, and unable to pay for care.

(b) The number of days of treatment of each such patient.

In the case of hospitals, wards, or sanatoriums operated jointly by two or more counties, the patients whose admission and care have been authorized by each county shall be reported separately.

Patient exchange

With the consent of the respective cities, counties, or groups of counties, an exchange of patients may be arranged without expense to the county except for transportation when the exchange seems necessary or desirable to assist in the patients' recovery.

County contract

Counties may contract for the care and treatment of tuberculosis patients through their boards of supervisors, after consultation with the state department, with cities, counties, or groups of counties, who maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis, which conforms to the regulations of, and is approved by, the state department, and may receive from the State the tuberculosis subsidy provided by Section 3300.

Amount of subsidy

3300. The amount of the tuberculosis subsidy provided by the State to cities or counties separately providing care under this chapter for persons suffering from tuberculosis and the amount of the tuberculosis subsidy provided by the State to each county participating jointly with one or more other counties in the establishment and maintenance of a tuberculosis ward, hospital or sanatorium shall be based upon the patient days of care provided to persons whose admission and care have been authorized by that county, as follows:

(a) For the first thirty-six thousand five hundred (36,500) patient days of care during a year, the amount shall be two dollars and sixty cents ($2.60) per patient day.

(b) For the second thirty-six thousand five hundred (36,500) patient days of care during a year, the amount shall be two dollars and thirty cents ($2.30) per patient day.

(c) For all patient days of care in excess of seventy-three thousand (73,000) patient days during a year, the amount shall be one dollar and seventy-five cents ($1.75) per patient day.

(d) In addition to the amounts specified in subsections (a), (b) and (c), there shall be provided any additional amounts specified in any appropriation made therefor.

"Patient day"

As used in this section "patient day" means the period of in-patient service rendered a patient between the census taking hours on two consecutive days, and "a year" means a period of 12 months commencing on the first day of July.

Legislative intent

3301. It is the intention of the Legislature to adjust from time to time state participation in the care of persons suffering from tuberculosis in accordance with changes in the cost of caring for such patients.

Hospital central committee

3302. Each group of counties desiring to establish and maintain a tuberculosis ward or hospital for the treatment of persons suffering from tuberculosis shall appoint, by its board of supervisors, one supervisor as a delegate, who shall attend the general meetings of the delegates of each county in the group. The necessary expense incurred in attending such meetings is a county charge. The body thus formed shall be called the hospital central committee.

Delegates

3303. Each group of counties maintaining a tuberculosis hospital under this chapter may by unanimous agreement provide for a different number of delegates to the hospital central committee than the number provided for in this chapter and may provide for a method of deciding a tie vote of the hospital central committee.

Depository

3304. The hospital central committee shall designate a county within the group maintaining the hospital as the place where the business of the hospital is to be transacted and where funds of the hospital are to be kept and deposited. All county officers selected for the business of the hospital shall render all necessary assistance required by the committee in keeping with the duties of their respective offices.

Cost

3305. The delegates from each county may enter into an agreement with delegates from the other counties, on behalf of the county appointing them, binding the county to the joint enterprise and apportioning the cost of constructing, establishing, and maintaining the hospital. Money due from any county under the agreement may be collected by the hospital central committee or, on its behalf, by the board of supervisors of any county in the group, by action in the county in which the hospital is situated.

Building committee

3306. The hospital central committee may appoint a committee to supervise the construction of the hospital, approve the bills, and do the usual things required of a building committee.

Powers of hospital central committee

The hospital central committee is the governing body of the hospital. It has the same powers and duties in regard to the hospital that a board of supervisors has over a county hospital. It shall adopt rules for its government, which shall include provisions for holding meetings and for the addition of other counties to the group. It may appoint such committees as are necessary, and shall prescribe their duties.

Land

3307. Any land required may be acquired or disposed of by the hospital central committee in such manner as may be determined by a three-fourths vote of its members, if all counties comprising a group shall have had notice of the intention to acquire or dispose of the land. Title to land may be held in the name of the entire group or in the name of any county composing the group, as trustee for the use and benefit of all, as may be determined by the hospital central committee.

Expenses

3308. Each county in the group shall pay its proportionate share to the hospital central committee of an amount designated by the committee to constitute a cash revolving fund to carry on the usual work and expense of the hospital. Each month a statement of the expenses of the hospital shall be sent to the board of supervisors of each county, together with a claim for its proportionate share of the expenses. The amounts when collected shall be paid into the cash revolving fund.

Admission of patients

3309. The hospital central committee may determine and pass upon the right of admission to the hospital of applicants, subject to the limitations of this chapter.

CHAPTER 6. VIOLATIONS

Violation Misdemeanor

3350. Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the state department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor.

Violation of order Confinement and probation

3351. Any person who, after service upon him of an order of a health officer directing his isolation as provided in Section 3285, violates or fails to comply with the same or any provision thereof, is guilty of a misdemeanor, and, upon conviction thereof, in addition to any and all other penalties which may be imposed by law upon such conviction, may be ordered by the court confined until such order of such health officer shall have been fully complied with or terminated by such health officer, but not exceeding six months from the date of passing judgment upon such conviction; further provided, that the court, upon suitable assurances that such order of such health officer will be complied with, may place any person convicted of a violation of such order of such health officer upon probation for a period not to exceed two years, upon condition that the said order of said health officer be fully complied with; and provided further, that upon any subsequent violation of such order of such health officer, such probation shall be terminated and confinement as herein provided ordered by the court.

Subsequent conviction

3352. Upon any subsequent conviction under the provisions of Section 3351, the court may order the person confined for a period not exceeding one year for such subsequent conviction, or such other penalty as provided by said section.

Exposure: Misdemeanor

3353. Except in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who wilfully exposes himself, and any person who wilfully exposes another person afflicted with such disease, is guilty of a misdemeanor.

Violation: Communicable or infectious disease

3354. Any person who violates any section in Chapter 3 of this division, with the exception of Section 3111, is guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars ($25) nor more than five hundred dollars ($500), or by imprisonment for a term of not more than 90 days, or by both. He is guilty of a separate offense for each day that the violation continued.

Prosecution by district attorney

3355. The district attorney of the county in which a violation of Sections 3285 and 3351 may be committed, shall prosecute all such violations and, upon the request of a health officer, shall prosecute, as provided in Section 3351, violations of any isolation order of a health officer made and served as provided in Section 3285.

SEC. 21. Section 3701 of said code is amended to read:

Drinking cups: "Common use"

3701. For the purposes of this chapter the term "common use" when applied to a drinking receptacle is defined as its use for drinking purposes by, or for, more than one person without its being thoroughly cleansed and sterilized between consecutive uses thereof by methods prescribed by or acceptable to the State Department of Public Health.

Sterilization

SEC. 22. Section 3702 of said code is amended to read:

Water containers

3702. No cask, water cooler, or other receptacle shall be used for storing or supplying drinking water to the public or to employees unless it is covered and protected so as to prevent persons from dipping the water therefrom or contaminating the water. All such containers shall be provided with a faucet or other suitable device for drawing the water.

SEC. 23. Section 3801 of said code is amended to read:

Towel "Common use"

3801. For the purpose of this chapter the term "common use" when applied to a towel means its use by, or for, more than one person without its being laundered between consecutive uses of such towel by methods prescribed by or acceptable to the State Department of Public Health.

SEC. 24. Section 3901 of said code is amended to read:

Wiping rags

3901. No person shall supply or furnish to his employees for wiping rags, or sell or offer for sale for wiping rags, any soiled wearing apparel, underclothing, bedding, or parts of soiled or used underclothing, wearing apparel, bedclothes, bedding, or soiled rags or cloths unless they have been sterilized by methods prescribed by or acceptable to the State Department of Public Health.

SEC. 5. Section 986.10 of said code is amended to read:

986.10. For the purposes of this article any veteran who is under the age of 21 shall be deemed to be of the age of majority and to be an adult person for the purpose of entering into any contract for the purchase of a farm or home from the department or any other contract with respect to such property.

SEC. 6. Section 987.01 of said code is amended to read:

987.01. The provisions of Section 987, relative to the rate of interest to be charged to veteran purchasers do not apply to assignees of such purchasers who are not veterans, but as to such assignees the rate of interest shall be as fixed by the department, compounded at periods fixed by the department.

The action of the department in refusing to permit any assignments except as provided in this section is hereby ratified and confirmed, it having at all times been the intent of the Legislature that Section 987 apply to veteran purchasers only.

CHAPTER 278

An act to maintain the Health and Safety Code by amending Sections 3300.1, 3355, 4704, 9302, 13713, 14011, 14405, 14603, 18897, 24368.4, and 26472, by amending and renumbering the second Section 33070 added by Chapter 2116 of the 1961 Statutes, and by repealing Article 15 (commencing with Section 24376.40) of former Chapter 2.6, Division 20, relating to health and safety.

[Approved by Governor May 7, 1963. Filed with Secretary of State May 7, 1963.]

The people of the State of California do enact as follows:

SECTION 1. Section 3300.1 of the Health and Safety Code is amended to read:

3300.1. A city or county receiving contributions from or on behalf of any person for whom subsidy has been or is claimed under Section 3300 shall use the total amount of all such contributions as an offset from any state subventions for this purpose in the following manner:

The total number of patient-days for which subsidy is paid by the State in each fiscal year shall be reduced by the number resulting from division of the total amount of contributions received from or on behalf of tuberculosis patients during each fiscal year, by the per diem cost; such per diem cost to be determined in accordance with Section 1473; or by the contract cost with another public agency or private hospital. This method shall apply to the total of all contributions received by cities or counties on and after July 1, 1961.

SEC. 2. Section 3355 of said code is amended to read:

3355. The district attorney of the county in which a violation of Sections 3285 and 3351 may be committed, shall prosecute all such violations and, upon the request of a health officer, shall prosecute, as provided in Section 3351, violations of any isolation or examination order of a health officer made and served as provided in Section 3285 or Section 3002.

SEC. 3. Section 4704 of said code is amended to read:

4704. Districts formed or proposed to be formed under this chapter are not subject to the "District Investigation Act of 1933" (commencing with Section 58500 of the Government Code.).

SEC. 4. Section 9302 of said code is amended to read:

9302. The proceeding shall be commenced by the filing of a verified petition with the clerk of the superior court.

The petition shall identify the plot which the cemetery district desires to have declared abandoned; state that the plot has not been used for the interment of human remains, that the present owner of the plot is unknown to the cemetery district, and that a period of at least 50 years has passed since any portion of the plot was used for interment purposes; and request that the court declare the plot abandoned.

SEC. 5. Section 12713 of said code is amended to read:

12713. The State Fire Marshal, and his deputies or salaried assistants, the chief of any city or county fire department or fire protection district, or any of their authorized representatives may remove any vehicle which is used unlawfully to transport fireworks or in which any fireworks are unlawfully kept, deposited or concealed, to the nearest garage or other place of safety or to a garage designated or maintained by the State Fire Marshal.

In the event that the State Fire Marshal, or any of his deputies or salaried assistants, the chief of any city or county fire department or fire protection district, or any of their authorized representatives, removes any such vehicle, he shall give the notices required of officers under Article 3 (commencing with Section 22850), Chapter 10, Division 11 of the Vehicle Code, and the keeper of any garage in which any such vehicle is stored may have a lien thereon for his compensation for towage and for caring for and keeping safe such vehicle and may satisfy such lien upon compliance with and under the conditions stated in Article 3 (commencing with Section 22850), Chapter 10, Division 11 of the Vehicle Code.

SEC. 6. Section 14011 of said code is amended to read:

14011. Districts formed or proposed to be formed under this chapter are not subject to any provisions of the "District Investigation Act of 1933" (commencing with Section 58500 of the Government Code).

SEC. 7. Section 14405 of said code is amended to read:

14405. A district formed or proposed to be formed under this chapter is not subject to any provisions of the "District

Investigation Act of 1933" (commencing with Section 58500 of the Government Code).

SEC. 8. Section 14603 of said code is amended to read:

14603. A district formed or proposed to be formed under this chapter is not subject to any provisions of the "District Investigation Act of 1933" (commencing with Section 58500 of the Government Code).

SEC. 9. Section 18897 of said code is amended to read:

18897. "Organized camp" means a site with program and facilities established for the primary purposes of providing an outdoor group living experience with social, spiritual, educational, or recreational objectives, for five days or more during one or more seasons of the year. The term "organized camp" does not include a motel, tourist camp, trailer park, resort, hunting camp, auto court, labor camp, penal or correctional camp nor does it include a child care institution or home-finding agency. The term "organized camp" also does not include any charitable or recreational organization which complies with the rules and regulations for recreational trailer parks provided for by subdivision (c) of Section 18013.

SEC. 10. Section 24368.4 of said code is amended to read:

24368.4. Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this section, any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the hearing board. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the hearing board and shall be delivered to the petitioner within 30 days after a request therefor by him, upon payment of the fee specified in Section 69950 of the Government Code, as now or hereinafter amended, for the transcript, the cost of preparation of other portions of the record, and for certification thereof. The complete record includes the pleadings, all notices and orders issued by the hearing board, any proposed decision by the hearing board, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case. Where petitioner, within 10 days after the last day on which reconsideration can be ordered, requests the hearing board to prepare all or any part of the record, the time within which a petition may be filed shall be extended until five days after its delivery to him. The hearing board may file with the court the original of any document in the record in lieu of a copy thereof.

SEC. 11. Section 26472 is amended to read:

26472. A food shall be deemed to be adulterated:

(a) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or

(2) If any substance has been substituted wholly or in part therefor; or

(3) If damage or inferiority has been concealed in any manner; or

(4) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is.

(b) If it is confectionery and it bears or contains any alcohol or nonnutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of 1 per centum, harmless natural gum and pectin. This subsection shall not apply to any confectionery by reason of its containing less than one-half of 1 per centum by volume of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.

(c) If it bears or contains a color additive other than one listed or certified by the United States Department of Health, Education, and Welfare, Food and Drug Administration.

(d) If any mineral oil has been added thereto or mixed or packed therewith contrary to the provisions of this chapter.

(e) If it be fresh meat and it contains any chemical substance containing sulphites, sulphur dioxide, benzoic acid, salts of benzoic acid or any other chemical preservative, or any substance which is not approved for use in fresh meat by the United States Department of Agriculture, Agricultural Research Service, or the Division of Animal Industry of the California State Department of Agriculture, or the California State Board of Public Health.

(f) If it be chopped or ground beef, or hamburger containing any substance other than the voluntary striated muscle of fresh beef, except those substances approved by the State Department of Public Health, or if the total fat content (determined by ether extract method of analysis) of chopped or ground beef, or hamburger is in excess of 30 percent.

Nothing in this subdivision shall be deemed to prohibit the use of monosodium glutamate in such chopped or ground beef and hamburger.

(g) Notwithstanding the provisions of Section 26461, nothing in this article shall be deemed to prohibit the use of common salt, sugar (cane or beet), maple sugar, dextrose, invert sugar, honey, corn syrup solids, corn syrup and glucose syrup, wood smoke, a vinegar, pure spices, spice oils, flavorings, saltpeter, nitrate of soda, nitrite of soda and potassium nitrite in meat food products such as sausage, corned, brined or pickled meats, hams, bacon and the like. No such substances shall increase the green or original weight by more than 10 percent of products which are not smoked or cooked, with the exception of fresh uncured beef brisket in which case the finished cured product may exceed the weight of the fresh uncured brisket by 20 percent, nor shall any such substance increase the green or original weight by more than 1 percent

of the green or original weight of products which are cooked or smoked. In the case of meat food products such as sausage, 10 percent added water shall be permitted and allowed in smoked or cooked products of such nature and 3 percent in said products which are not cooked or smoked.

(h) If it be alimentary paste and contains any artificial color derived from coal tar or vegetable substances.

(i) If it contains any saccharine or other nonnutritive sweetening agent contrary to the provisions of this chapter.

(j) If it be pork sausage or breakfast sausage and the total fat content (determined by the ether extract method of analysis) is in excess of 50 percent.

SEC. 12. The second Section 33070 of said code added by Chapter 2116 of the 1961 Statutes is amended and renumbered to read:

33070.5. A redevelopment agency may, in order to facilitate the rehousing of families and single persons who are displaced from their homes in a project area, utilize the aids made available through federal urban renewal, redevelopment and housing legislation and may use funds derived from any public or private source to carry out the purposes of this section.

SEC. 13. Article 15 (commencing with Section 24376.40) of former Chapter 2.6, Division 20, of said code is repealed.

CHAPTER 279

An act to amend Section 36.17 of the San Luis Obispo County Flood Control and Water Conservation District Act (Chapter 1294 of the Statutes of 1945), relating to revenue bonds.

[Approved by Governor May 7, 1963. Filed with Secretary of State May 7, 1963.]

The people of the State of California do enact as follows:

SECTION 1. Section 36.17 of the San Luis Obispo County Flood Control and Water Conservation District Act (Chapter 1294 of the Statutes of 1945) is amended to read:

Sec. 36.17. Notwithstanding any other provision of this act, the district may authorize, issue and sell revenue bonds pursuant to the provisions of Chapter 6 (commencing at Section 54300), Part 1, Division 2, Title 5 of the Government Code to provide funds for the acquisition, construction, improving, or financing any one or more revenue-producing enterprises for any one or more of the purposes for which the district has been formed. "Enterprise" as used in this section means a revenue-producing system, plant, works, or undertaking used for or useful in carrying out any one or more of the purposes of the district. In connection with the

(i) Industrial or agricultural vocations
(j) Fine arts

SEC. 3. Section 7503 of said code is amended to read:

7503. (a) Except as provided in subparagraphs (b) and (c) hereof, all members of the Curriculum Commission shall be appointed for a term of four years commencing March 1.

(b) The term of each person who is a member of the Curriculum Commission on the effective date of the amendment to this section enacted at the 1965 session of the Legislature and the term of each person who, after that date, is appointed to fill any vacancy in the membership of the Curriculum Commission shall terminate on the last day of February, 1969.

(c) To follow the terms that under subsection (b) expire the last day of February 1969, the State Board of Education shall appoint members to the Curriculum Commission whose terms shall commence March 1, 1969; three members for a one-year term; three members for a two-year term; three members for a three-year term; and three members for a four-year term. Thereafter, all members shall be appointed to serve a term of four years.

SEC. 4. Section 7505 of said code is amended to read:

7505. The Superintendent of Public Instruction shall be the chairman of the Curriculum Commission. In his absence, the Chief of the Division of Instruction of the State Department of Education shall be acting chairman.

SEC. 5. Section 7508.5 is added to said code, to read:

7508 5. Whenever an employee of any public school district, state college, or other public agency is appointed to membership on the Curriculum Commission, his employer shall grant him sufficient time away from his regular duties, without loss of income or other benefits to which he is entitled by reason of his employment, to attend meetings of the commission and to attend to the duties imposed upon him by reason of his membership on the commission. The employer of any such member may make available such stenographic, secretarial, and staff assistance as is reasonably necessary to enable him to execute the duties imposed upon him by reason of his membership on the commission.

CHAPTER 1552

An act to amend Sections 3285 and 3351 of the Health and Safety Code, relating to health officers.

[Approved by Governor July 16, 1965. Filed with Secretary of State July 23, 1965]

The people of the State of California do enact as follows:

SECTION 1. Section 3285 of the Health and Safety Code is amended to read:

3285. Each health officer is hereby directed to use every available means to ascertain the existence of, and immediately to investigate, all reported or suspected cases of tuberculosis in the infectious stages within his jurisdiction and to ascertain the sources of such infections. In carrying out such investigations, each health officer is hereby invested with full powers of inspection, examination and quarantine or isolation of all persons known to be infected with tuberculosis in an infectious stage and is hereby directed:

(a) To make such examinations as are deemed necessary of persons reasonably suspected of having tuberculosis in an infectious stage and to isolate or isolate and quarantine such persons, whenever deemed necessary for the protection of the public health.

(b) Follow local rules and regulations regarding examinations, quarantine, or isolation, and all general and special rules, regulations, and orders of the state department in carrying out such examination, quarantine or isolation.

(c) Whenever the health officer shall determine on reasonable grounds that an examination of any person is necessary for the preservation and protection of the public health, he shall make an examination order in writing, setting forth the name of the person to be examined, the time and place of the examination, and such other terms and conditions as may be necessary to protect the public health. Nothing contained in this subdivision shall be construed to prevent any person whom the health officer determines should have an examination for infectious tuberculosis from having such an examination made by a physician of his own choice who is licensed to practice medicine under the provisions of Chapter 5 (commencing with Section 2000), Division 2 of the Business and Professions Code under such terms and conditions as the health officer shall determine on reasonable grounds to be necessary to protect the public health.

(d) Whenever the health officer shall determine that quarantine or isolation in a particular case is necessary for the preservation and protection of the public health, he shall make an isolation or quarantine order in writing, setting forth the name of the person to be isolated, the period of time during which the order shall remain effective, the place of isolation or quarantine, and such other terms and conditions as may be necessary to protect the public health.

(e) Upon the making of an examination, isolation, or quarantine order as provided in this section, a copy of such order shall be served upon the person named in such order.

(f) Upon the receipt of information that any examination, quarantine, or isolation order, made and served as herein provided, has been violated, the health officer shall advise the district attorney of the county in which such violation has occurred, in writing, and shall submit to such district attorney the information in his possession relating to the subject matter

of such examination, isolation, or quarantine order, and of such violation or violations thereof.

(g) Any and all orders authorized under this section shall be made by the health officer and his authority to make such orders shall be delegated only pursuant to Section 7. The health officer shall not make any orders incorporating by reference any other rules or regulations.

SEC. 2. Section 3351 of said code is amended to read:

3351. Inasmuch as the order provided for by Section 3285 is for the protection of the public health, any person who, after service upon him of an order of a health officer directing his isolation or examination as provided in Section 3285, violates or fails to comply with the same or any provision thereof, is guilty of a misdemeanor, and, upon conviction thereof, in addition to any and all other penalties which may be imposed by law upon such conviction, may be ordered by the court confined until such order of such health officer shall have been fully complied with or terminated by such health officer, but not exceeding six months from the date of passing judgment upon such conviction; further provided, that the court, upon suitable assurances that such order of such health officer will be complied with, may place any person convicted of a violation of such order of such health officer upon probation for a period not to exceed two years, upon condition that the said order of said health officer be fully complied with; and provided further, that upon any subsequent violation of such order of such health officer, such probation shall be terminated and confinement as herein provided ordered by the court.

CHAPTER 1553

An act to amend Section 241 of the Penal Code, relating to assault and battery on peace officers.

[Approved by Governor July 16, 1965. Filed with Secretary of State July 23, 1965.]

The people of the State of California do enact as follows:

SECTION 1. Section 241 of the Penal Code is amended to read:

241. An assault is punishable by fine not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both. When it is committed against the person of a peace officer, and the person committing the offense knows or reasonably should know that such victim is a peace officer engaged in the performance of his duties, and such peace officer is engaged in the performance of his duties, the offense shall be punished by imprisonment in the state prison not exceeding two years.

As used in this subdivision, "peace officer" refers to any person designated as a peace officer in the first paragraph of

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 101. Administration of Public Health (Refs & Annos)
Part 3. Local Health Departments (Refs & Annos)
Chapter 1. Organization and Appointment of Health Officers (Refs & Annos)
➡ **§ 101000. County health officer**

Each board of supervisors shall appoint a health officer who is a county officer.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 3.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 451, enacted by Stats.1939, c. 60, § 451, amended by Stats.1939, c. 413, p. 1748.

Political Code § 4225, added by Stats.1907, c. 282, p. 413, § 1, amended by Stats.1909, c. 81, p. 133, § 1; Stats.1935, c. 725, p. 1974, § 1.

CROSS REFERENCES

Approval of garbage dump, see Health and Safety Code § 6512.
City health officer, appointment, see Health and Safety Code § 101460.
Conference of local health officers, see Health and Safety Code § 100925.
County officers, election of, see Elections Code § 1300.
County officers, see Government Code § 24000 et seq.
Employment of dentists and hygienists, see Health and Safety Code § 101135.
Employment of public health nurses, see Health and Safety Code § 101110.
Fees to pay expenses of health officer, see Health and Safety Code § 101325.
Health officer functions, communicable disease prevention and control, see Health and Safety Code § 120175 et seq.
Preventive measures during disaster or emergency, see Health and Safety Code § 101040.

LIBRARY REFERENCES

2006 Main Volume

Health 364.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 9, 11 to 13, 15.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Family Law § 1403, Local Registrar.

CA Jur. 3d Health and Sanitation § 6, Local Health Officers.

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf § 361, in General.

NOTES OF DECISIONS

1. Construction and application

Pol.C. § 4225 which empowered board of supervisors to appoint county health officer who should be employee of county and not county officer applied solely to unchartered counties and was inoperative in chartered counties which, under authority of their charters, had provided for health officer, regardless of particular title given him and regardless of variance in official title given to the office in various enactments. Lesem v. Getty (App. 4 Dist. 1937) 23 Cal.App.2d 57, 72 P.2d 183. Health 364

2. Health officer

The legislature distinguishes between county and city health officers and considers them together under the term "health officer" only when it expressly so provides. 38 Op.Atty.Gen. 41, 8-23-61.

3. Employment contracts

The county may not enter into a contract with the county health officer as such in an independent contractual status to circumvent the bars of Gov.C. §§ 21103, 20060, and no such contract may be drawn to cover that position once retirement has been effected. 26 Op.Atty.Gen. 14, 7-15-55.

4. Dual officeholding

An individual may hold simultaneously the positions of Monterey County Director of Health, Monterey County

Health Officer, Monterey County Local Emergency Medical Services Agency Director, and Monterey County Local Emergency Medical Services Agency Medical Director. 78 Op.Atty.Gen. 352, December 18, 1995.

5. Salary

The salary of the county health officer, who holds his office at the pleasure of the appointive power, can be increased at any time during his tenure of office. 17 Op.Atty.Gen. 143, 4-6-51.

West's Ann. Cal. Health & Safety Code § 101000, CA HLTH & S § 101000

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 101. Administration of Public Health (Refs & Annos)
Part 3. Local Health Departments (Refs & Annos)
Chapter 1. Organization and Appointment of Health Officers (Refs & Annos)
➡ **§ 101005. Qualifications of county health officer; compensation**

The county health officer shall be a graduate of a medical college of good standing and repute. His or her compensation shall be determined by the board of supervisors.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 3.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 454, enacted by Stats.1939, c. 60, § 454, amended by Stats.1943, c. 925, § 1.

Political Code § 4225, added by Stats.1907, c. 282, p. 413, § 1, amended by Stats.1909, c. 81, p. 133, § 1; Stats.1935, c. 725, p. 1974, § 1.

CROSS REFERENCES

Eligibility requirements for county officers, see Government Code § 24001.

CODE OF REGULATIONS REFERENCES

Health officer, see 17 Cal. Code of Regs. §§ 1250, 1300.

LIBRARY REFERENCES

2006 Main Volume

Health 362, 365.
Westlaw Topic No. 198H.

C.J.S. Health and Environment §§ 7 to 9, 14, 44 to 45.

NOTES OF DECISIONS

Salary 1
Separate employment 2

1. Salary

The salary of the county health officer, who holds his office at the pleasure of the appointive power, can be increased at any time during his tenure of office. 17 Op.Atty.Gen. 143, 4-6-51.

2. Separate employment

Director of public health and sanitation of San Diego county was not entitled to fees accruing as result of his performance of duties as local registrar of vital statistics, in addition to salary paid by county, in view of provision of San Diego county charter that all county officers by whom fees are collected for the performance of official duties, "or otherwise," shall pay such fees without deduction into county treasury, as against contentions that his appointment as local registrar by state was to separate office or employment, and that county had no authority to required payment to it of his fees as local registrar. Lesem v. Getty (App. 4 Dist. 1937) 23 Cal.App.2d 57, 72 P.2d 183. Health 365

West's Ann. Cal. Health & Safety Code § 101005, CA HLTH & S § 101005

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 101. Administration of Public Health (Refs & Annos)
Part 3. Local Health Departments (Refs & Annos)
Chapter 4. Additional Administrative Provisions (Refs & Annos)
Article 4. City Health Ordinances, Boards, and Officers (Refs & Annos)

➡ § 101460. Health officer; appointment

Every governing body of a city shall appoint a health officer, except when the city has made other arrangements, as specified in this code, for the county to exercise the same powers and duties within the city, as are conferred upon city health officers by law.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 3. Amended by Stats.1996, c. 1023 (S.B.1497), § 303.2, eff. Sept. 29, 1996.)

HISTORICAL AND STATUTORY NOTES

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Legislative findings, declaration and intent relating to Stats.1996, c. 1023 (S.B.1497), see Historical and Statutory Notes under Business and Professions Code § 690.

Subordination of legislation by Stats.1996, c. 1023 (S.B.1497), see Historical and Statutory Notes under Business and Professions Code § 690.

Derivation

Former § 502, enacted by Stats.1939, c. 60, § 500, amended by Stats.1957, c. 205, § 12.

Political Code § 3061, amended by Code Am.1877-78, c. 275, p. 59, § 1; Stats.1917, c. 123, p. 172, § 3.

CROSS REFERENCES

Communicable disease prevention and control, see Health and Safety Code § 120100 et seq.
Conference of local health officers, see Health and Safety Code § 100925.
Employment of dentists and hygienists, see Health and Safety Code § 101125.
Employment of public health nurses, see Health and Safety Code § 101100.
Enforcement duties of county health officer in a city, see Health and Safety Code § 101375.

Fees to pay expenses of health officer, see Health and Safety Code § 101325.

LIBRARY REFERENCES

2006 Main Volume

Health 364.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 9, 11 to 13, 15.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Health and Sanitation § 6, Local Health Officers.

NOTES OF DECISIONS

Contract with county 2
Health officers 1

1. Health officers

The legislature distinguishes between county and city health officers and considers them together under the term "health officer" only when it expressly so provides. 38 Op.Atty.Gen. 41, 8-23-61.

2. Contract with county

Contract under which powers and duties relative to enforcement of state health laws within city, as previously transferred to county health officer per statutory authorization, would again be performed by city health officer but under supervision and control of county health officer and at county's expense was valid and binding on city and county. City of Pasadena v. Los Angeles County (App. 2 Dist. 1965) 45 Cal.Rptr. 94, 235 Cal.App.2d 153. Counties 122(1); Municipal Corporations 244(1)

West's Ann. Cal. Health & Safety Code § 101460, CA HLTH & S § 101460

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 1. Administration of Communicable Disease Prevention and Control (Refs & Annos)
Chapter 1. General Provisions and Definitions (Refs & Annos)
§ 120100. Health officer

"Health officer," as used in the Communicable Disease Prevention and Control Act (Section 27) includes county, city, and district health officers, and city and district health boards, but does not include advisory health boards.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 2500, added by Stats.1939, c. 60, p. 537, § 2500.

Former § 3000, added by Stats.1957, c. 205, § 20.

CROSS REFERENCES

City health officer, see Health and Safety Code § 101460 et seq.
County health officer, see Health and Safety Code § 101000 et seq.

CODE OF REGULATIONS REFERENCES

Report of diseases and conditions by physician, see 17 Cal. Code of Regs. § 2500 et seq.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Family Law § 1393, Regulations.

Cal. Civ. Prac. Probate & Trust Proceedings § 28:62, When Guardian Consent Not Required.

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf § 368, (S 368) Communicable Diseases.

NOTES OF DECISIONS

County health officers 1

1. County health officers

When the legislature used the term “county health officer” in § 3382 (repealed) relating to program of county health officer, it meant the health officer for the county, and not both city and county health officers. 38 Op.Atty.Gen. 41, 8-23-61.

West's Ann. Cal. Health & Safety Code § 120100, CA HLTH & S § 120100

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 1. Administration of Communicable Disease Prevention and Control (Refs & Annos)
Chapter 2. Functions and Duties of the State Department of Health Services (Refs & Annos)

§ 120125. Causes of communicable diseases

The department shall examine into the causes of communicable disease in man and domestic animals occurring or likely to occur in this state.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 200, enacted by Stats.1939, c. 60, § 200, amended by Stats.1971, c. 1593, § 62; Stats.1977, c. 1252, § 126.

Political Code § 2979, amended by Stats.1905, c. 340, p. 398, § 2; Stats.1909, c. 59, p. 49, § 1.

CROSS REFERENCES

Animal quarantine and diseased animals, see Food and Agricultural Code § 9101 et seq.
Communicable disease prevention and control, see Health and Safety Code § 120100 et seq.
Duties regarding services for older persons, see Welfare and Institutions Code § 9101.
Hospital survey and construction, see Health and Safety Code § 129375 et seq.
Investigations by agriculture department, see Food and Agricultural Code §§ 461, 481.
Occupational health and occupational disease prevention program, see Health and Safety Code §§ 105175, 105180.
Programs for prevention of blindness, see Health and Safety Code § 104300.
Quarantine and destruction of animals in the interest of public health, see Health and Safety Code §§ 120150, 120210.
Rabies, see Health and Safety Code § 121575 et seq.
Sanitation, see Health and Safety Code § 118375 et seq.
State departments, generally, see Government Code § 11000 et seq.
Tuberculosis, see Health and Safety Code § 121360 et seq.

Venereal diseases, see Health and Safety Code § 120505 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

Decline of emergency medical services coordination in California: Why cities are at war with counties over illusory ambulance monopolies. Byron K. Toma, 23 Sw. U. L. Rev. 285 (1994).

LIBRARY REFERENCES

2006 Main Volume

Health 383.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 28 to 34, 36 to 43.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Health and Sanitation § 3, State Department of Health Care Services.

CA Jur. 3d Health and Sanitation § 27, Communicable Diseases Other Than AIDS.

UNITED STATES CODE ANNOTATED

Surgeon general, duties in prevention and control of communicable diseases, see 42 U.S.C.A. § 264.

NOTES OF DECISIONS

Validity 1

1. Validity

Whatever reasonably tends to preserve public health is subject on which legislature, within police power, may take action. Patrick v. Riley (1930) 209 Cal. 350, 287 P. 455. Health 354

The adoption of measures for the protection of the public health is a valid exercise of the police power of the state, as to which the legislature is necessarily vested with large discretion, not only in determining what are contagious and infectious diseases, but also in adopting means for preventing their spread, as by imposing on health department of city the duty to take measures to prevent the spread of disease afflicting say person. Ex parte Johnston (App. 1919) 40 Cal.App. 242, 180 P. 644. Health 384

Statutes protecting public health are passed by the legislature as an exercise of the police power. 15 Op.Atty.Gen. 113 (1950).

West's Ann. Cal. Health & Safety Code § 120125, CA HLTH & S § 120125

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective: January 1, 2011

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 1. Administration of Communicable Disease Prevention and Control (Refs & Annos)
Chapter 2. Functions and Duties of the State Department of Health Services (Refs & Annos)

➡ § 120130. List of reportable diseases and conditions; establishment and contents; regulations for isolation or quarantine; isolation or quarantine by health officer; publication of list; penalties; electronic reporting requirement

(a) The department shall establish a list of reportable diseases and conditions. For each reportable disease and condition, the department shall specify the timeliness requirements related to the reporting of each disease and condition, and the mechanisms required for, and the content to be included in, reports made pursuant to this section. The list of reportable diseases and conditions may include both communicable and noncommunicable diseases. The list may include those diseases that are either known to be, or suspected of being, transmitted by milk or milk-based products. The list shall also include, but not be limited to, diphtheria, listeria, salmonella, shigella, streptococcal infection in food handlers or dairy workers, and typhoid. The list may be modified at any time by the department, after consultation with the California Conference of Local Health Officers. Modification of the list shall be exempt from the administrative regulation and rulemaking requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and shall be implemented without being adopted as a regulation, except that the revised list shall be filed with the Secretary of State and printed in the California Code of Regulations as required under subdivision (d). Those diseases listed as reportable shall be properly reported as required to the department by the health officer.

(b) The department may from time to time adopt and enforce regulations requiring strict or modified isolation, or quarantine, for any of the contagious, infectious, or communicable diseases, if in the opinion of the department the action is necessary for the protection of the public health.

(c) The health officer may require strict or modified isolation, or quarantine, for any case of contagious, infectious, or communicable disease, when this action is necessary for the protection of the public health.

(d) The list established pursuant to subdivision (a) and any subsequent modifications shall be published in Title 17 of the California Code of Regulations.

(e) Notwithstanding any other provision of law, no civil or criminal penalty, fine, sanction, finding, or denial, suspension, or revocation of licensure for any person or facility may be imposed based upon a failure to provide the notification of a reportable disease or condition that is required under this section, unless the disease or condition that is required to be reported was printed in the California Code of Regulations at least six months prior to the date of the claimed failure to report.

(f) Commencing July 1, 2009, or within one year of the establishment of a state electronic laboratory reporting system, whichever is later, a report generated pursuant to this section, or Section 121022, by a laboratory shall be submitted

electronically in a manner specified by the department. The department shall allow laboratories that receive incomplete patient information to report the name of the provider who submitted the request to the local health officer.

(g) The department may through its Internet Web site and via electronic mail advise out-of-state laboratories that are known to the department to test specimens from California residents of the new reporting requirements.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7. Amended by Stats.2004, c. 262 (A.B.1091), § 1, eff. Aug. 23, 2004; Stats.2008, c. 249 (A.B.2658), § 1; Stats.2010, c. 470 (A.B.2541), § 1.)

HISTORICAL AND STATUTORY NOTES

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Section 2 of Stats.2004, c. 262 (A.B.1091), provides:

"SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

"In order to facilitate accurate and efficient reporting of reportable diseases and conditions to the proper authorities at the earliest possible time, it is necessary that this act take effect immediately."

2011 Electronic Update

2008 Legislation

Section 2 of Stats.2008, c. 249 (A.B.2658), provides:

"SEC. 2. Section 1.5 of this bill incorporates amendments to Section 120130 of the Health and Safety Code proposed by both this bill and SB 356 [vetoed]. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2009, (2) each bill amends Section 120130 of the Health and Safety Code, and (3) this bill is enacted after SB 356 [vetoed], in which case Section 1 of this bill shall not become operative."

An amendment of this section by § 1.5 of Stats.2008, c. 249 (A.B.2658), failed to become operative under the provisions of § 2 of that Act.

Section affected by two or more acts at the same session of the Legislature, see Government Code § 9605.

Section 3 of Stats.2008, c. 249 (A.B.2658), provides:

"SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution."

2010 Legislation

Stats.2010, c. 470 (A.B.2541), in subd. (f), in the first sentence, inserted ", or Section 121022," and deleted ", except that this electronic reporting requirement shall not apply to reports of HIV infections" following "specified by the department"; and in subd. (g), substituted "through its Internet Web site" for "on its Web site".

Sections 4 and 5 of Stats.2010, c. 470 (A.B.2541), provide:

"SEC. 4. Section 1.5 of this bill incorporates amendments to Section 120130 of the Health and Safety Code proposed by both this bill and AB 2786 [vetoed]. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2011, (2) each bill amends Section 120130 of the Health and Safety Code, and (3) this bill is enacted after AB 2786 [vetoed], in which case Section 1 of this bill shall not become operative.

"SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because, in that regard, this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

"However, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code."

An amendment of this section by § 1.5 of Stats.2010, c. 470 (A.B.2541), failed to become operative under the provisions of § 4 of that Act.

2006 Main Volume

Derivation

Former § 2571, added by Stats.1939, c. 60, p. 541, § 2571, amended by Stats.1939, c. 375, p. 1710; Stats.1947, c. 598, p. 1605, § 3.

Former § 3123, added by Stats.1957, c. 205, § 20, amended by Stats.1986, c. 1052, § 2.

Stats.1907, c. 492, p. 896, § 13; Stats.1911, c. 339, p. 568, § 3; Stats.1927, c. 360, p. 592, § 1.

CROSS REFERENCES

Clinical laboratory technology, grounds for denial or adverse action on license or registration, see Business and Professions Code § 1320.
Health officer defined for purposes of this division, see Health and Safety Code § 120100.
Nondiagnostic general health assessment programs, requirements, see Business and Professions Code § 1244.
Secretary of State, generally, see Government Code § 12150 et seq.

CODE OF REGULATIONS REFERENCES

Rabies, animal, see 17 Cal. Code of Regs. § 2606.

Reportable diseases and conditions, see 17 Cal. Code of Regs. § 2500 et seq.

State Department of Health Services, diseases and conditions, viral hemorrhagic fevers, see 17 Cal. Code of Regs. § 2638.

LAW REVIEW AND JOURNAL COMMENTARIES

California Public Records Act. 4 Golden Gate U. L. Rev. 203 (1974).

Controlling genetic disease through law. 15 U.C. Davis L. Rev. 801 (1982).

LIBRARY REFERENCES

2006 Main Volume

Health 384, 386.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 28, 31 to 34, 37 to 43.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Health and Sanitation § 27, Communicable Diseases Other Than AIDS.

Treatises and Practice Aids

California Medical Malpractice Law and Practice § 2:14, Duty to Communicate to Third Persons.

NOTES OF DECISIONS

Confidentiality 2
Construction with other laws 1

1. Construction with other laws

The Business and Professions Code and the Administrative Code permit promulgation of a regulation requiring the reporting by clinical laboratories of results of positive laboratory tests for reportable communicable diseases to local health authority, and such reporting does not constitute "diagnosis" within meaning of Bus. & Prof.C. § 2141 (repealed), relating to practice of medicine without a license. 28 Op.Atty.Gen. 244 (1956).

2. Confidentiality

All venereal disease records compiled and kept by local health departments are confidential and a health officer receiving a subpoena for such record may assert a privilege pursuant to Evid.C. § 1040. 53 Op.Atty.Gen. 10, 1-13-70.

The state board of public health may promulgate a regulation to disseminate the identities of persons known to be infected with viral hepatitis to licensed blood banks for the sole purpose of screening donors, provided such regulation

further directs that the information is to remain confidential and to be used only for such screening. 51 Op.Atty.Gen. 217, 10-29-68.

West's Ann. Cal. Health & Safety Code § 120130, CA HLTH & S § 120130

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 1. Administration of Communicable Disease Prevention and Control (Refs & Annos)
Chapter 2. Functions and Duties of the State Department of Health Services (Refs & Annos)

§ 120145. Quarantine, isolation, inspection and disinfection of persons and property

The department may quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, other property, places, cities, or localities, whenever in its judgment the action is necessary to protect or preserve the public health.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 2522, added by Stats.1939, c. 60, p. 538, § 2522.

Former § 3051, added by Stats.1957, c. 205, § 20.

Political Code § 2979, amended by Stats.1905, c. 340, p. 398, § 2; Stats.1909, c. 59, p. 49, § 1.

CROSS REFERENCES

Confinement by state for protection of public health, see Government Code § 202.
Quarantine of animals, see Food and Agricultural Code § 9561 et seq.

CODE OF REGULATIONS REFERENCES

Turtle salmonellosis, see 17 Cal. Code of Regs. § 2612.1.

LIBRARY REFERENCES

2006 Main Volume

Health 386.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 28, 31, 37 to 43.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Animals § 47, Inspection and Quarantine Regulations.

CA Jur. 3d Health and Sanitation § 39, Quarantine.

NOTES OF DECISIONS

1. Construction and application

Statutes, providing that state department of health may quarantine, isolate, and disinfect persons, houses, etc., that upon being informed by health officer of any contagious or communicable disease, department may take such measures as are necessary to ascertain nature of disease and prevent its spread, by use of term "may" impose discretionary and not mandatory powers. Jones v. Czapkay (App. 1 Dist. 1960) 6 Cal.Rptr. 182, 182 Cal.App.2d 192. Health 386

The statutory duty of health officers to take all measures necessary to prevent transmission of venereal disease is mandatory, and in the enforcement of such mandate, health officers are vested with full power of quarantine. Ex parte Martin (App. 1948) 83 Cal.App.2d 164, 188 P.2d 287. Health 386

2. Purpose

The power and authority granted to health officers under § 2522 (repealed) and other sections was for the purpose of preventing and suppressing communicable and contagious diseases to protect those persons infected and to protect the general public from such communicable and contagious diseases. 4 Op.Atty.Gen. 146 (1944).

3. Consent of parent or guardian

Under former §§ 2522, 2524, 2558, 2573 (repealed), a physician who is acting under the direction of the county health officer may make examination of minor male or female persons applying at the clinic requesting diagnostic services for a suspected venereal disease, without knowledge or consent of parent or guardian. 1 Op.Atty.Gen. 541 (1943).

4. Evidence to support quarantine

To sustain quarantine of person allegedly having venereal disease, law required only probable cause to believe that person has communicable infectious disease. In re King (App. 1932) 128 Cal.App. 27, 16 P.2d 694. Health 386

Health authorities might place under quarantine a person afflicted with an infectious or contagious disease, as defined in Pol.C. § 2979a (repealed), only where reasonable ground exists to support the belief that such person was so afflicted. Ex parte Arata (App. 2 Dist. 1921) 52 Cal.App. 380, 198 P. 814. Health 386

Petitioners, arrested without warrant for violation of rooming house ordinance, could not be held by the chief of police without bail and under pretended quarantine, by reason of a general instruction given by the health department of the city, and without any knowledge being had on the part of the health department, or its inspectors, which would give rise to reasonable cause, or even suspicion, that petitioners were afflicted with contagious or infectious venereal disease. Ex parte Dillon (App. 2 Dist. 1919) 44 Cal.App. 239, 186 P. 170. Habeas Corpus 540; Health 386

One infected with a contagious disease, declared to be such by Pol.C. § 2979a (repealed), as amended by Stats.1917, p. 171, may be subjected to quarantine regulations by the health commissioner of a city, without its first being judicially established by some proceeding in court that he or she was so infected. Ex parte Johnston (App. 1919) 40 Cal.App. 242, 180 P. 644. Health 386

5. Animals

In this state, public authorities have the right to quarantine or destroy diseased animals and certain diseased animals are public nuisances. Chisholm v. California Jockey Club (App. 1958) 164 Cal.App.2d 367, 330 P.2d 676.

West's Ann. Cal. Health & Safety Code § 120145, CA HLTH & S § 120145

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

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West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 1. Administration of Communicable Disease Prevention and Control (Refs & Annos)
Chapter 3. Functions and Duties of Local Health Officers (Refs & Annos)
➡ **§ 120175. Prevention of spread of disease**

Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 2554, added by Stats.1939, c. 60, p. 538, § 2554.

Former § 3110, added by Stats.1957, c. 205, § 20, amended by Stats.1971, c. 1593, § 172; Stats.1977, c. 1252, § 270.

Political Code § 2979a, added by Stats.1901, c. 85, p. 99, § 1, amended by Stats.1907, c. 81, p. 105, § 1; Stats.1911, c. 250, p. 430, § 1; Stats.1917, c. 123, p. 171, § 1.

CROSS REFERENCES

Health officer defined for purposes of this division, see Health and Safety Code § 120100.
Immunization information systems, authority to operate, see Health and Safety Code § 120440.
Neglect of health officer to perform duties, misdemeanor, see Health and Safety Code § 100182.
Punishment for violation, see Health and Safety Code § 120295.
Reports of diseases, see Health and Safety Code § 120190 et seq.
State summary criminal history information furnished health officers enforcing this section, see Penal Code § 11105.

CODE OF REGULATIONS REFERENCES

Anonymous counseling and testing program, see 17 Cal. Code of Regs. § 2641.10.

Anonymous HIV test, defined, see 17 Cal. Code of Regs. § 2641.15.

Biological specimen, defined, see 17 Cal. Code of Regs. § 2641.20.

Confidential HIV test, defined, see 17 Cal. Code of Regs. § 2641.25.

Confirmed HIV test, defined, see 17 Cal. Code of Regs. § 2641.30.

Contamination of milk and milk products by pathogenic organisms, see 17 Cal. Code of Regs. § 2528.

Department, see 17 Cal. Code of Regs. § 2641.35.

Health care provider, defined, see 17 Cal. Code of Regs. § 2641.45.

Health officer and local health officer, defined, see 17 Cal. Code of Regs. § 2641.50.

HIV/AIDS case report, defined, see 17 Cal. Code of Regs. § 2641.55.

HIV reporting by laboratories, requirements, see 17 Cal. Code of Regs. § 2643.10.

HIV reporting by local health officers, requirements, see 17 Cal. Code of Regs. § 2643.15.

HIV reporting exemptions, see 17 Cal. Code of Regs. § 2643.20.

Investigation of case, see 17 Cal. Code of Regs. § 2501.

Local health department,defined, see 17 Cal. Code of Regs. § 2641.70.

Non-name code, defined, see 17 Cal. Code of Regs. § 2641.75.

Notification by laboratories of communicable disease evidence, see 17 Cal. Code of Regs. § 2505.

Partial non-name code, defined, see 17 Cal. Code of Regs. § 2641.77.

Personal information, defined, see 17 Cal. Code of Regs. § 2641.80.

Publicly-funded confidential counseling and testing program, defined, see 17 Cal. Code of Regs. § 2641.85.

Soundex code, defined, see 17 Cal. Code of Regs. § 2641.90.

Specific diseases and conditions, see 17 Cal. Code of Regs. § 2550 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

Health officer's right to search private homes without a warrant. 23 S. Cal. L. Rev. 96 (1949).

Validity of regents' regulation requiring vaccination of students. 2 Cal. L. Rev. 234 (1914).

LIBRARY REFERENCES

2006 Main Volume

Health 383.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 28 to 34, 36 to 43.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Health and Sanitation § 27, Communicable Diseases Other Than AIDS.

CA Jur. 3d Health and Sanitation § 40, Venereal Disease.

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf § 368, (S 368) Communicable Diseases.

NOTES OF DECISIONS

1. Construction and application

This statute does not apply to officers of the state department of public health. Jones v. Czapkay (App. 1 Dist. 1960) 6 Cal.Rptr. 182, 182 Cal.App.2d 192.

2. Purpose

This statute requiring each health officer knowing or having reason to believe existence of a reportable disease or of a contagious, infectious, or communicable disease to take necessary measures to prevent spread of disease or occurrence of additional cases and § 3125 requiring all physicians, etc., to report fact of illness from infectious or communicable disease to health officer together with name of person ill, etc., were enacted to protect public against spread of con-

tagious, communicable diseases. Derrick v. Ontario Community Hospital (App. 4 Dist. 1975) 120 Cal.Rptr. 566, 47 Cal.App.3d 145. Health 384; Health 399

3. Validity of regulations

Where not exceeding 9 persons in a city were supposed to have died from the bubonic plague, and no living persons were known to have contracted the disease, a regulation establishing a general quarantine district, embracing a territory covering 12 blocks, in which more than 10,000 persons resided, which prohibits persons from entering or leaving such district, but permits free intercourse between all persons within it, cannot be upheld as a reasonable regulation for preventing the spread of the disease, but its effect must necessarily be, if the disease exists within the district, to facilitate its spread among all the persons confined within its limits. Jew Ho v. Williamson, 1900, 103 F. 10. Health 386; Municipal Corporations 191

Where the board of health of San Francisco adopted a resolution declaring its belief in the existence of bubonic plague in the city, and, in connection with the quarantine officer of the United States for the port, promulgated and enforced an order prohibiting any Chinese or Asiatic person from leaving the city without first submitting to inoculation with a serum supposed to be a preventive, but the administration of which to a person who had been exposed to the disease was dangerous to life and contrary to medical authority, the resolution had no reasonable relation to the protection of the health of the inhabitants of the city, and was illegal and void, as an unconstitutional invasion of the rights of the persons against whom it was directed. Wong Wai v. Williamson, 1900, 103 F. 1. Health 385; Municipal Corporations 191

Police regulation for protecting public health, if tending to effect its object, will be sustained. Ex parte Gray (1929) 206 Cal. 497, 274 P. 974. Health 352

4. Discretion of authorities

A large discretion is necessarily vested in state or municipal authorities in determining what is a proper exercise of the police powers of the state for the protection of the public health, and what measures are necessary to meet particular conditions or emergencies; but their determination is not final, and is subject to supervision by the courts, and they may not, under the guise of protecting the public, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, and whether they have done so in a particular case is a judicial question. Jew Ho v. Williamson, 1900, 103 F. 10. Health 354; Health 382

Except for duty to report occurrence of certain diseases to state department of public health, local public health officer is vested with considerable discretion as to what actions he should take to control spread of infectious disease. Derrick v. Ontario Community Hospital (App. 4 Dist. 1975) 120 Cal.Rptr. 566, 47 Cal.App.3d 145. Health 384; Health 399

Provisions of Health and Safety Code dealing with duties of health officers in issuing tuberculosis quarantine orders make those duties discretionary rather than mandatory. Jones v. Czapkay (App. 1 Dist. 1960) 6 Cal.Rptr. 182, 182 Cal.App.2d 192. Health 386

5. Evidence of disease

A health officer is not required to first determine that one is afflicted with an infectious or communicable disease before subjecting such person to quarantine, all that is required being that there be probable cause to believe that person so held has such a disease. Ex parte Martin (App. 1948) 83 Cal.App.2d 164, 188 P.2d 287. Health 386

The necessary proof in cases of quarantine is analogous to that required on a preliminary examination before magistrate prior to commitment on criminal charge, extent of inquiry being merely as to existence of reasonable cause pending opportunity for further investigation or examination. Ex parte Martin (App. 1948) 83 Cal.App.2d 164, 188 P.2d 287. Health 386

Health authorities might place under quarantine a person afflicted with an infectious or contagious disease, as defined in Pol.C. § 2979a (repealed), only where reasonable ground existed to support the belief that such person was so afflicted. Ex parte Arata (App. 2 Dist. 1921) 52 Cal.App. 380, 198 P. 814. Health 386

Mere suspicion that an individual was afflicted with an isolable disease was not sufficient to give a health officer "reason to believe" that such person was so afflicted, under Pol.C. former § 2979a (repealed), making it the duty of health officers to protect the public against spread of such disease from persons whom such officers have "reason to believe" were afflicted with such diseases. In re Shepard (App. 2 Dist. 1921) 51 Cal.App. 49, 195 P. 1077. Health 386

It might be assumed that under the laws relating to public health, inspection and quarantine might be made of persons upon reasonable ground that the persons so subjected to inspection or quarantine were afflicted with contagious or infectious diseases, such as were enumerated in Pol.C. former § 2979a (repealed). Ex parte Dillon (App. 2 Dist. 1919) 44 Cal.App. 239, 186 P. 170. Habeas Corpus 701.1

Petitioners, arrested without warrant for violation of rooming house ordinance, could not be held by the chief of police without bail and under pretended quarantine, by reason of a general instruction given by the health department of the city, and without any knowledge being had on the part of the health department, or its inspectors, which would give rise to reasonable cause, or even suspicion, that petitioners were afflicted with contagious or infectious venereal disease. Ex parte Dillon (App. 2 Dist. 1919) 44 Cal.App. 239, 186 P. 170. Habeas Corpus 540; Health 386

6. Quarantine

The duty of health officers to take all measures necessary to prevent transmission of venereal disease is mandatory, and in the enforcement of such mandate, health officers are vested with full power of quarantine. Ex parte Martin (App. 1948) 83 Cal.App.2d 164, 188 P.2d 287. Health 386

While Pol.C. former § 2979a (repealed), did not expressly confer on city and county health officer right to take possession or control of body of one afflicted with infectious disease, as it did on state board of health, isolation of one so afflicted was reasonable and proper measure to prevent increase and spread of such disease within powers conferred on such officer by such act, and one so isolated cannot secure release from quarantine under writ of habeas corpus. In re Fisher (App. 1925) 74 Cal.App. 225, 239 P. 1100. Health 386

Where sufficient reasonable cause exists to believe that a person is afflicted with a quarantinable disease, the health authorities may examine into the case, and in a proper way determine the fact; but preliminary investigation must be made without delay, and, if quarantining is found justifiable, only such quarantine measures as are reasonably necessary to protect the public health may be resorted to. Ex parte Dillon (App. 2 Dist. 1919) 44 Cal.App. 239, 186 P. 170. Health 386

7. Place of quarantine

Under §§ 2554, 2555, 2556 (repealed), county health officers, may quarantine individuals infected with a venereal disease in county or city jails where no other public institutions are available or where an emergency has arisen, or where the afflicted person is under confinement in the city or county jail and is quarantined, and will not be detrimental

to other prisoners. 4 Op.Atty.Gen. 146 (1944).

8. Liability of officers

Exposure of plaintiff to known tubercular victim was sole proximate cause of plaintiff's acquiring the disease, and any breach of duty by health officers in failing to conduct proper or adequate investigation to insure strict compliance by patient with quarantine orders could constitute only a remote cause which could not form basis for imposition of liability upon them. Jones v. Czapkay (App. 1 Dist. 1960) 6 Cal.Rptr. 182, 182 Cal.App.2d 192. Health 384

9. Animals

Section 1905, relating to rabies control and this statute, relating to communicable diseases, authorized local health officers to establish rabies quarantine of skunks, and department of public health is authorized to enact additional regulations pursuant to § 1905. 38 Op.Atty.Gen. 176 (1961).

10. Review

In a suit to enjoin the enforcement of quarantine regulations adopted because of the supposed existence of a contagious disease in the locality quarantined, the court will not, under ordinary circumstances, undertake to review the finding of the proper health authorities that the disease exists and the quarantine is necessary. Jew Ho v. Williamson, 1900, 103 F. 10. Health 386; Injunction 85(2)

West's Ann. Cal. Health & Safety Code § 120175, CA HLTH & S § 120175

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 1. Administration of Communicable Disease Prevention and Control (Refs & Annos)
Chapter 4. Violations (Refs & Annos)

§ 120280. Refusal to comply with isolation order; offense; confinement by court order; probation

Inasmuch as the orders provided for by Section 121365 are for the protection of the public health, any person who, after service upon him or her of an order of a local health officer as provided in Section 121365 violates or fails to comply with the order, is guilty of a misdemeanor. Upon conviction thereof, in addition to any and all other penalties that may be imposed by law upon the conviction, the person may be ordered by the court confined until the order of the local health officer shall have been fully complied with or terminated by the local health officer, but not exceeding one year from the date of passing judgment upon the conviction, further, the court, upon suitable assurances that the order of the local health officer will be complied with, may place any person convicted of a violation of the order of the local health officer upon probation for a period not to exceed two years, upon condition that the order of the local health officer be fully complied with, further, upon any subsequent violation of the order of the local health officer, the probation shall be terminated and confinement as provided for in this section shall be ordered by the court. Confinement may be accomplished by placement in any appropriate facility, penal institution, or dwelling approved for the specific case by the local health officer.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 2600.5, added by Stats.1949, c. 305, p. 592, § 1.

Former § 3351, added by Stats.1957, c. 205, § 20, amended by Stats.1961, c. 30, § 3; Stats.1965, c. 1552, § 2; Stats.1993, c. 676, § 15; Stats.1994, c. 685, § 12.

CROSS REFERENCES

Burial expenses of persons dying while confined, see Health and Safety Code § 121395.
Health officer defined for purposes of this division, see Health and Safety Code § 120100.
Misdemeanor,

Defined, see Penal Code § 17.
Punishment, see Penal Code §§ 19, 19.2.
Penal institution defined for purposes of this Division, see Health and Safety Code § 120115.
Release in county other than county of confinement, see Health and Safety Code § 121400.

LAW REVIEW AND JOURNAL COMMENTARIES

Review of Selected 1993 California Legislation. 25 Pac. L.J. 731 (1994).

LIBRARY REFERENCES

2006 Main Volume

Health 985.
Westlaw Topic No. 198H.
C.J.S. Health and Environment § 89.

RESEARCH REFERENCES

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf § 368, (S 368) Communicable Diseases.

NOTES OF DECISIONS

In general 1

1. In general

If a person suspected of having tuberculosis refuses to submit to an examination by the health officer, an action may be instituted to compel such examination or a quarantine order may be issued, a violation of which may be prosecuted criminally. 36 Op.Atty.Gen. 28, 7-14-60.

West's Ann. Cal. Health & Safety Code § 120280, CA HLTH & S § 120280

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 1. Administration of Communicable Disease Prevention and Control (Refs & Annos)
Chapter 4. Violations (Refs & Annos)
➡ **§ 120300. Prosecution of violations; duty of district attorney**

The district attorney of the county where a violation of Sections 121365 and 120280 may be committed, shall prosecute all those violations and, upon the request of a health officer, shall prosecute, as provided in Section 120280, violations of any order of a health officer made and served as provided in Section 121365 or Section 120105.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 2603, added by Stats.1949, c. 305, p. 594, § 3.

Former § 3355, added by Stats.1957, c. 205, § 20, amended by Stats.1961, c. 30, § 4; Stats.1963, c. 278, § 2; Stats.1993, c. 676, § 16.

CROSS REFERENCES

Attorney General as legal adviser in prosecution, see Government Code § 11157.
District attorney, powers and duties, see Government Code § 26500 et seq.
Health officer defined for purposes of this division, see Health and Safety Code § 120100.

LIBRARY REFERENCES

2006 Main Volume

Health 985, 987.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 89, 91.

NOTES OF DECISIONS

1. In general

If a person suspected of having tuberculosis refused to submit to an examination by the health officer, an action may be instituted to compel such examination or, a quarantine order may be issued, a violation of which may be prosecuted criminally. 36 Op.Atty.Gen. 28, 7-14-60.

West's Ann. Cal. Health & Safety Code § 120300, CA HLTH & S § 120300

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

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West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 5. Tuberculosis (Refs & Annos)
Chapter 1. Tuberculosis Control (Refs & Annos)
§ 121350. Program for control; administration of available funds

The department shall maintain a program for the control of tuberculosis. The department shall administer the funds made available by the state for the care of tuberculosis patients.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 3279, added by Stats.1957, c. 205, § 20, amended by Stats.1973, c. 1212, § 49; Stats.1975, c. 671, § 1.

Former §§ 410, 413, added by Stats.1939, c. 60, p. 492, §§ 410, 413.

Stats.1915, c. 766, p. 1530, § 1.

CROSS REFERENCES

Annual subvention to political subdivisions for control programs, see Health and Safety Code § 121450.

LIBRARY REFERENCES

2006 Main Volume

Health 384.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 28, 31 to 34.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Health and Sanitation § 27, Communicable Diseases Other Than AIDS.

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf § 368, (S 368) Communicable Diseases.

NOTES OF DECISIONS

Construction and application 2
Discretion of legislature 3
Validity of prior law 1

1. Validity of prior law

Stats.1915, p. 1530 (repealed) was a valid exercise of the sovereign power and police power of the state to take all the necessary steps for the promotion of the health and comfort of its inhabitants and to make regulations essential to the protection of the state and the people thereof against the prevalence of disease, as the true purpose of county government organizations, is to perform functions which belong to the state itself, and the state may employ them jointly with itself or alone as instrumentalities in aid of the administration or carrying out of its own general governmental functions and policy. Sacramento County v. Chambers (App. 1917) 33 Cal.App. 142, 164 P. 613.

2. Construction and application

In order to accomplish purpose for which this chapter dealing with tuberculosis was enacted, court should give chapter a broad and liberal construction. Application of Halko (App. 2 Dist. 1966) 54 Cal.Rptr. 661, 246 Cal.App.2d 553. Health 356; Health 384

3. Discretion of legislature

Legislature is vested with broad discretion in determining what are contagious and infectious diseases and in adopting means for preventing the spread thereof. Application of Halko (App. 2 Dist. 1966) 54 Cal.Rptr. 661, 246 Cal.App.2d 553. Health 384

West's Ann. Cal. Health & Safety Code § 121350, CA HLTH & S § 121350

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

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West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 5. Tuberculosis (Refs & Annos)
Chapter 1. Tuberculosis Control (Refs & Annos)
➡ **§ 121357. Tuberculosis control and prevention lead agency**

The state department shall be the lead agency for all tuberculosis control and prevention activities at the state level.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 3279.3, added by Stats.1993, c. 676, § 4.

LIBRARY REFERENCES

2006 Main Volume

Health 384.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 28, 31 to 34.

West's Ann. Cal. Health & Safety Code § 121357, CA HLTH & S § 121357

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

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West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 5. Tuberculosis (Refs & Annos)
Chapter 1. Tuberculosis Control (Refs & Annos)

➡ § 121358. Correctional facilities; institutionalization of criminals with tuberculosis; program funds; notification of detention sites

(a) Notwithstanding any other provision of law, individuals housed or detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities, and the funds available under that program with regard to those individuals shall not be disbursed to, or used by, correctional facilities. This section shall not be interpreted to prohibit the institutionalization of criminals with tuberculosis in correctional facilities.

(b) The department shall work with local health jurisdictions to identify a detention site for recalcitrant tuberculosis patients appropriate for each local health jurisdiction in the state. The department shall notify all counties of their designated site by January 1, 1998.

CREDIT(S)

(Added by Stats.1997, c. 294 (S.B.391), § 24, eff. Aug. 18, 1997.)

HISTORICAL AND STATUTORY NOTES

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Severability of provisions of Stats.1997, c. 294 (S.B.391), see Historical and Statutory Notes under Government Code § 95001.5.

LIBRARY REFERENCES

2006 Main Volume

Health 384.
Prisons 17(2).
Westlaw Topic Nos. 198H, 310.
C.J.S. Health and Environment §§ 28, 31 to 34.
C.J.S. Prisons and Rights of Prisoners §§ 55, 59, 63 to 66, 68 to 69, 71 to 72, 76 to 90, 125, 129, 138.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Health and Sanitation § 27, Communicable Diseases Other Than AIDS.

Treatises and Practice Aids

2 Witkin Cal. Crim. L. 3d Crimes Against Peace Welf § 368, (S 368) Communicable Diseases.

NOTES OF DECISIONS

1. Construction and application

County was prohibited from using its jail to detain noncompliant tuberculosis (TB) patients; clause in statute prohibiting the use of state TB funding to support jail detentions did not overcome the clause prohibiting jail detentions or compel construction of statute which made such detentions elective at the county level. Souvannarath v. Hadden (App. 5 Dist. 2002) 116 Cal.Rptr.2d 7, 95 Cal.App.4th 1115. Health 384

2. Construction with other laws

Reference to "the tuberculosis control, housing, and detention program" in statute prohibiting detention of noncompliant tuberculosis (TB) patients in correctional facilities does not restrict application of statute to only State Department of Health Services (DHS) tuberculosis control schemes nor does it distinguish between the "state" program and county's purported "local" program. Souvannarath v. Hadden (App. 5 Dist. 2002) 116 Cal.Rptr.2d 7, 95 Cal.App.4th 1115. Health 384

3. Judicial notice

Court of Appeal would take judicial notice of the legislative history of statute prohibiting detention of noncompliant tuberculosis (TB) patients in correctional facilities. Souvannarath v. Hadden (App. 5 Dist. 2002) 116 Cal.Rptr.2d 7, 95 Cal.App.4th 1115. Evidence 33

4. Discretion of health officer

Although a local health officer may have been granted broad general discretion to select the place of detention for noncompliant tuberculosis (TB) patients, that discretion was intended by the Legislature to be circumscribed by the flat statutory prohibition against jail detention. Souvannarath v. Hadden (App. 5 Dist. 2002) 116 Cal.Rptr.2d 7, 95 Cal.App.4th 1115. Health 384

West's Ann. Cal. Health & Safety Code § 121358, CA HLTH & S § 121358

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 5. Tuberculosis (Refs & Annos)
Chapter 1. Tuberculosis Control (Refs & Annos)
§ 121370. Religious freedom; exemption from provisions

No examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination or organization and claims exemption on that ground, except that the provisions of this code regarding compulsory reporting of communicable diseases and isolation and quarantine shall apply where there is probable cause to suspect that the person is infected with the disease in a communicable stage. Such person shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he or she can be safely quarantined and/or isolated in his or her own home or other suitable place of his or her choice.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 3286, added by Stats.1957, c. 205, § 20.

Former § 2559.6, added by Stats.1949, c. 305, p. 593, § 1.5.

CROSS REFERENCES

Examination defined for purposes of this division, see Health and Safety Code § 120115.

LAW REVIEW AND JOURNAL COMMENTARIES

Faith healing. 8 Loy. L.A. L. Rev. 396 (1975).

LIBRARY REFERENCES

2006 Main Volume

Constitutional Law 84.5(17).

Health 387.
Westlaw Topic Nos. 198H, 92.
C.J.S. Constitutional Law §§ 513 to 517, 527.
C.J.S. Health and Environment §§ 28 to 29, 31.
C.J.S. Right to Die § 2.

West's Ann. Cal. Health & Safety Code § 121370, CA HLTH & S § 121370

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 105. Communicable Disease Prevention and Control (Refs & Annos)
Part 5. Tuberculosis (Refs & Annos)
Chapter 1. Tuberculosis Control (Refs & Annos)
§ 121390. State care of persons who violate quarantine or isolation orders; lease of facilities

The department shall lease any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer as provided in Section 120280.

CREDIT(S)

(Added by Stats.1995, c. 415 (S.B.1360), § 7.)

HISTORICAL AND STATUTORY NOTES

2006 Main Volume

Derivation

Former § 3295, added by Stats.1957, c. 205, § 20, amended by Stats.1975, c. 671, § 7.

Former § 3300.4, added by Stats.1949, c. 1091, p. 1990, § 1.

CROSS REFERENCES

Health officer defined for purposes of this division, see Health and Safety Code § 120100.

LIBRARY REFERENCES

2006 Main Volume

Health 386.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 28, 31, 37 to 43.

West's Ann. Cal. Health & Safety Code § 121390, CA HLTH & S § 121390

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective: July 1, 2007

West's Annotated California Codes Currentness
Health and Safety Code (Refs & Annos)
Division 112. Public Health (Refs & Annos)
Part 1. General Provisions (Refs & Annos)
Chapter 2. General Powers of the Department (Refs & Annos)
Article 1. General Provisions (Refs & Annos)
➡ **§ 131080. Advice to and control of local health authorities**

The department may advise all local health authorities, and, when in its judgment the public health is menaced, it shall control and regulate their action.

CREDIT(S)

(Formerly § 100180, added by Stats.1995, c. 415 (S.B.1360), § 3. Renumbered § 131080 and amended by Stats.2006, c. 241 (S.B.162), § 20, operative July 1, 2007.)

HISTORICAL AND STATUTORY NOTES

2011 Electronic Update

2006 Legislation

For uncodified provisions relating to Stats.2006, c. 241 (S.B.162), concerning short title, legislative intent, reorganization of the former State Department of Health Services as the State Department of Health Care Services, budget effect of reorganization, appropriations, operative effect, establishment and duties of Office of Change Management, and implementation of act, see Historical and Statutory Notes under Government Code § 6253.4.

Subordination of legislation by Stats.2006, c. 241 (S.B.162), to other 2006 legislation, see Historical and Statutory Notes under Government Code § 6253.4.

2006 Main Volume

Derivation

Former § 207, enacted by Stats.1939, c. 60, § 207.

Political Code § 2979, amended by Stats.1905, c. 340, p. 398, § 2; Stats.1909, c. 59, p. 49, § 1.

CROSS REFERENCES

Local health administration, see Health and Safety Code § 101025 et seq.

CODE OF REGULATIONS REFERENCES

Anonymous counseling and testing program, see 17 Cal. Code of Regs. § 2641.10.

Anonymous HIV test, defined, see 17 Cal. Code of Regs. § 2641.15.

Biological specimen, defined, see 17 Cal. Code of Regs. § 2641.20.

Confidential HIV test, defined, see 17 Cal. Code of Regs. § 2641.25.

Confirmed HIV test, defined, see 17 Cal. Code of Regs. § 2641.30.

Department, see 17 Cal. Code of Regs. § 2641.35.

Health care provider, defined, see 17 Cal. Code of Regs. § 2641.45.

Health officer and local health officer, defined, see 17 Cal. Code of Regs. § 2641.50.

HIV/AIDS case report, defined, see 17 Cal. Code of Regs. § 2641.55.

HIV reporting by laboratories, requirements, see 17 Cal. Code of Regs. § 2643.10.

HIV reporting by local health officers, requirements, see 17 Cal. Code of Regs. § 2643.15.

HIV reporting exemptions, see 17 Cal. Code of Regs. § 2643.20.

Local health department,defined, see 17 Cal. Code of Regs. § 2641.70.

Non-name code, defined, see 17 Cal. Code of Regs. § 2641.75.

Partial non-name code, defined, see 17 Cal. Code of Regs. § 2641.77.

Personal information, defined, see 17 Cal. Code of Regs. § 2641.80.

Publicly-funded confidential counseling and testing program, defined, see 17 Cal. Code of Regs. § 2641.85.

Soundex code, defined, see 17 Cal. Code of Regs. § 2641.90.

State Department of Health Services, diseases and conditions, viral hemorrhagic fevers, see 17 Cal. Code of Regs. § 2638.

LIBRARY REFERENCES

2006 Main Volume

Health 366.
Westlaw Topic No. 198H.
C.J.S. Health and Environment §§ 9, 18 to 25, 65 to 73, 77 to 83.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Health and Sanitation § 4, State Department of Public Health.

Treatises and Practice Aids

4 Witkin, California Summary 10th Sales § 356, (S 356) Food or Drug Ordered Removed from Sale.

West's Ann. Cal. Health & Safety Code § 131080, CA HLTH & S § 131080

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Penal Code (Refs & Annos)
Part 3. Of Imprisonment and the Death Penalty (Refs & Annos)
Title 7. Administration of the State Correctional System (Refs & Annos)
Chapter 5. The Corrections Standards Authority (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

➡ § 6031.4. Local detention facility defined

(a) For the purpose of this title, "local detention facility" means any city, county, city and county, or regional facility used for the confinement for more than 24 hours of adults, or of both adults and minors, but does not include that portion of a facility for the confinement of both adults and minors which is devoted only to the confinement of minors.

(b) In addition to those provided for in subdivision (a), for the purposes of this title, "local detention facility" also includes any city, county, city and county, or regional facility, constructed on or after January 1, 1978, used for the confinement, regardless of the length of confinement, of adults or of both adults and minors, but does not include that portion of a facility for the confinement of both adults and minors which is devoted only to the confinement of minors.

(c) "Local detention facility" also includes any adult detention facility, exclusive of any facility operated by the California Department of Corrections or any facility holding inmates pursuant to Section 2910.5, Chapter 4 (commencing with Section 3410) of Title 2 of, Chapter 9.2 (commencing with Section 6220) of Title 7 of, Chapter 9.5 (commencing with Section 6250) of Title 7 of, or Chapter 9.6 (commencing with Section 6260) of Title 7 of, Part 3, that holds local prisoners under contract on behalf of cities, counties, or cities and counties. Nothing in this subdivision shall be construed as affecting or authorizing the establishment of private detention facilities.

(d) For purposes of this title, a local detention facility does not include those rooms that are used for holding persons for interviews, interrogations, or investigations, and are either separate from a jail or located in the administrative area of a law enforcement facility.

CREDIT(S)

(Added by Stats.1971, c. 1789, p. 3855, § 6. Amended by Stats.1977, c. 1210, p. 4086, § 1; Stats.1986, c. 1519, § 2, eff. Oct. 1, 1986; Stats.1988, c. 386, § 2, eff. Aug. 8, 1988; Stats.1993, c. 787 (A.B.148), § 2.)

HISTORICAL AND STATUTORY NOTES

2011 Main Volume

The 1977 amendment added subd. (b).

The 1986 amendment added subd. (c).

The 1988 amendment inserted subd. (c) and redesignated former subd. (c) as subd. (d).

The 1993 amendment, in subd. (c), in the first sentence, inserted ", exclusive of any facility operated by the California Department of Corrections or any facility holding inmates pursuant to Section 2910.5, Chapter 4 (commencing with Section 3410) of Title 2 of, Chapter 9.2 (commencing with Section 6220) of Title 7 of, Chapter 9.5 (commencing with Section 6250) of Title 7 of, or Chapter 9.6 (commencing with Section 6260) of Title 7 of, Part 3,"; and in the second sentence, inserted "or authorizing".

CROSS REFERENCES

Department defined for purposes of this Part, see Penal Code § 6080.
Department of Corrections and Rehabilitation, generally, see Penal Code § 5000 et seq.

RESEARCH REFERENCES

Treatises and Practice Aids

California Jury Instructions - Criminal, 6th Ed. 10.14, Unlawful Oral Copulation--Prisoner.

California Jury Instructions - Criminal, 6th Ed. 10.24, Unlawful Sodomy--Prisoner.

NOTES OF DECISIONS

Private operation 1

1. Private operation

City may contract with private entity to operate local detention facility. 74 Op.Atty.Gen. 109, 7-10-91.

West's Ann. Cal. Penal Code § 6031.4, CA PENAL § 6031.4

Current with urgency legislation through Ch. 360 of 2011 Reg.Sess. and Ch. 11, and 13-16 of 2011-2012 1st Ex.Sess.

END OF DOCUMENT

Senate Bill No. 1360

CHAPTER 415

An act to amend Section 1290 of, to add Section 27 to, to add Division 101 (commencing with Section 100100), Division 102 (commencing with Section 102100), Division 103 (commencing with Section 104100), Division 104 (commencing with Section 106500), Division 105 (commencing with Section 120100), Division 106 (commencing with Section 123100), and Division 107 (commencing with Section 127000) to, to repeal Sections 26, 850, 1250.9, 1250.10, and 1260 of, to repeal Article 1 (commencing with Section 200), Article 1.5 (commencing with Section 225), Article 1.7 (commencing with Section 230), Article 1.7 (commencing with Section 235), Article 1.8 (commencing with Section 242), Article 1.9 (commencing with Section 246.1), Article 2 (commencing with Section 248), Article 2.1 (commencing with Section 275, Article 2.4 (commencing with Section 283), Article 2.6 (commencing with Section 289), Article 2.9 (commencing with Section 295), Article 3 (commencing with Section 300), Article 3.1 (commencing with Section 309.7), Article 3.2 (commencing with Section 309.100), Article 3.3 (commencing with Section 310), Article 3.4 (commencing with Section 320), Article 3.45 (commencing with Section 324.7), Article 3.5 (commencing with Section 325), Article 3.6 (commencing with Section 340), Article 3.7 (commencing with Section 349), Article 4 (commencing with Section 350), Article 4.5 (commencing with Section 360), Article 4.6 (commencing with Section 372), Article 5 (commencing with Section 374), Article 5.5 (commencing with Section 380), Article 5.7 (commencing with Section 390), Article 6 (commencing with Section 400), Article 6.1 (commencing with Section 402), Article 6.5 (commencing with Section 405), Article 7 (commencing with Section 410), Article 7.2 (commencing with Section 412), Article 7.7 (commencing with Section 417), Article 7.8 (commencing with Section 418), Article 8 (commencing with Section 420), Article 8.1 (commencing with Section 421), Article 8.5 (commencing with Section 423), Article 8.7 (commencing with Section 424.10), Article 9.5 (commencing with Section 426), Article 10 (commencing with Section 427), Article 10.2 (commencing with Section 427.10), Article 11 (commencing with Section 428), Article 13 (commencing with Section 429.11), Article 13.1 (commencing with Section 429.13), Article 14.5 (commencing with Section 429.35), and Article 15 (commencing with Section 429.40), Article 16 (commencing with Section 429.50), Article 17 (commencing with Section 429.60), Article 18 (commencing with Section 429.70), Article 18.5 (commencing with Section 429.90), Article 19 (commencing with Section 429.94, and Article 20 (commencing with Section 429.994) of Chapter 2 of

Part 1 of Division 1 of, to repeal Article 8 (commencing with Section 1630) of Chapter 4 of Division 2 of, to repeal Chapter 1 (commencing with Section 100), Chapter 1.4 (commencing with Section 140), Chapter 1.5 (commencing with Section 150), Chapter 1.7 (commencing with Section 175), Chapter 1.8 (commencing with Section 185), Chapter 1.85 (commencing with Section 188), Chapter 1.9 (commencing with Section 190), Chapter 1.10 (commencing with Section 195), Chapter 1.11 (commencing with Section 199.20), Chapter 1.12 (commencing with Section 199.30), Chapter 1.13 (commencing with Section 199.42), Chapter 1.14 (commencing with Section 199.45), Chapter 1.15 (commencing with Section 199.55), Chapter 1.16 (commencing with Section 199.70), Chapter 1.17 (commencing with Section 199.81), Chapter 1.19 (commencing with Section 199.86), Chapter 1.20 (commencing with Section 199.95), Chapter 3 (commencing with Section 430) of, Chapter 4 (commencing with Section 436), and Chapter 5 (commencing with Section 436.50) of Part 1 of Division 1 of, to repeal Chapter 1 (commencing with Section 450), Chapter 2 (commencing with Section 600), Chapter 3 (commencing with Section 700), Chapter 6 (commencing with Section 954), Chapter 7 (commencing with Section 1000), Chapter 7.5 (commencing with Section 1010), and Chapter 8 (commencing with Section 1100) of Part 2 of Division 1 of, to repeal Chapter 7 (commencing with Section 1700) of Division 2 of, to repeal Chapter 2 (commencing with Section 1800), Chapter 3 (commencing with Section 1900), Chapter 4 (commencing with Section 2100), Chapter 5.5 (commencing with Section 2425), and Chapter 9 (commencing with Section 2950) of Division 3 of, to repeal Chapter 6.5 (commencing with Section 5474.20) of Part 3 of Division 5 of, to repeal Chapter 1 (commencing with Section 15000) of Division 12.5 of, to repeal Chapter 1.5 (commencing with Section 19010) of Part 3 of Division 13 of, to repeal Chapter 1 (commencing with Section 24000), Chapter 1.2 (commencing with Section 24160), Chapter 1.5 (commencing with Section 24180), Chapter 3 (commencing with Section 24380), Chapter 3.5 (commencing with Section 24385), Chapter 4 (commencing with Section 24400), Chapter 4.3 (commencing with Section 24425), Chapter 4.5 (commencing with Section 24450), Chapter 5 (commencing with Section 24800), Chapter 6 (commencing with Section 25000), Chapter 6.1 (commencing with Section 25015), Chapter 6.99 (commencing with Section 25572), Chapter 7 (commencing with Section 25600), Chapter 7.1 (commencing with Section 25620), Chapter 7.2 (commencing with Section 25625), Chapter 7.3 (commencing with Section 25650), Chapter 7.4 (commencing with Section 25660), Chapter 7.5 (commencing with Section 25700), Chapter 7.6 (commencing with Section 25800), Chapter 7.7 (commencing with Section 25880), Chapter 7.8 (commencing with Section 25882), Chapter 7.9 (commencing with Section 25884),

Chapter 8 (commencing with Section 25895), Chapter 9 (commencing with Section 25898), Chapter 10 (commencing with Section 25900), Chapter 10.2 (commencing with Section 25906), Chapter 10.5 (commencing with Section 25920), Chapter 10.7 (commencing with Section 25930), Chapter 10.8 (commencing with Section 25940), Chapter 11 (commencing with Section 25950), Chapter 12 (commencing with Section 25960), Chapter 12.7 (commencing with Section 25967), Chapter 13 (commencing with Section 25970), Chapter 13.7 (commencing with Section 25989.500), Chapter 14 (commencing with Section 25990), Chapter 14.5 (commencing with Section 25995), and Chapter 14.7 (commencing with Section 25996.950) of Division 20 of, to repeal Part 1.5 (commencing with Section 437.01), Part 1.8 (commencing with Section 443), Part 1.85 (commencing with Section 444), Part 1.95 (commencing with Section 446), Part 1.96 (commencing with Section 447.70), Part 1.97 (commencing with Section 448), Part 3 (commencing with Section 1170), Part 3.5 (commencing with Section 1175), Part 6 (commencing with Section 1180), Part 6.9 (commencing with Section 1189.101), and Part 7 (commencing with Section 1190) of Division 1 of, to repeal Part 1 (commencing with Section 3700) and Part 2 (commencing with Section 4100) of Division 5 of, to repeal Division 2.3 (commencing with Section 1795), Division 4 (commencing with Section 3000), Division 9 (commencing with Section 10000), Division 9.5 (commencing with Section 10800), Division 9.7 (commencing with Section 10900), Division 10.1 (commencing with Section 11670), Division 17 (commencing with Section 23000), Division 21 (commencing with Section 26000), and Division 22 (commencing with Section 27000) of, the Health and Safety Code, relating to reorganization of the Health and Safety Code.

[Approved by Governor August 10, 1995. Filed with Secretary of State August 11, 1995.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1360, Committee on Health and Human Services. Reorganization of the Health and Safety Code: public health.

Existing law sets forth in the Health and Safety Code various provisions relating to health and safety. Existing law requires the State Director of Health Services to conduct a comprehensive review of the statutes governing the protection of the public health as principally embodied in that code.

This bill would repeal existing provisions of the Health and Safety Code relating to public health and reenact those provisions into 7 new divisions in the Health and Safety Code for the purpose of

reorganizing the public health component of the Health and Safety Code and would make other technical changes.

This bill would state the intent of the Legislature to reorganize and clarify portions of the Health and Safety Code and thereby facilitate its administration. It would further state the Legislature's intent that the changes made to the Health and Safety Code, as reorganized by this bill, have only technical and nonsubstantive effect.

This bill would state the finding of the Legislature that the reorganization of the Health and Safety Code pursuant to this bill, in view of the nonsubstantive statutory changes made, will not result in new or additional costs to local agencies.

This bill would provide that any section of any act, other than the code maintenance act (SB 975), enacted in 1995 that takes effect on or before January 1, 1996, and that amends, amends and renumbers, adds, repeals and adds, or repeals a section that is amended, amended and renumbered, added, repealed and added, or repealed by this act, shall prevail over the amendment, amendment and renumbering, addition, repeal and addition, or repeal of that section by this act.

The people of the State of California do enact as follows:

SECTION 1. Section 27 is added to the Health and Safety Code, to read:

27. For purposes of this code:

(a) ''Communicable Disease Prevention and Control Act'' means Sections 104730, 104830 to 104860, inclusive, 113150, 113155, Part 1 (commencing with Section 120100) of, Chapter 1 (commencing with Section 120325, but excluding Section 120380) of Part 2 of, Part 3 (commencing with Section 120500) of, and Part 5 (commencing with Section 121350) of, Division 105.

(b) ''Hereditary Disorders Act'' means Article 1 (commencing with Section 124975) of Chapter 1 of Part 5 of Division 106, and Sections 125050, 125055, 125060, and 125065.

(c) ''Maternal and Child Health Program Act'' means Section 120380, Chapter 4 (commencing with Section 103925) of Part 2 of Division 102, Article 4 (commencing with Section 116875) of Chapter 5 of Part 12 of Division 104, Article 1 (commencing with Section 123225) of Chapter 1 of Part 2 of Division 106, Article 2 (commencing with Section 125000) of Chapter 1 of Part 5 of Division 106, and Sections 125075 to 125110, inclusive.

(d) ''Miscellaneous Food, Food Facility, and Hazardous Substances Act'' means Chapter 4 (commencing with Section 108100), Chapter 6 (commencing with Section 108675), and Chapter 7 (commencing with Section 108750) of Part 3 of, Chapter 3 (commencing with Section 111940), Chapter 4 (commencing with Section 111950), Chapter 5 (commencing with Section 112150), Chapter 6 (commencing with Section 112350), Chapter 7

(commencing with Section 112500), Chapter 8 (commencing with Section 112650), Chapter 9 (commencing with Section 112875), Chapter 10 (commencing with Section 113025), and Article 3 (commencing with Section 113250) of Chapter 11, of Part 6 of, and Chapter 4 (commencing with Section 113700) of Part 7 of, Division 104.

(e) ''Primary Care Services Act'' means Chapter 1 (commencing with Section 124400), Chapter 2 (commencing with Section 124475), Chapter 3 (commencing with Section 124550), Chapter 4 (commencing with Section 124575), Chapter 5 (commencing with Section 124600), Chapter 6 (commencing with Section 124800), and Article 1 (commencing with Section 124875) of Chapter 7 of, Part 4 of Division 106.

(f) ''Radiologic Technology Act'' means Sections 106965 to 107120, inclusive, and Chapter 6 (commencing with Section 114840) of Part 9 of Division 104.

SEC. 2. Section 1290 of the Health and Safety Code is amended to read:

1290. (a) Except as provided in subdivision (b) or (c), any person who violates this chapter or Section 127050 or 128600, or who willfully or repeatedly violates any rule or regulation adopted under this chapter or Section 127050 or 128600 is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days, or by both the fine and imprisonment.

(b) Any person who violates Section 1286 is guilty of an infraction and shall be punished by a fine of not more than one hundred dollars ($100).

(c) Any person who willfully or repeatedly violates this chapter or Chapter 2.4 (commencing with Section 1417), excluding Sections 1425 and 1432, or any rule or regulation adopted under this chapter, relating to the operation or maintenance of a long-term health care facility as defined in Section 1418, is guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed two thousand five hundred dollars ($2,500) or by imprisonment in the county jail for a period not to exceed 180 days, or by both.

In determining the punishment to be imposed upon a conviction under this subdivision, the court shall consider all relevant facts, including, but not limited to, the following:

(1) Whether the violation exposed the patient to the risk of death or serious physical harm.

(2) Whether the violation had a direct or immediate relationship to the health, safety, or security of the patient.

(3) Evidence, if any, of willfulness.

(4) The number of repeated violations.

(5) The presence or absence of good faith efforts by the defendant to prevent the violation.

(d) For the purposes of this section, ''willfully'' or ''willful'' means the person doing an act or omitting to do an act intends the act or omission, and knows the relevant circumstances connected therewith.

SEC. 3. Division 101 (commencing with Section 100100) is added to the Health and Safety Code to read:

DIVISION 101. ADMINISTRATION OF PUBLIC HEALTH

PART 1. CALIFORNIA DEPARTMENT OF HEALTH SERVICES

CHAPTER 1. ORGANIZATION OF THE DEPARTMENT

100100. There is in the state government in the Health and Welfare Agency, a State Department of Health Services.

100105. The department is under the control of an executive officer known as the Director of Health Services, who shall be appointed by the Governor, subject to confirmation by the Senate, and hold office at the pleasure of the Governor. The director shall receive the annual salary provided by Article 1 (commencing with Section 11550) of Chapter 6 of Part 1 of Division 3 of Title 2 of the Government Code.

Upon recommendation of the director, the Governor may appoint not to exceed two chief deputies of the department who shall hold office at the pleasure of the Governor. The salaries of the chief deputies shall be fixed in accordance with law.

100110. The director shall have the powers of a head of the department pursuant to Chapter 2 (commencing with Section 11150) of Part 1 of Division 3 of Title 2 of the Government Code.

100115. There is in the department a Division of Rural Health. The division shall administer Chapter 3 (commencing with Section 124550) and Chapter 4 (commencing with Section 124575) of Part 4 of Division 106, Section 101300, and Article 1 (commencing with Section 124600) of Chapter 5 of Part 4 of Division 106.

100117. The Legislature finds and declares all of the following:

(a) The AIDS pandemic continues to devastate California. Over 44,000 Californians have died of AIDS since 1981, and it is estimated that one out of every 200 Californians is infected with HIV, the virus believed to cause AIDS. Education remains the best tool to prevent the ongoing spread of HIV.

(b) The seroprevalence rate of HIV-infected persons is increasing dramatically in some groups. The incidence rate among women, people of color, at-risk youth, substance abusers, rural residents and their sexual partners is increasing, as is the rate of infection among

gay and bisexual men, especially in urban areas. It is clear that targeted financial resources must be directed to conduct effective HIV education and risk reduction.

(c) Many AIDS service providers, community-based organizations, and other advocacy groups lack the technical assistance necessary for them to access public and private grant moneys to serve their clients.

(d) In addition to prevention education efforts, there are additional unmet financial needs in the war against HIV infection and AIDS. These unmet needs include, but are not limited to, care and treatment of those with HIV, expanded medical and social behavioral research, funding for HIV antibody testing at both anonymous and confidential test sites throughout California, housing and financial assistance for those with HIV and their families, and mental health programs for people with HIV and those at risk for contracting AIDS.

(e) Numerous state agencies and departments conduct HIV-related programs, including the State Department of Health Services, the State Department of Social Services, the Department of Corrections, the State Department of Alcohol and Drug Programs, the State Department of Education, the State Department of Mental Health, the Department of the Youth Authority, and the University of California. Coordination of the various state funded programs will enhance the service delivery of HIV-related programs to Californians in need.

(f) An evaluation of state prevention and education efforts was conducted by the Institute for Health Policy Studies at the University of California, San Francisco and published in March of 1993. This report, entitled ''HIV Prevention in California,'' noted both positive achievements of state-run programs as well as opportunities for improvement. Among the primary recommendations of the study was the need to legislatively identify the Office of AIDS in the State Department of Health Services as the lead agency on HIV and AIDS to ensure the goal of state program coordination.

100119. There is in the State Department of Health Services an Office of AIDS. The State Department of Health Services, Office of AIDS, shall be the lead agency within the state, responsible for coordinating state programs, services, and activities relating to the human immunodeficiency virus (HIV), acquired immune deficiency syndrome (AIDS), and AIDS related conditions (ARC). Among its responsibilities, the State Department of Health Services, Office of AIDS, shall coordinate Sections 120875, Section 120880, Chapter 2 (commencing with Section 120800), Chapter 4 (commencing with Section 120900), Chapter 6 (commencing with Section 120950), Chapter 8 (commencing with Section 121025), Chapter 9 (commencing with Section 121050), Chapter 10 (commencing with Section 121075), Chapter 11 (commencing with Section 121150),

Chapter 12 (commencing with Section 121200), Chapter 13 (commencing with Section 121250), and Chapter 14 (commencing with Section 121300), of Part 4 of Division 105. Any reference in those provisions to the State Department of Health Services shall be deemed a reference to the Office of AIDS.

100120. All officers or employees of the department employed after July 1, 1978, shall be appointed by the director.

100125. Notwithstanding any other provision of state law, the department shall develop a proposal for consolidation of various programs affecting the health of mothers and children. The department, in developing the proposal, shall consult with the State Maternal Child and Adolescent Health Board, the California Conference of Local Health Officers, the California State Association of Counties, the Primary Care Clinic Advisory Committee, and other organizations interested in health services for women and children, as determined by the department, that shall assist it in identifying waivers of state and federal requirements that would be necessary to implement the proposal. The proposal shall consider administrative cost savings that may result from this consolidation. The department shall obtain waivers from state and federal requirements that the department determines are necessary to make the proposal viable. Any problem in obtaining the waivers shall be reported to the Legislature with the proposals. The department shall submit its proposal to the Legislature on or before January 1, 1984. Programs may include, but need not be limited to, the following:

(a) California Children's Services.
(b) WIC—Special Supplemental Food.
(c) Child Health and Disability Prevention.
(d) California Immunization Assistance Program.
(e) Children and Youth Project.
(f) Dental Disease Prevention.
(g) Rural Health.
(h) Indian Health.
(i) Pediatric Renal Failure Centers.
(j) Prepaid Health Plans.
(k) Family Planning.
(*l*) Infant Medical Dispatch Centers Program.
(m) Childhood Lead Program.
(n) Tuberculosis Control Program.
(o) Venereal Disease.
(p) SSI Disabled Children's Program.
(q) Other maternal and child health programs, including, but not limited to, the following:
(1) Sickle Cell.
(2) Prenatal Testing.
(3) Tay Sachs.
(4) Huntington's Disease.

(5) Prenatal Access.
(6) High Risk Followup.
(7) O.B. Access.
(8) Perinatal Health Clinics.
(9) Primary Care Clinics.
(10) Maternal and Child Health Grants.

Consolidation may include combining two or more specialized programs or the development of a single planning, evaluation, budgeting and reporting process for two or more programs that share a common target population. The department may submit more than one proposal for consolidation if two or more groupings of programs merit consolidation.

Each proposal shall be developed after a review by the department of consolidation efforts proposed or developed by the counties. In the design of the proposal, the department shall consider how state level plans may assist further development of these local efforts.

The department shall consult with the Department of Finance to develop a simplified budget and reporting format for programs that are recommended for consolidation.

The Department of Finance shall make modifications in the California Fiscal Information System as it deems necessary to accommodate the proposed program consolidation.

The Office of Statewide Health Planning and Development shall consult with the department with respect to the implementation of this section. The office shall incorporate recommendations for the consolidation of maternal, child, and adolescent health services in applicable policy plans adopted after January 1, 1983.

100130. Each state level consolidation proposal shall include plans for the development of the following:

(a) Common eligibility standards for programs included within the consolidated proposal, or, if federal law requires different eligibility standards for these programs, a common method for determining eligibility.

(b) A single form for the collection of necessary data from individuals, or a uniform format shared by all programs included in the consolidated proposal.

(c) A single form for reporting service delivery to the state.

(d) Shared plans, budgets, and fiscal accountability mechanisms, including audit procedures.

(e) Common intake points for services included in the consolidated system, that include eligibility determination, referral services, and follow through.

(f) A unified case management system.

(g) A method of determining the needs of, and developing services for, special populations.

(h) Implementation plans that propose solutions to any identified significant barriers or gaps in service.

100135. The director may seek and grant waivers that the department determines are reasonably necessary for the implementation of the department's proposed consolidations.

100140. It is the intent of the Legislature that the duties and responsibilities provided for in Sections 100125 and 100130 be accomplished by utilizing existing staff resources, and that no additional funding be provided other than that appropriated by the Legislature in the annual Budget Act.

CHAPTER 2. GENERAL POWERS OF THE DEPARTMENT

Article 1. General Provisions

100150. The State Department of Health Services succeeds to and is vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the State Department of Health as they relate to public health, licensing and certification of health facilities, except community care facility licensing to which the State Department of Social Services succeeds, and any other functions performed by the Division of Public Health of the State Department of Health on July 1, 1978, unless the function is transferred to a different state agency or department as a result of another provision of the statutes of the 1977–78 Regular Session of the Legislature amending this section.

''State department,'' ''department,'' or ''State Department of Health'' as used in this code, except in Article 7.5 (commencing with Section 416) of Chapter 2 of Part 1 of Division 1 or as otherwise specified in this code, means the State Department of Health Services.

The Office of Statewide Health Planning and Development shall assume the functions and responsibilities of the Facilities Construction Unit of the former State Department of Health, including, but not limited to, those functions and responsibilities performed pursuant to the following provisions of law: Sections 13113 and 127050; Article 1 (commencing with Section 129000) of Chapter 1 of, and Chapter 2 (commencing with Section 129375) of, Part 6 of, and Part 7 (commencing with Section 129675) of, Division 107.

100155. The department may use the unexpended balance of funds available for use in connection with the performance of the functions of the State Department of Health to which the department has succeeded pursuant to Section 100150.

100160. All officers and employees of the State Department of Health heretofore performing any duty, power, purpose, responsibility, or jurisdiction to which the department has succeeded, who, on July 1, 1978, are serving in the state civil service, other than as temporary employees, and engaged in the performance of a function vested in the department by Section 100150 shall be transferred to the department. The status, positions, and rights of

these persons shall not be affected by the transfer and shall be retained by them as officers and employees of the department, pursuant to the State Civil Service Act except as to positions exempted from civil service.

100165. The department shall have possession and control of all records, papers, officers, equipment, supplies, moneys, funds, appropriations, land or other property, real or personal, held for the benefit or use of any state agency whose functions are vested in the department by Section 100150.

100170. The department may commence and maintain all proper and necessary actions and proceedings for any or all of the following purposes:

(a) To enforce its regulations.

(b) To enjoin and abate nuisances dangerous to health.

(c) To compel the performance of any act specifically enjoined upon any person, officer, or board, by any law of this state relating to the public health.

(d) To protect and preserve the public health.

It may defend all actions and proceedings involving its powers and duties. In all actions and proceedings it shall sue and be sued under the name of the department.

100175. The department may abate public nuisances.

100180. The department may advise all local health authorities, and, when in its judgment the public health is menaced, it shall control and regulate their action.

100185. (a) The department may perform any of the following activities relating to the protection, preservation, and advancement of public health:

(1) Studies.

(2) Demonstrations of innovative methods.

(3) Evaluations of existing projects.

(4) Provision of training programs.

(5) Dissemination of information.

(b) In performing an activity specified in subdivision (a), the department may do any of the following:

(1) Perform the activity directly.

(2) Enter into contracts, cooperative agreements, or other agreements for the performance of the activity.

(3) Apply for and receive grants for the performance of the activity.

(4) Award grants for the performance of the activity.

100190. The department may provide for consultant and advisory services and for the training of technical and professional personnel in educational institutions and field training centers approved by the department, and for the establishment and maintenance of field training centers in local health departments and in the department.

100195. The department shall cause special investigation of the preparation and sale of drugs and food and their adulteration.

100200. The department shall perform duties as required by law for the detection and prevention of the adulteration of articles used for food and drink, and for the punishment of persons guilty of violation of any law providing against their adulteration.

100205. The department shall examine and may prevent the pollution of sources of public domestic water and ice supply.

100210. The department shall maintain a program of Drinking Water and Environmental Management.

100215. The department may maintain a mental health service that shall advise and assist local departments of health and education in the establishment of mental health services, particularly in connection with maternal and child health conferences and in the schools of the state.

The department may conduct these activities as may be required in the development of mental health services as related to public health.

This section does not authorize any form of compulsory medical or physical examination, treatment, or control of any person.

100220. With the approval of the Department of Finance, and for use in the furtherance of the work of the department, the director may accept (a) grants of interest in real property, and (b) gifts of money from public agencies or from organizations or associations organized for scientific, educational, or charitable purposes.

100225. The department shall enforce Section 383b of the Penal Code.

100230. (a) Any person who willfully sells, keeps for sale, or offers for sale any food, drug, device, or cosmetic knowing, after a written notice from either (1) a manufacturer, wholesaler, distributor, or importer, or (2) the department or a local health officer that the product linked to an outbreak of illness, injury, or product tampering is being ordered removed from sale by the department pursuant to Section 100180, shall, upon conviction, be punished by a fine of not less than two thousand dollars ($2,000) nor more than ten thousand dollars ($10,000) for each day of violation, or by imprisonment in the county jail for not more than one year, or by both a fine and imprisonment.

(b) If a second or subsequent violation is committed after a previous conviction under this section has become final, the person shall be punished by a fine of not less than five thousand dollars ($5,000) nor more than twenty-five thousand dollars ($25,000) for each day of violation, or by imprisonment in the state prison, or by both a fine and imprisonment.

(c) Notwithstanding any other provision of law, the court may suspend the minimum fines provided for in this section if it

determines that there are circumstances in mitigation and the court states on the record its reasons for suspending the minimum fine.

100235. Whenever any person violates any provision of Section 100230, the court may, as a condition of probation, order the defendant to pay, in lieu of any fine, any expenses, both direct and indirect, incurred by a local health department or the department in monitoring compliance with the order pursuant to Section 100180, including, but not limited to, the costs of conducting inspections and imposing embargoes. The total costs payable to the department and local health departments collectively imposed pursuant to this section shall not exceed the maximum fine for the offense of which the defendant is convicted.

Any amount collected under this section shall be paid to the local health department incurring the expenses or, if to reimburse costs of the department, into the General Fund.

Article 2. State Laboratories

100250. The department shall maintain a laboratory and branch laboratories as may be necessary to perform the microbiological, physical and chemical analyses required to meet the responsibilities of the department.

100255. The department may prepare or purchase biological products and distribute them at cost.

Article 3. Regulatory Authorization and Review

100275. (a) The department may adopt and enforce regulations for the execution of its duties.

(b) All regulations heretofore adopted by the department or its predecessors relating to public health, the licensing and certification of health facilities, except the licensing of community care facilities, or any other function performed by the Division of Public Health of the department, and in effect immediately preceding July 1, 1978, shall remain in effect and shall be fully enforceable unless and until readopted, amended, or repealed by the director or as otherwise provided by Section 25 or other provisions of law. This subdivision shall not apply to any regulation relating to a function transferred to a different state agency or department as a result of another provision of the statutes enacted during the 1977–78 Regular Session.

100280. (a) The director shall adopt emergency regulations pursuant to Section 1267.7 implementing Chapter 327 of the Statutes of 1982, effective July 1, 1983, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of regulations shall be deemed to be an emergency, and necessary for the immediate preservation of the public peace, health and safety, or general welfare.

(b) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, regarding the duration of emergency regulations, any regulations adopted by any state agency in order to implement this section, shall remain in effect until June 30, 1984.

100285. (a) Notwithstanding Section 11346.1 of the Government Code regarding the duration of emergency regulations, any regulations adopted by the director pursuant to Section 100280 and in effect on June 27, 1984, shall remain in effect until emergency regulations adopted pursuant to subdivision (b) become effective.

(b) The director shall adopt emergency regulations pursuant to Section 1267.7, to be effective August 1, 1984, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The adoption of the regulations shall be deemed to be an emergency and necessary for the immediate preservation of the public peace, health and safety, or general welfare.

(c) The director shall transmit emergency regulations adopted pursuant to subdivision (b) directly to the Secretary of State for filing, and the regulations shall become effective immediately upon filing.

(d) Upon completion of the formal regulation adoption process and prior to the expiration of the 120-day duration period of emergency regulations, the director shall transmit directly to the Secretary of State for filing the adopted regulations, the rulemaking file, and the certification of compliance, as required by subdivision (e) of Section 11346.1 of the Government Code.

(e) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any regulations adopted by the director pursuant to this section and any documentation filed with those regulations shall not be subject to any review, approval, disapproval, or repeal by the Office of Administrative Law.

100290. Notwithstanding any other provision of law, the department shall submit all of its regulations on matters related to statutory responsibilities delegated to or enforced by local health departments, except emergency regulations, to the California Conference of Local Health Officers for review and comment prior to adoption. If the department deems it appropriate to implement the proposed regulations or parts thereof, contrary to the recommendations of the conference, the department shall make a public finding summarizing the reasons for acting contrary to these recommendations.

100295. The department, after consultation with and approval by the Conference of Local Health Officers, shall by regulation establish standards of education and experience for professional and technical personnel employed in local health departments and for the organization and operation of the local health departments. These

standards may include standards for the maintenance of records of services, finances and expenditures, that shall be reported to the director in a manner and at times as the director may specify.

100300. When a dispute arises as to the interpretation or enforcement of regulations of the department that are being enforced by a city, city and county, county, or district, a request for clarification or interpretation may be submitted to the department. The department shall make a determination of the proper interpretation and required enforcement when so requested by a party to the dispute.

In making its determination the department may conduct a hearing where all interested parties may present relative comments or arguments.

Determinations of the department made pursuant to this section shall be transmitted to the concerned local agency and the involved party or parties within 60 days after the receipt of the request. The determination of the department shall be binding upon the local agency and the parties subject to the regulations of the department, except when the matter may be subject to judicial review.

100305. Notwithstanding any other provision of law, the department by regulation may provide for the issuance and renewal on a two-year basis of licenses, certificates of registration, or other indicia of authority issued pursuant to this code by the department.

The department may by regulation set the fee for the two-year license, certificate of registration, or other indicia, not to exceed twice the annual fee for issuance or renewal set by statute.

100310. Notwithstanding any other provision of law, but to the extent consistent with applicable federal law or regulation, the director may, after a request by a board of supervisors of an affected county and after a public hearing held in accordance with Section 11346 of the Government Code, waive regulations pertaining to the provision of hospital services in a hospital operated by a county or under contract to a county for a county with a population of 200,000 or less on January 1, 1980, if the director makes a finding that the waiver would not affect adversely the health and safety of persons in the county.

The authority contained in this section shall be in addition to, and shall not supersede or limit, any other provision of law authorizing the waiver by the department of requirements contained in regulations adopted by the department relating to health facilities.

Article 4. Population, Public Health, and Environmental Study

100325. The department shall cause special investigations of the sources of morbidity and mortality and the effects of localities, employments, conditions and circumstances on the public health and the department shall perform other duties as may be required in

procuring information for state and federal agencies regarding the effects of these conditions on the public health.

100330. All records of interviews, written reports, and statements procured by the department or by any other person, agency, or organization acting jointly with the department, in connection with special morbidity and mortality studies shall be confidential insofar as the identity of the individual patient is concerned and shall be used solely for the purposes of the study. The furnishing of this information to the department or its authorized representative, or to any other co-operating individual, agency or organization in any special study, shall not subject any person, hospital, sanitarium, rest home, nursing home, or other organization furnishing this information to any action for damages. This section shall not apply to general morbidity and mortality studies customarily and continuously conducted by the department that do not involve patient identification.

Nothing in this section shall prohibit the publishing by the department of statistical compilations relating to morbidity and mortality studies that do not identify individual cases and sources of information or religious affiliations.

100335. The department may do all of the following activities:

(1) Make a continuing study of births, deaths, marriages, and divorces, in order to provide a continuing analysis of trends to state agencies and to the Legislature.

(2) Request and receive demographic and population data from the Department of Finance.

(3) Make any additional collection of data necessary to describe and analyze fertility, family formation and dissolution, abortion practices, and other factors related to population dynamics, public health, and the environment.

(4) Assess the health, environmental, and related effects of current and projected population.

(5) Formulate recommendations for programs, consistent with individual rights and the integrity of the environment, to respond to projected trends.

100340. The department may report to the Legislature, on the fifth calendar day of every second regular legislative session, on its findings related to public health, the environment, and population trends and distribution, and may make recommendations concerning the consequences of projected growth and change pertinent to the planning and legislative concerns of the state.

CHAPTER 3. ADDITIONAL ADMINISTRATIVE PROVISIONS

Article 1. Advance Payments to Small Contractors

100350. The Legislature finds that many programs of the department are hindered by the length of time required for the state

to execute contracts and pay vendor claims. These programs include, but are not limited to, community hypertension, rural health services development, family planning, genetic counseling, supplemental feeding program for women, infants, and children, sickle cell disease and newborn screening projects. This hardship is particularly felt by new or small community-based public or private nonprofit agencies with modest reserves and cash-flow problems. It is the intent of the Legislature that advance payment authority be established for the department in order to alleviate those problems for those types of contractors to the extent possible.

Notwithstanding any other provision of law, the department may, to the extent funds are available, provide for advance payments for services to be performed under any contract, with a total annual contract amount of two hundred thousand dollars ($200,000) or less, that the department determines has been entered into with any small, community-based public or private nonprofit agency with modest reserves and potential cash-flow problems. These programs include, but are not limited to, the following:

(a) Community hypertension.

(b) Genetic disease programs.

(c) Supplemental feeding programs for women, infants and children.

(d) Sickle cell disease.

(e) Newborn screening projects.

(f) Rural health programs.

(g) Indian health programs.

No advance payment or aggregate of advance payments made pursuant to this section shall exceed 25 percent of the total annual contract amount. No advance payment should be made pursuant to this section if the applicable federal law prohibits advance payment.

Article 2. Public Health Federal Fund

100375. The Public Health Federal Fund in the State Treasury is hereby created. All grants of money received by the state from the United States, the expenditure of which is administered through or under the direction of the department, shall, on order of the Controller, be deposited in the Public Health Federal Fund.

100380. All money in the Public Health Federal Fund is hereby appropriated to the department, without regard to fiscal years, for expenditure for the purposes for which the money deposited therein is made available by the United States.

100385. The department and the Controller shall keep a record of the classes and sources of income deposited in, or transferred to, the Public Health Federal Fund, and of the disbursements and transfers therefrom.

100390. The Director of Finance and the Controller may approve any general plan that meets the following requirements:

(a) Any expenditures that are a proper charge against the money made available by the United States and deposited in the Public Health Federal Fund may be paid in the first instance from any appropriation from the General Fund, expenditures from which are administered through or under the direction of the department.

(b) Any expenditures that are a proper charge against an appropriation from any special fund in the State Treasury, expenditures from which are administered through or under the direction of the department, may be paid in the first instance from any appropriation from the General Fund, expenditures from which are administered through or under the direction of the department.

(c) The General Fund shall be reimbursed for expenditures made therefrom that are a proper charge against the Public Health Federal Fund or against any appropriation from any special fund.

Such a general plan may provide for advance transfers from the Public Health Federal Fund to the General Fund, based on estimates of expenditures that will be subject to reimbursement from the Public Health Federal Fund pursuant to the plan, and may provide for reimbursements to the Public Health Federal Fund, when necessary.

Request for reimbursement or transfer pursuant to the plan shall be furnished to the Controller in writing by the department, accompanied by financial statements as the plan may provide; and on order of the Controller, the required amount shall be transferred in accordance with the plan.

Article 3. Special Deposit Funds

100400. All grants or donations of money received by the state from sources other than the United States, the expenditure of which is administered through or under the direction of the department, shall, on order of the Controller, be deposited in the Special Deposit Fund, subject to Article 2 (commencing with Section 16370) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code. The Controller shall designate, by name, separate accounts within the Special Deposit Fund covering the accountability for each class of grant or donation deposited pursuant to this section; and the department and the Controller shall keep a record of the classes and sources of income deposited in, or transferred to, each of the accounts in the Special Deposit Fund, and of the disbursements therefrom.

All moneys deposited in the Special Deposit Fund pursuant to this section shall be available, without regard to fiscal years, for expenditure for the purposes for which the money was made available to the state.

Article 4. Fees or Charges for Issuance and Renewal of Documents

100425. (a) The fees or charges for the issuance or renewal of any permit, license, registration, or document pursuant to Sections 1639.5, 1676, 1677, 2202, 2805, 11887, 100720, 100860, 106700, 106890, 106925, 107080, 107090, 107095, 107160, 110210, 110470, 111130, 111140, 111630, 112405, 112510, 112750, 112755, 113060, 113065, 115035, 115065, 115080, 116205, 117923, 117995, 118045, 118210, and 118245 shall be adjusted annually by the percentage change printed in the Budget Act for those items appropriating funds to the department. After the first annual adjustment of fees or charges pursuant to this section, the fees or charges subject to subsequent adjustment shall be the fees or charges for the prior calendar year. The percentage change shall be determined by the Department of Finance, and shall include at least the total percentage change in salaries and operating expenses of the state department. However, the total increase in amounts collected under this section shall not exceed the total increased cost of the program or service provided.

(b) The department shall publish annually a list of the actual numerical fee charges for each permit, license, certification, or registration governed by this section. This adjustment of fees and publication of the fee list shall not be subject to the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

100430. (a) The fees or charges for a record search or for the issuance of any license, permit, registration, or any other document pursuant to Sections 26832, 26840, and 26859 of the Government Code, or Sections 102525, 102625, 102670, 102725, 102750, 103050, 103065, 103225, 103325, 103400, 103425, 103450, 103525, 103590, 103595, 103625, 103650, 103675, 103690, 103695, 103700, 103705, 103710, 103715, 103720, 103725, and 103730 of this code, may be adjusted annually by the percentage change determined pursuant to Section 100425.

The base amount to be adjusted shall be the statutory base amount of the fee or charge plus the sum of the prior adjustments to the statutory base amount. Whenever the statutory base amount is amended, the base amount shall be the new statutory base amount plus the sum of adjustments to the new statutory base amount calculated subsequent to the statutory base amendment. The actual dollar fee or charge shall be rounded to the next highest whole dollar.

(b) Beginning January 1, 1983, the department shall annually publish a list of the actual numerical fee charges as adjusted pursuant to this section. This adjustment of fees and the publication of the fee list shall not be subject to the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

100435. For the fee specified in Section 26840 of the Government Code, the adjustment authorized by Section 100430 shall apply only to the portion of the fee designated for the State Registrar of Vital Statistics. Any increase in this component of the fee shall be added to the total fee authorized by Section 26840 of the Government Code.

100440. For the fee specified in subdivision (c) of Section 103625, the adjustment authorized by Section 100430 shall apply to the additional fee charged to applicants other than public agency applicants for certified copies of marriage or marriage dissolution records, as well as to the other fees imposed by that section.

100445. (a) The fees or charges required to accompany an application for the issuance or renewal of any license pursuant to Sections 1403, 1575.9, and 1729 shall be adjusted annually, commencing July 1, 1988, by the percentage change printed in the Budget Act and determined by dividing the General Fund appropriation to the Licensing and Certification Division in the current state fiscal year by the General Fund appropriation to the Licensing and Certification Division in the preceding state fiscal year. Commencing July 1, 1988, the fees or charges subject to adjustment pursuant to this subdivision shall be the fees or charges that would have been payable in the prior calendar year without regard to the provisions of subdivision (b).

(b) The fees or charges required to accompany an application for the issuance or renewal of any license pursuant to Section 1729 shall also be adjusted annually, commencing July 1, 1988, by a percentage determined by dividing the total amount of federal funds available for home health agencies during the federal fiscal year ending on September 30 of the year immediately preceding the effective date of the change in fees, less federal funds available for home health agencies for the federal fiscal year that began on October 1 of the year immediately preceding the effective date of the change in fees, by the total estimated revenue derived pursuant to Section 1729 for the fiscal year beginning July 1 of the year immediately preceding the effective date of the change in fees.

(c) The department shall by July 1 of each year publish a list of the actual numerical fee charges as adjusted pursuant to this section. This adjustment of fees and the publication of the fee list shall not be subject to the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

100450. (a) The fees or charges required to accompany an application for the issuance or renewal of any license pursuant to Section 1300 of the Business and Professions Code or pursuant to Section 1616 shall be adjusted annually by the percentage change printed in the Budget Act and determined by dividing the General Fund appropriation to Laboratory Field Services in the current state fiscal year by the General Fund appropriation to Laboratory Field

Services in the preceding state fiscal year. The fees or charges subject to adjustment pursuant to this subdivision shall be the fees or charges that would have been payable in the prior calendar year without regard to the provisions of subdivision (c).

(b) Commencing January 1, 1995, upon establishment of the Clinical Laboratory Improvement Fund, the annual adjustment required under subdivision (a) and printed in the annual Budget Act shall be determined by dividing the current fiscal year appropriation to the Clinical Laboratory Improvement Fund by the General Fund appropriation to Laboratory Field Services of the State Department of Health Services in the preceding fiscal year. Thereafter, the annual adjustment required by subdivision (a) and printed in the annual Budget Act shall be determined by dividing the current fiscal year appropriation to the Clinical Laboratory Improvement Fund by the Clinical Laboratory Improvement Fund appropriation in the preceding fiscal year.

(c) The fees or charges shall also be adjusted annually by a percentage determined by dividing the total amount of federal funds available for all programs in Laboratory Field Services of the State Department of Health Services during the federal fiscal year ending on September 30 of the year immediately preceding the effective date of the change in fees, less federal funds available for the federal fiscal year which began on October 1 of the year immediately preceding the effective date of the change in fees as indicated in any grant award letter received from the federal Department of Health and Human Services on or before November 1 of that federal fiscal year, by the total estimated revenue derived pursuant to Section 1300 of the Business and Professions Code and Section 1616 for the fiscal year beginning July 1 of the year immediately preceding the effective date of the change in fees.

(d) The department shall by January 1 of each year publish a list of actual numerical fee charges as adjusted pursuant to this section. This adjustment of fees and the publication of the fee list shall not be subject to the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

Article 5. Review of Statutes

100475. (a) The director shall conduct a comprehensive review of the statutes governing the protection of the public health, as principally embodied in this code. The review shall be conducted by the director in cooperation with county and city representatives and the California Conference of Local Health Officers and shall produce the following:

(1) A list of those sections of law that should be deleted due to ambiguity, conflict with other statutes, inappropriateness, or obsolescence.

(2) A reorganization by chapter and section for all public health laws.

(3) Recommendations regarding new or expanded legislation that should be added to balance or provide equity, avoid conflict, or meet defined needs.

(4) A process to provide continuous review of public health statutes and regulations to avoid obsolescence and identify need for new legislation.

(b) A report shall be submitted to the Legislature at the conclusion of the review, but no later than April 1, 1993. The report shall address the objectives of the review, specified in subdivision (a) and shall be jointly submitted by the director, county and city representatives, and the California Conference of Local Health Officers, with addendums as appropriate to further explain the recommendations of any party.

Article 6. Richmond Laboratory and Office Facility

100500. (a) The Director of General Services may acquire real property in order to construct a laboratory and office facility or remodeling an existing facility in the City of Richmond, for the use of the State Department of Health Services.

(b) Revenue bonds, negotiable notes, and negotiable bond anticipation notes may be issued by the State Public Works Board pursuant to the State Building Construction Act of 1955 (Part 10b (commencing with Section 15800) of Division 3 of Title 2 of the Government Code) to finance the acquisition and construction of a new laboratory and office facility, or remodeling of an existing facility for the State Department of Health Services in the City of Richmond. The amount of the bonds plus the cost of equipment shall not exceed fifty-four million five hundred thousand dollars ($54,500,000) as necessary for land acquisition including, but not limited to, land needed for planned future expansion of the laboratory and office facility, environmental studies, preliminary plans, working drawings, construction, furnishings, equipment, and all related betterments and improvements. Notwithstanding Section 13332.11 of the Government Code, the State Public Works Board may authorize the augmentation of the amount authorized under this section for the project by an amount not to exceed 10 percent of the amount appropriated for this project.

(c) The State Public Works Board may borrow funds for project costs from the Pooled Money Investment Account pursuant to Sections 16312 and 16313 of the Government Code.

(d) The amount of revenue bonds, negotiable notes, or negotiable bond anticipation notes to be sold shall equal the cost of acquisition, including land, construction, preliminary plans, and working drawings, construction management and supervision, other costs relating to the design, construction, or remodeling of the facilities, and any additional sums necessary to pay interim and permanent financing costs. The additional amount may include interest and a reasonable required reserve fund. At least 30 days prior to the signing of the agreement for the acquisition, construction, or remodeling of the Richmond facility pursuant to subdivision (b), the State Director of Health Services and the Director of General Services shall jointly report to the Joint Legislative Budget Committee and the fiscal committees of each house of the Legislature. The report shall specify (1) the terms of the proposed agreement, (2) how the acquisition, construction, or remodeling will meet the needs of the State Department of Health Services for laboratory facilities in the East Bay area, and (3) implementation plans for the Richmond facility, including project planning guides and cost estimates for the project.

100505. It is the intent of the Legislature to fully utilize current state real property assets and to encourage joint land use between public entities. Therefore, it is the Legislature's intent that the development of the State Department of Health Services' laboratory and office facility, as authorized by Section 100500 occur on property owned by the Regents of the University of California, commonly known as the Richmond Field Station in Richmond, California.

100510. (a) Subject to the approval by the Regents of the University of California and the Public Works Board, of a land exchange agreement that is consistent with this section, a land exchange shall occur in which the state-owned real property located at 2151 Berkeley Way, Berkeley, shall be exchanged for real property located on the University of California, Richmond Field Station, owned by the Regents of the University of California, to allow the department to construct a laboratory and office facility pursuant to Section 100500 and planned future expansion to meet its programmatic needs.

(b) In exchange for no more than 11.5 acres on the northwest corner of the Richmond Field Station, with the understanding that the department shall negotiate with the regents for additional land to provide whatever additional employee parking is necessary, and upon vacating the property at 2152 Berkeley Way, the department shall transfer title to the real property located at 2151 Berkeley Way, Berkeley, to the Regents of the University of California under all of the following conditions:

(1) The department shall be responsible for the future demolition of the building, and any other improvements, located at 2151 Berkeley Way, Berkeley. The demolition of this property shall begin within six months of the department vacating the property 2152

Berkeley Way, Berkeley and be completed with all due diligence but no later than two years from the beginning date of demolition.

(2) The department and the University of California shall each be responsible for ensuring the property they exchange is free of contamination to the extent provided by law.

(3) The department shall consult with representatives of local environmental organizations, the University of California at Berkeley, and the City of Richmond regarding the site plan of the laboratory and office facility on the Richmond Field Station to meet the department's programmatic needs, and to resolve environmental concerns on the property.

(4) The sale of the department property located at 2002 Acton Street, Berkeley, shall be commenced by the Department of General Services on behalf of the department at the time the new laboratory and office facility at the Richmond Field Station is occupied. The sale of this property shall be to a private entity causing the property to revert to the tax rolls, with the proceeds deposited in the General Fund.

(5) Within 12 months of the transfer of title of the property at 2151 Berkeley Way, Berkeley, the regents shall offer for sale, lease, or exchange, for nontax exempt uses, that portion of the property bounded on the west by Shattuck Avenue, on the south by Berkeley Way, on the north by Hearst, and on the east by a marking of approximately 135 feet from the west boundary of the property. The proceeds of the sale, lease, or exchange of this property shall be to the credit of the Regents of the University of California.

(c) The Regents of the University of California shall, by June 1, 1995, either preliminarily approve or disapprove the exchange of real properties between the University of California and the department as provided for in this section. The regents, the Public Works Board, and the department shall give final approval or disapproval of the real property exchange as specified in this section within three months of their receipt of final environmental documentation as required by the California Environmental Quality Act, Division 13 (commencing with Section 21000) of the Public Resources Code on the department's project at the Richmond Field Station site.

(d) In the event the City of Richmond should approve the relocation of the railroad tracks currently located north of the Richmond Field Station site, the city shall be responsible for necessary mitigation measures to ensure that the relocation of the railroad tracks does not negatively affect the scientific work and studies being conducted by the department.

(e) It is the intent of the Legislature that both parties receive equal value as a result of the land exchange agreement described in subdivision (a). The determination of equal value shall be approved by the Regents of the University of California and the State Public

Works Board prior to the final approval of the land exchange agreement.

(f) This section shall not apply to the University of California, except to the extent that the Regents of the University of California, by appropriate resolution, make it applicable.

100515. In the event the regents do not preliminarily approve this project by June 1, 1995, or final approval is not forthcoming from the Regents, the board, or the department after completion of the final environmental documentation pursuant to Section 100510, the department shall obtain property elsewhere in the City of Richmond for the critically needed laboratory. Upon completion of the new department facility in Richmond, the property at 2151 Berkeley Way, Berkeley, shall, as determined by the department, either:

(a) Be retained by the department to meet additional facility needs. Any future development by the department of 2151 Berkeley Way, Berkeley, shall, to the extent feasible, include joint use between the department and the University of California Berkeley School of Public Health.

(b) Be sold to a private entity by the Department of General Services on behalf of the department in order to cause the property to revert to the tax rolls. Any proceeds from the sale of 2151 Berkeley Way, Berkeley, shall be deposited in the General Fund.

Article 7. Contract Uniformity

100525. It is the Legislature's intent in enacting this article to promote efficiency in the administration of multiple contracts between nonprofit organizations and the divisions of the department by requiring uniform provisions concerning fringe benefits. Nothing contained in this article shall be construed to mandate any personnel policies, procedures, or fringe benefits as a condition of contracting with the state. In addition, this article shall not supersede or amend any agreement that may have been entered into, or may be entered into in the future, between a nonprofit corporation and its employees, agents, or employee representative organization.

100530. Notwithstanding any other provision of law, the department shall review the following categorical programs and develop a procedure by which a contracting nonprofit organization is notified at the execution of a contract of the terms and conditions relating to the allowable costs associated with personnel, primary care grants-in-aid, maternal and child health, family planning, women, infant and children, dental disease prevention, child health and disability prevention, California children's services, preventive health care for the aging, rural health services, farmworker health services, California health services corps, American Indian health services, genetically handicapped programs, hypertension, perinatal health services, immunization, adolescent family life, and other

programs that the department wishes to include within the scope of this article.

100535. Nothing contained in this article shall conflict with any mandate imposed by laws or regulations of the state or federal government.

100540. The department shall take the steps necessary to achieve uniformity among contracts.

Article 8. Consolidation of Contracts

100550. Notwithstanding any other provisions of state law or any division in the allocation of funds in the Budget Act, the department may, within its authority to contract with a provider for the provision of health services, enter into a single contractual instrument encompassing services in any number of health services subject areas, limited to the following: primary care, maternal and child health, woman, infant, and child care, family planning, rural health services, migrant and seasonal farmworker care, child health and disability prevention, genetic disease, hypertension, grants-in-aid, American Indian health, adult health care, and dental care, except that federally funded programs requiring separate accounting and reporting shall preserve the separate accounting and reporting for contracts executed pursuant to this article.

100555. To the extent that a reduction in administrative costs would thereby result, any agency or agencies authorized to conduct audits under any state health services program that is the subject of a contract with a provider shall conform the scope of any audit to include other health services programs encompassed by the contract for which the agency or agencies have authority to conduct audits.

100560. Notwithstanding any other provision of state law, any contract under this article shall be subject to review and approval by the Department of General Services.

100565. No provision of this article shall be construed to prohibit the department from providing under any contract entered into under this article for reimbursement on the basis of negotiated rates, capitation, fee-for-service, or any other method designed to reduce administrative costs.

100570. In order to implement this article, the department may establish a single account wherein all funds for eligible programs may be deposited for purposes of contracting in a single form.

Article 9. Pest Spray Reports

100575. (a) By the 10th of each month, a person engaged in the business of pest control under the authority of a license issued pursuant to Article 1 (commencing with Section 11701), Chapter 4, Division 6 of the Food and Agricultural Code shall file a spray report

with the county agricultural commissioner of each county in which the person has treated property during the previous month.

(b) The spray report shall include the name and address of the person and, for each property treated, the following information:

(1) The name and address of the owner of the property treated.

(2) The name and address of the owner of the crop treated.

(3) The type of crop treated.

(4) The date, time, and method of treatment.

(5) The type, quantity, and concentration of each pesticide used in the treatment.

(6) The type of insect or pest to be controlled.

(7) The number of trees or acres treated.

(8) Any other information that the department may deem necessary in view of conditions that may constitute a menace to life, health, or safety of individuals living or working in areas where pesticides are applied.

(c) Spray reports filed pursuant to this section are public records that shall be made available by the county agricultural commissioners for public inspection.

CHAPTER 4. REGULATION OF LABORATORY SERVICES

Article 1. (Reserved)

Article 2. Licensing of Laboratories

100700. The department shall adopt and publish rules and regulations to be used in approving and governing the operation of laboratories engaging in the performance of tests referred to in Sections 100710 and 100715, including the qualifications of the employees who perform the tests, that it determines are reasonably necessary to ensure the competence of the laboratories and employees to prepare, analyze, and report the results of the tests.

100710. The testing by or for law enforcement agencies of blood, urine, or tissue for the purposes of determining the concentration of ethyl alcohol in the blood of persons involved in traffic accidents or in traffic violations shall be performed only by a laboratory approved and licensed by the director for the performance of these tests.

100715. The testing of breath samples by or for law enforcement agencies for purposes of determining the concentration of ethyl alcohol in the blood of persons involved in traffic accidents or in traffic violations shall be performed in accordance with regulations adopted by the department.

The regulations shall establish the procedures to be used by law enforcement agencies in administering breath tests for the purposes of determining the concentration of ethyl alcohol in a person’s blood. The regulations shall be adopted and published in accordance with

Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

100720. Each laboratory in the state that performs the tests referred to in Sections 100710 and 100715, shall be licensed by the director. Each of these laboratories, other than a laboratory operated by the state, city or county or other public agency shall upon application for licensing pay a fee to the department in an amount, to be determined by the department, that will reimburse the department for the costs incurred by the department in the issuance and renewal of these licenses. On or before each January 1 of each year thereafter, each of these laboratories shall pay to the department a fee so determined by the department.

100725. On or after January 1, 1971, the department shall enforce this chapter and regulations adopted by the board.

100730. On or after January 1, 1971, the department shall annually publish a list of approved and licensed laboratories engaging in the performance of tests referred to in Sections 100710 and 100715.

100735. Every approved and licensed laboratory shall be periodically inspected by the department. Reports of each inspection shall be prepared on forms furnished by the department and shall be filed with the department.

100740. Any license issued pursuant to Section 100720 may be suspended or revoked by the director for any of the reasons set forth in Section 100750. The director may refuse to issue a license to any applicant for any of the reasons set forth in Section 100745. The proceedings under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the director shall have the powers and duties granted therein.

100745. The director may deny a license if the applicant or any partner, officer or director thereof:

(a) Fails to meet the qualifications established by the department pursuant to this article for the issuance of the license applied for.

(b) Was previously the holder of a license issued under this article that was revoked and never reissued or that was suspended and the terms of the suspension have not been fulfilled.

(c) Has committed any act involving dishonesty, fraud, or deceit whereby another was injured or whereby the applicant has benefited.

100750. The director may suspend, revoke, or take other disciplinary action against a licensee as provided in this article if the licensee or any partner, officer or director thereof:

(a) Violates any of the regulations adopted by the department pursuant to this article.

(b) Commits any act of dishonesty, fraud, or deceit whereby another is injured or whereby the licensee benefited.

(c) Misrepresents any material fact in obtaining a license.

100755. The director may take disciplinary action against any licensee after a hearing as provided in this article by any of the following:

(a) Imposing probation upon terms and conditions set forth by the director.

(b) Suspending the license.

(c) Revoking the license.

100760. Upon the effective date of any order of suspension or revocation of any license governed by this article, the licensee shall surrender the license to the director.

100765. All accusations against licensees shall be filed within three years after the act or omission alleged as the ground for disciplinary action, except that with respect to an accusation alleging a violation of subdivision (c) of Section 100750, the accusation may be filed within two years after the discovery by the department of the alleged facts constituting the misrepresentation prohibited by that section.

100770. After suspension of the license upon any of the grounds set forth in this article, the director may reinstate the license upon proof of compliance by the applicant with all provisions of the decision as to reinstatement. After revocation of a license upon any of the grounds set forth in this article, the license shall not be reinstated or reissued within a period of one year after the effective date of revocation.

100775. Any ampoules and their contents employed in a breath alcohol analysis test may be destroyed by the law enforcement agency in possession of them one year after the date of collection of the breath sample.

Article 3. Environmental Laboratories

100825. (a) The department may certify laboratories that perform, for regulatory purposes, analyses of drinking water, waste water, hazardous wastes, and contaminated soils or sediments, or any combination of these, through the issuance of certificates pursuant to this article. The department may also certify laboratories that perform analyses for pesticide residues pursuant to Section 110490.

(b) In any arrangement between laboratories that involves the transfer of samples or portions of samples, the analyzing laboratory shall be identified in all sample reports and shall be the laboratory for purposes of certification.

(c) For the purposes of this article:

(1) ‘‘Certificate’’ means a certificate issued under this article.

(2) ‘‘Laboratory’’ means any facility or vehicle that is owned by a person or persons, or by a public or private entity, and that is equipped and operated to carry out analyses in any of the fields of testing listed in Section 100860.

(3) ‘‘Pesticide’’ means any substance that alone, in chemical combination, or in any formulation with one or more substances, is an ‘‘economic poison’’ within the meaning of Section 12753 of the Food and Agricultural Code or a ‘‘pesticide’’ as defined in the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136 et seq.).

(4) ‘‘Regulatory purposes’’ means the use of laboratory analysis required by a regulatory governmental agency for determining compliance with this section or Chapter 1 (commencing with Section 116275), Chapter 2 (commencing with Section 116300), and Chapter 3 (commencing with Section 116350) of Part 11 of Division 104, Chapter 6.5 (commencing with Section 25100) of, Chapter 6.7 (commencing with Section 25280) of, and Chapter 6.8 (commencing with Section 25300) of, Division 20, or Division 7 (commencing with Section 13000) of the Water Code, or the regulations adopted under any of the provisions set forth in this paragraph.

100830. The department shall adopt regulations governing the administration and enforcement of this article. Until these regulations are adopted, regulations adopted under Sections 25198.2 and 116390 shall remain in effect. Regulations adopted by the department under this article shall specify conditions for recognizing on the basis of reciprocity the certification of laboratories located outside of the State of California for activities regulated under this article by another state or by an agency of the United States government. Certification by another jurisdiction may be recognized for purposes of this article with regard to one or several program activities, including, but not limited to, onsite inspections, the analysis of performance evaluation samples, or the evaluation of personnel qualifications.

100835. (a) The department may adopt regulations for the following:

(1) Quality assurance programs in effect at the laboratory.

(2) Laboratory facilities.

(3) Methods.

(4) Equipment.

(5) Proficiency evaluation.

(6) Fields of testing.

(7) Qualifications of laboratory directors and other laboratory personnel.

(8) Fees, inspections, hearings and other matters necessary to the administration and enforcement of this article.

(9) Any other area concerning the operation or maintenance of a laboratory not inconsistent with this article as may be necessary to carry out this article.

(b) If any regulations governing the minimum standards for certification of laboratories that perform analysis of food relate to the testing of raw agricultural commodities or dairy products, those

regulations shall be adopted, in cooperation with the Department of Food and Agriculture.

100840. Any laboratory desiring certification under this article shall file with the department a verified application on forms prescribed by the department containing all of the following:

(a) The names of the applicant and the laboratory.

(b) The location of the laboratory.

(c) A list of fields of testing for which the laboratory is seeking certification, selected from the activities listed in subdivision (a) of Section 100860.

(d) Evidence satisfactory to the department that the applicant has the ability to comply with this article and the regulations adopted under this article.

(e) Any other information required by the department for administration or enforcement of this article or regulations adopted under this article.

100845. (a) Each certificate issued pursuant to this article shall be issued to the owner of the laboratory and shall expire 24 months from the date of issuance. Application for renewal shall be filed with the department within a time period specified by regulation. Failure to make timely application for renewal shall result in expiration of the certificate.

(b) A certificate shall be forfeited by operation of law prior to its expiration date when one of the following occurs:

(1) The owner sells or otherwise transfers the ownership of the laboratory, except that the certificate shall remain in force 90 days, if the department receives written assurance and appropriate documentation within 15 days after the change has occurred that one or more of the conditions in subdivision (c) are met. The department shall accept or reject the assurance in writing within 30 days after it has been received.

(2) There is a change in the location of the laboratory (except a mobile laboratory) or structural alteration that may affect adversely the quality of analysis in the fields of testing for which the laboratory has been certified or is seeking certification, without prior written notification to the department.

(3) The certificate holder surrenders the certificate to the department.

(c) Upon change of ownership of a laboratory, the department may extend a certificate to the expiration date of the original certificate upon written assurance by the new owner that the operation of the laboratory will continue so as not to adversely affect the conditions regulated by this article.

(d) The department shall be notified in writing within 15 days whenever there is a change of director or other person in charge of a laboratory certified under this article. The notification shall include

documentation of the qualifications of the new director or other person in charge of the laboratory.

100850. (a) Upon the filing of an application for certification and after a finding by the department that there is full compliance with this article and regulations adopted under this article, the department shall issue to the owner a certificate in the fields of testing identified in Section 100860.

(b) The department shall deny or revoke a certificate if it finds any of the following:

(1) The laboratory fails to report acceptable results in the analysis of performance evaluation samples.

(2) The laboratory fails to pass an onsite inspection.

(3) The laboratory is not in compliance with any other provision of this article or regulations adopted under this article.

(c) Provided that there is compliance with all other provisions of this article, a certificate may be restricted by the department to the fields of testing of Section 100860 or subgroups thereof as defined by regulation for which acceptable results have been produced and onsite inspection was passed.

(d) Upon the filing of a complete application for a certificate pursuant to subdivision (a), the department may issue an interim certificate pending the completion of onsite inspection and an analysis of performance evaluation samples. An interim certificate shall be nonrenewable and shall remain in effect until a certificate is either granted under subdivision (a) or denied under subdivision (b), but not later than one year after the date of issuance.

100852. (a) Notwithstanding any other provision of law, the department may issue a certificate to the owner of a laboratory in a field of testing or method adopted by the federal Environmental Protection Agency pursuant to Part 136 of Title 40 of the Code of Federal Regulations, as amended September 11, 1992, as published in the Federal Register (57 FR 41830), or Part 141 of Title 40 of the Code of Federal Regulations, as amended July 17, 1992, as published in the Federal Register (57 FR 31776), and as subsequently amended and published in the Federal Register.

(b) Notwithstanding any other provision of law, the department shall not be required to meet the requirements of Chapter 3.5 (commencing with Section 11340) of the Government Code in order to issue a certificate pursuant to subdivision (a).

100855. Upon denial of any application for a certificate, or revocation of a certificate, the department shall immediately notify the applicant by certified mail, return receipt requested, of the denial and the reasons for the denial. Within 20 days of receipt, the applicant may present the department with a written petition for a hearing. Upon receipt in proper form by the department, the petition shall be set for hearing. The proceedings shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of

Part 1 of Division 3 of Title 2 of the Government Code and the department has all the powers granted in that chapter.

100860. (a) At the time of application and annually thereafter, from the date of the issuance of the certificate, a laboratory shall pay an annual certification fee. The fee shall consist of a basic nonrefundable fee of eight hundred seventy-nine dollars ($879) and an additional fee of three hundred ninety-six dollars ($396) for certification in each of the following fields of testing for which accreditation is sought: (1) microbiology of drinking water and waste water; (2) inorganic chemistry and physical properties of drinking water excluding toxic chemical elements; (3) analysis of toxic chemical elements in drinking water; (4) organic chemistry of drinking water (measurement by gc/ms combination); (5) organic chemistry of drinking water (excluding measurements by gc/ms combination); (6) radiochemistry; (7) shellfish sanitation; (8) aquatic toxicity bioassays; (9) physical properties testing of hazardous waste; (10) inorganic chemistry and toxic chemical elements of hazardous waste; (11) extraction tests of hazardous waste; (12) organic chemistry of hazardous waste (measurement by gc/ms combination); (13) organic chemistry of hazardous waste (excluding measurements by gc/ms combination); (14) bulk asbestos analysis; (15) substances regulated under the California Safe Drinking Water and Toxic Enforcement Act and not included in other listed groups; (16) waste water inorganic chemistry, nutrients, and demand; (17) toxic chemical elements in waste water; (18) organic chemistry of waste water (measurements by gc/ms combination); (19) organic chemistry of waste water (excluding measurements by gc/ms combination); (20) inorganic chemistry and toxic chemical elements of pesticide residues in food; (21) organic chemistry of pesticide residues in food (measurement by gc/ms combination); (22) organic chemistry of pesticide residues in food (excluding measurement by gc/ms combination); (23) operation of a mobile laboratory in any one of the above fields of testing in addition to activity in the same field of testing in a certified stationary laboratory under the same owner.

Fees for certification in a specified field of testing may be refunded if the department nullifies the application due to failure by the laboratory to complete the application process in the time and manner prescribed by regulation.

(b) In addition to the payment of certification fees, laboratories located outside the State of California shall reimburse the department for travel and per diem necessary to perform onsite inspections.

(c) If reciprocity with another jurisdiction is established by regulation as described in Section 100830, the regulations may provide for the waiver of certification fees for program activities considered equivalent.

(d) Fees collected under this section shall be adjusted annually as specified in Section 100425. The adjustment shall be rounded to the nearest whole dollar. It is the intent of the Legislature that the programs operated under this article be fully fee-supported.

(e) State and local government-owned laboratories in California established under Section 101150 or performing work only in a reference capacity as a reference laboratory are exempt from the payment of the fee prescribed under subdivision (a).

(f) In addition to the payment of certification fees, laboratories certified or applying for certification in fields of testing (20), (21), or (22) under subdivision (a) shall pay the department a fee of four hundred dollars ($400) for the preparation and handling of each performance evaluation sample set.

(g) For the purpose of this section, a reference laboratory is a laboratory owned and operated by a governmental regulatory agency for the principal purpose of analyzing samples referred by other laboratories for confirmatory analysis. Reference laboratories carry out quality assurance functions for other laboratories and may carry out unusual, highly specialized, and difficult analyses not generally available through commercial laboratories, and a limited number of routine analyses, for regulatory purposes only, and without assessing per-sample fees for the services.

100865. In order to carry out the purpose of this article, any duly authorized representative of the department may do the following:

(a) Enter and inspect a laboratory that is certified pursuant to this article or that has applied for certification.

(b) Inspect and photograph any portion of the laboratory, equipment, any activity, any samples taken, copy and photograph any records, reports, test results, or other information related solely to certification under this article or regulations adopted pursuant to this article.

(c) It shall be a misdemeanor for any person to prevent, interfere with, or attempt to impede in any way, any duly authorized representative of the department from undertaking the activities authorized by this section.

100870. (a) Any laboratory that is certified or has applied for certification or for renewal of certification under this article, shall analyze performance evaluation samples provided directly or indirectly by the department. The department shall have the authority to contract with third parties for the provision of performance evaluation samples. The samples shall be tested by the laboratory according to methods specifically approved for this purpose by the United States government or the department, or alternate methods of demonstrated adequacy or equivalence, as determined by the department. Performance evaluation sample sets shall be provided not less than twice, nor more than four times, a year

to each certified laboratory that performs analyses of food for pesticide residues.

(b) The department may provide directly or indirectly performance evaluation samples to a laboratory for the purpose of determining compliance with this article with or without identifying the department.

(1) When the department identifies itself, all of the following shall apply:

(A) The results of the testing shall be submitted to the department on forms provided by the department on or before the date specified by the department, and shall be used in determining the competency of the laboratory.

(B) There shall be no charge to the department for the analysis.

(2) When the department does not identify itself, the department shall pay the price requested by the laboratory for the analyses.

100875. Whenever the department determines that any person has violated or is violating this article or any certificate, regulation, or standard issued or adopted pursuant to this article, the director may issue an order directing compliance forthwith or directing compliance in accordance with a time schedule set by the department.

100880. If the department determines that a laboratory is in violation of this article or any regulation or order issued or adopted pursuant to this article, the department may issue a citation to the owner of the laboratory.

(a) The citation shall be served personally or by registered mail.

(b) Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the statutory provision, order, or regulation alleged to have been violated.

(c) The citation shall fix the earliest feasible time for elimination or correction of the condition constituting the violation.

(d) Citations issued pursuant to this section shall specify a civil penalty for each violation, not to exceed one thousand dollars ($1,000), for each day that the violation occurred.

(e) If the owner fails to correct a violation within the time specified in the citation, the department may assess a civil penalty as follows:

(1) For failure to comply with any citation issued for a violation of this article or a regulation, an amount not to exceed two hundred fifty dollars ($250) for each day that the violation continues beyond the date specified for correction in the citation.

(2) For failure to comply with any citation issued for violation of any department-issued order, an amount not to exceed two hundred dollars ($200) per day for each day the violation continues beyond the date specified for correction in the citation.

100885. (a) Any person who operates a laboratory that performs work that requires certification under Section 25198, 25298.5, 25358.4, 110490, or 116390 of this code, or Section 13176 of the Water Code, who is not certified to do so, may be enjoined from so doing by any court of competent jurisdiction upon suit by the department.

(b) When the department determines that any person has engaged in, or is engaged in, any act or practice that constitutes a violation of this article, or any regulation or order issued or adopted thereunder, the department may bring an action in the superior court for an order enjoining these practices or for an order directing compliance and affording any further relief that may be required to ensure compliance with this article.

100890. (a) Any person who knowingly makes any false statement or representation in any application, record, or other document submitted, maintained, or used for purposes of compliance with this article, may be liable, as determined by the court, for a civil penalty not to exceed five thousand dollars ($5,000) for each separate violation or, for continuing violations, for each day that violation continues.

(b) Any person who operates a laboratory for purposes specified pursuant to Section 25198, 25298.5, 25358.4, 110490, or 116390 of this code, or Section 13176 of the Water Code that requires certification, who is not certified by the department pursuant to this article, may be liable, as determined by the court, for a civil penalty not to exceed five thousand dollars ($5,000) for each separate violation or, for continuing violations, for each day that violation continues.

(c) A laboratory that advertises or holds itself out to the public or its clients as having been certified for any of the fields of testing referred to in Section 100860 without having a valid and current certificate in each field of testing identified by the advertisement or other representation may be liable, as determined by the court, for a civil penalty not to exceed one thousand dollars ($1,000) or, for continuing violations, for each day that violation continues.

(d) Each civil penalty imposed for any separate violation pursuant to this section shall be separate and in addition to any other civil penalty imposed pursuant to this section or any other provision of law.

100895. (a) Any person who knowingly does any of the following acts may, upon conviction, be punished by a fine of not more than twenty-five thousand dollars ($25,000) for each day of violation, or by imprisonment in the county jail not to exceed one year, or by both the fine and imprisonment:

(1) Makes any false statement or representation in any application, record, report, or other document submitted, maintained, or used for the purposes of compliance with this article.

(2) Has in his or her possession any record required to be maintained pursuant to this article that has been altered or concealed.

(3) Destroys, alters, or conceals any record required to be maintained pursuant to this article.

(4) Withholds information regarding an imminent and substantial danger to the public health or safety when the information has been requested by the department in writing and is required to carry out the department's responsibilities pursuant to this article.

(b) If the conviction under subdivision (a) is for a violation committed after a first conviction of the person under this section, the person may be punished by imprisonment in the state prison for up to 24 months, or in the county jail for not to exceed one year, or by a fine of not less than two thousand dollars ($2,000) or more than fifty thousand dollars ($50,000) per day of violation, or by both the fine and imprisonment.

100900. The remedies provided by this article are cumulative and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party, and no judgment under this article shall preclude any party from obtaining additional relief based upon the same facts.

100905. The department may suspend or revoke any certificate issued under of this article for any of the following reasons:

(a) Violation by the owner of the laboratory of any of the provisions of this article or any regulation adopted under this article.

(b) Aiding, abetting, or permitting the violation of any provision of this article or regulations adopted under this article.

(c) Proof that the certificateholder or owner has made false statements in any material regard on the application for certification.

(d) Conviction of an owner of the laboratory of any crime that is substantially related to the qualifications or duties of that owner and that is related to the functions of the laboratory. For purposes of this subdivision, a ''conviction'' means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Action to revoke or suspend the certificate may be taken when: (1) the time for appeal has elapsed, or (2) the judgment of conviction has been affirmed on appeal, or (3) when an order granting probation is made suspending the imposition of sentence, notwithstanding a subsequent order pursuant to Section 1203.4 of the Penal Code permitting withdrawal of a plea of guilty and entry of a plea of not guilty, or (4) setting aside a verdict of guilty, or (5) dismissing the accusation, information, or indictment. The department shall take into account all judicial decisions on rehabilitation furnished by the owner of the laboratory.

100910. Proceedings for the suspension or revocation of a certificate under this article shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3

of Title 2 of the Government Code, and the department shall have all powers granted pursuant to that chapter.

100915. The department may temporarily suspend a certificate prior to any hearing, when it has determined that this action is necessary to protect the public. The department shall notify the owner of the temporary suspension and the effective date thereof and at the same time shall serve the owner with an accusation. Upon receipt of a notice of defense by the owner, the matter shall be set for hearing within 15 days. The hearing shall be held as soon as possible but no later than 30 days after receipt of the notice. The temporary suspension shall remain in effect until the hearing is completed and the department has made a final determination on the merits. However, the temporary suspension shall be deemed vacated if the department fails to make a final determination on the merits within 60 days after the original hearing has been completed.

100920. Fees and civil penalties collected under this article shall be deposited in the Environmental Laboratory Improvement Fund, that is hereby created. Moneys in the fund shall be available for expenditure by the department for the purposes of this article, upon appropriation by the Legislature.

PART 2. CALIFORNIA CONFERENCE OF LOCAL HEALTH OFFICERS

CHAPTER 1. ORGANIZATION

100925. There is hereby established a California Conference of Local Health Officers. The department shall consult with the conference in establishing standards as provided in this part and may consult on other matters affecting health. The conference may consult with, advise, and make recommendations to the department, other departments, boards, commissions and officials of federal, state, and local government, the Legislature, and any other organization or association on matters affecting health. The conference shall consist of all legally appointed local health officers in the state. It shall organize, adopt bylaws, and shall annually elect officers.

Actual and necessary expenses, including any necessary registration fee, incident to attendance at not more than two meetings per year of the conference shall be a legal charge against the local governmental unit. Actual and necessary expenses incident to attendance at special meetings of the committees of the conference called by the director shall be a legal charge against any funds available for administration of this part, Section 100295, Chapter 3 (commencing with Section 101175) of Part 3, and Part 3 (commencing with Section 124300) of Division 106.

100930. Nothing in this part, Section 100295, Chapter 3 (commencing with Section 101175) of Part 3, and Part 3

(commencing with Section 124300) of Division 106 or in any regulation prescribed by the department in accordance herewith shall compel any practitioner who treats the sick by prayer in the practice of the religion of any well-recognized church, sect, denomination, or organization or any persons covered by Sections 2731 and 2800 of the Business and Professions Code to give any information about a disease or disability that is not infectious, contagious, or communicable or authorize any compulsory education, medical examination, or medical treatment.

CHAPTER 2. GENERAL POWERS AND DUTIES

100950. The department shall administer this part, Section 100295, Chapter 3 (commencing with Section 101175) of Part 3, and Part 3 (commencing with Section 124300) of Division 106 and shall adopt necessary regulations. These regulations shall be adopted only after consultation with and approval by the California Conference of Local Health Officers. Approval of these regulations shall be by majority vote of those present at an official session.

CHAPTER 3. ADDITIONAL ADMINISTRATIVE PROVISIONS (RESERVED)

PART 3. LOCAL HEALTH DEPARTMENTS

CHAPTER 1. ORGANIZATION AND APPOINTMENT OF HEALTH OFFICERS

101000. Each board of supervisors shall appoint a health officer who is a county officer.

101005. The county health officer shall be a graduate of a medical college of good standing and repute. His or her compensation shall be determined by the board of supervisors.

101010. Immediately after the appointment of the health officer, the board of supervisors shall notify the director of the appointment and the name and address of the appointee.

CHAPTER 2. POWERS AND DUTIES OF LOCAL HEALTH OFFICERS AND LOCAL HEALTH DEPARTMENTS

Article 1. County Health Officers

101025. The board of supervisors of each county shall take measures as may be necessary to preserve and protect the public health in the unincorporated territory of the county, including, if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws, and provide for the payment of all expenses incurred in enforcing them.

101030. The county health officer shall enforce and observe in the unincorporated territory of the county, all of the following:

(a) Orders and ordinances of the board of supervisors, pertaining to the public health and sanitary matters.

(b) Orders, including quarantine and other regulations, prescribed by the department.

(c) Statutes relating to public health.

101035. The county health officer shall advise on medical matters any board or body vested with the management of any county pension or retirement system and shall attend the meetings of the board or body when requested by the board or body.

101040. The county health officer may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any ''state of war emergency,'' ''state of emergency,'' or ''local emergency,'' as defined by Section 8558 of the Government Code, within his or her jurisdiction.

''Preventive measure'' means abatement, correction, removal or any other protective step that may be taken against any public health hazard that is caused by a disaster and affects the public health. Funds for these measures may be allowed pursuant to Sections 29127 to 29131, inclusive, and 53021 to 53023, inclusive, of the Government Code and from any other money appropriated by a county board of supervisors or a city governing body to carry out the purposes of this section.

The county health officer, upon consent of the county board of supervisors or a city governing body, may certify any public health hazard resulting from any disaster condition if certification is required for any federal or state disaster relief program.

101045. The county health officer shall investigate health and sanitary conditions in every county jail, every other publicly operated detention facility in the county, and all private work furlough facilities and programs established pursuant to Section 1208 of the Penal Code, at least annually. Private work furlough facilities and programs shall pay an annual fee to the county health officer commensurate with the annual cost of those investigations, as determined by the county health officer. He or she may make additional investigations of any county jail or other detention facility of the county as he or she determines necessary. He or she shall submit a report to the Board of Corrections, the sheriff or other person in charge of the jail or detention facility, and to the board of supervisors. In any city having a health officer, the city health officer shall investigate health and sanitary conditions in every city jail and other detention facility at least annually. He or she may make additional investigations of any city jail or detention facility as he or she determines necessary. He or she shall submit a report to the

Board of Corrections, the person in charge of the jail or detention facility, and to the city governing body.

Whenever requested by the sheriff, the chief of police, local legislative body, or the Board of Corrections, but not more often than twice annually, the county health officer or, in cities having a city health officer, the city health officer, shall investigate health and sanitary conditions in any of the jails and detention facilities described in this section, and submit a report to each of the officers and agencies authorized in this section to request the investigation and to the Board of Corrections.

The investigating officer shall determine if the food, clothing, and bedding is of sufficient quantity and quality that at least shall equal minimum standards and requirements prescribed by the Board of Corrections for the feeding, clothing and care of prisoners in all local jails and detention facilities, and if the sanitation requirements required by Article 11 (commencing with Section 114250) of Chapter 4 of Part 7 of Division 107 for restaurants have been maintained.

101050. (a) The county health officer shall prepare a list of family planning and birth control clinics located in the county for distribution by the county clerk pursuant to Section 26808 of the Government Code. The list shall include information about the availability of pregnancy testing services provided pursuant to Section 123380.

(b) This section shall be inoperative from July 1, 1993, to June 30, 1994, inclusive.

101055. (a) The county health officer shall furnish all hospitals within the county, and all physicians and surgeons upon request, copies of the list prepared pursuant to Section 101050 in sufficient numbers as they may need for voluntary distribution to patients.

(b) This section shall be inoperative from July 1, 1993, to June 30, 1994, inclusive.

101060. The county health officer may designate a nonprofit food distribution agency to coordinate and facilitate the donation of food and food products to nonprofit, charitable corporations, from available sources, including restaurants, grocery stores, or food distributors.

Article 2. Local Health Emergencies

101075. As used in this article:

(a) ''Hazardous waste'' means a waste, or combination of wastes, that because of its quantity, concentration, or physical, chemical, or infectious characteristics may do any of the following:

(1) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(2) Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

(b) ‘‘Waste’’ means either of the following:

(1) Any material for which no use or reuse is intended and that is to be discarded.

(2) Any material that spills, escapes, or is released from any manufacturing, industrial, commercial, or other plant, facility, or process, or that escapes or is released during the transporting or transferring from one place to another, or during the pumping, processing, storing, or packaging of any material in, to, or from such a plant, facility, or process, or that enters or may enter an uncontained air space or a surface water course that is not totally contained on the contiguous property of the plant, facility, or process, or which enters, or may enter, the groundwater underlying such plant, facility, or process.

101080. Whenever a release, spill, escape, or entry of waste occurs as described in paragraph (2) of subdivision (b) of Section 101075 and the director or the local health officer reasonably determines that the waste is a hazardous waste or medical waste, or that it may become a hazardous waste or medical waste because of a combination or reaction with other substances or materials, and the director or local health officer reasonably determines that the release or escape is an immediate threat to the public health, the director may declare a health emergency and the local health officer may declare a county health emergency in the county or any area thereof affected by the threat to the public health. Whenever a local health emergency is declared by a local health officer pursuant to this section, the local health emergency shall not remain in effect for a period in excess of seven days unless it has been ratified by the board of supervisors. The board of supervisors shall review, at least every 14 days until the local health emergency is terminated, the need for continuing the local health emergency and shall proclaim the termination of the local health emergency at the earliest possible date that conditions warrant the termination.

101085. (a) After the declaration of a health emergency or a county health emergency pursuant to Section 101080, the director or local health officer may do any or all of the following:

(1) Require any person or organization that the director or local health officer shall specify to furnish any information known relating to the properties, reactions, and identity of the material that has been released, spilled, or escaped. The director or local health officer may require information to be furnished, under penalty of perjury, by the person, company, corporation, or other organization that had custody of the material, and, if the material is being transferred or transported, by any person, company, corporation, or organization that caused the material to be transferred or transported. This

information shall be furnished to the director or local health officer upon request in sufficient detail, as determined by the director or local health officer, as required to take any action necessary to abate the health emergency or county health emergency or protect the health of persons in the county, or any area thereof, who are, or may be affected. However, the burden, including costs, of furnishing the information shall bear a reasonable relationship to the need for the information and the benefits to be obtained therefrom.

(2) Provide the information, or any necessary portions thereof, or any other necessary information available to the director or local health officer to state or local agencies responding to the health emergency or county health emergency or to medical and other professional personnel treating victims of the local health emergency.

(3) Sample, analyze, or otherwise determine the identifying and other technical information relating to the health emergency or county health emergency as necessary to respond to or abate the county health emergency and protect the public health.

(b) This section does not limit or abridge any of the powers or duties granted to the State Water Resources Control Board and to each regional water quality control board by Division 7 (commencing with Section 13000) of the Water Code. This section also does not limit or abridge the powers or duties granted to the State Air Resources Board or to any air pollution control district by Division 26 (commencing with Section 39000).

This section does not limit or abridge any of the powers or duties granted to the Director of Food and Agriculture or to any county agricultural commissioner by Division 6 (commencing with Section 11401) or by Division 7 (commencing with Section 12501) of the Food and Agricultural Code.

101090. When requested by the person furnishing the information furnished pursuant to Section 101085, the portions of the information that might disclose trade secrets or secret processes shall not be made available for inspection by the public, but shall be made available to governmental agencies for use in abatement of the health emergency or county health emergency and in judicial review or enforcement proceedings involving the person furnishing the information.

101095. Any person failing or refusing to furnish technical, toxicological, or other information required pursuant to Section 101085, or falsifying any information provided therein is guilty of a misdemeanor and is also subject to any other criminal or civil penalties provided by statute.

Article 3. Public Health Nurses

101100. The governing body of a city may employ one or more public health nurses, each of whom shall be a registered nurse possessing qualifications prescribed by the department on the date of his or her employment.

101105. The public health nurse shall attend to matters pertaining to the health and sanitary conditions of the city as the governing body may assign. Compensation for the public health nurse shall be determined by that body.

101110. The board of supervisors in each county may employ one or more public health nurses, each of whom shall be a registered nurse possessing qualifications prescribed by the department on the date of employment.

101115. The public health nurse shall attend to matters pertaining to the health and sanitary conditions of the county as the board of supervisors may assign. Compensation for the public health nurse shall be determined by that board.

Article 4. Dental Professionals

101125. The governing body of a city may employ one or more dentists or dental hygienists, each of whom shall be a licensed dentist or dental hygienist.

101130. The dentist or dental hygienist shall attend to dental conditions of the city as the governing body may assign. Compensation for the dentist or dental hygienist shall be determined by that body.

101135. The board of supervisors in each county may employ one or more dentists or dental hygienists, each of whom shall be a licensed dentist or dental hygienist.

101140. The dentist or dental hygienist shall attend to such dental conditions of the county, as the board of supervisors may assign. Compensation for the dentist or dental hygienist shall be determined by that board.

Article 5. Municipal and County Laboratories

101150. To protect the community against infectious disease, any city or county may establish a bacteriological and chemical laboratory for the examination of specimens from suspected cases of disease and for the examination of milk, waters, and food products.

101155. The cost of establishing and maintaining the laboratory is a legal expenditure from any city or county funds that are for disbursement under the direction of the city or county health officer for the protection of public health.

101160. Any city or county laboratory established for the purposes set forth in this article shall use only equipment and employ only technical personnel that meets with the approval of the state department.

CHAPTER 3. STATE AID FOR LOCAL HEALTH ADMINISTRATION

Article 1. Definitions and General Policy

101175. The rapid increase in the population of the state and the increasing industrialization in both the urban and rural areas necessitate the provision of effective public health services to all the people of the state.

In many areas within the state local health departments lack the necessary funds, and the local population lack the means to furnish funds, to provide effective public health services.

The Legislature therefore seeks to further the provision of necessary public health services by granting financial assistance to local health departments thus enabling them to meet present and future health needs in an efficient and effective manner. The funds granted are to augment local appropriations provided for public health purposes, and shall not be used to replace local appropriations.

The administrative pattern providing public health services to all the people of the state will vary in different areas. It is generally recognized that the minimum population necessary for efficient administration of a local health department is approximately 50,000. To attain this desirable population minimum it will be necessary in some areas for two or more counties to unite and establish a single administrative public health jurisdiction.

101180. ''Population,'' for the purpose of this chapter, shall be determined by the most recent United States decennial census; provided, however, whenever it appears to the department that the population of any city or county, changed sufficiently to warrant adjustment, the department for purposes of this chapter may request the Population Research Unit of the Department of Finance to determine the population for cities or counties.

101185. For the purposes of this chapter a ''local health department'' shall be interpreted to mean any one of the following public health administrative organizations:

(a) Local health district created pursuant to former Chapter 6 (commencing with Section 880) of Part 2 of Division 1 of the Health and Safety Code, that includes territory in one or more counties, and that includes at least all of the cities that have less than 50,000 population in the county or counties.

(b) A local health department serving one or more counties that shall on September 19, 1947, and thereafter, provide services to all

cities whose population is less than 50,000 in addition to the unincorporated territory of the county or counties.

(c) A county health department that does not serve all of the cities of less than 50,000 population, but that has the provisional approval of the department, in accordance with Section 101225.

(d) The health department of a city of 50,000 or greater population, except that the governing body of the city by resolution may declare its intention to be included under the jurisdiction of the county health department, or of the local health district serving other territory in the county, as provided by existing statutes.

(e) The local health department of any county that had under its jurisdiction on September 19, 1947, a population in excess of 1,000,000, or the local health department of any city and county.

Article 2. Qualification for Financial Assistance

101200. Local health departments qualifying for assistance as provided in this chapter, on or after September 19, 1947, shall receive financial aid as of the date of their becoming eligible.

Article 3. State Aid

101225. Provisional approval may be given by the department to a county health department that meets minimum standards as specified in this part, Section 100295, and Part 3 (commencing with Section 124300) of Division 106, but that does not serve all cities of less than 50,000 population within the county.

101230. From the appropriation made for the purposes of this article, allocation shall be made to the administrative bodies of qualifying local health departments in the following manner:

(a) A basic allotment as follows:

To the administrative bodies of local health departments serving the territory in one or more counties a basic allotment of sixteen thousand dollars ($16,000) per county or sixty cents ($0.60) per capita per county, whichever is less; however, if a county is divided into two or more local health department jurisdictions, the basic allotment shall be divided between the departments in proportion to the population served by each department, except that no funds shall be available to any city of less than 50,000 population for the maintenance of an independent health department.

(b) A per capita allotment, determined as follows:

After deducting the amounts allowed for the basic allotment as provided in this section, the balance of the appropriation shall be allotted on a per capita basis to the administrative body of each local health department in the proportion that the population of that local health department jurisdiction bears to the population served by all qualified local health departments of the state.

101235. The department succeeds to and is vested with the duties, purposes, responsibilities, and jurisdiction heretofore exercised by the State Department of Benefit Payments with respect to the processing, audit, and payment of funds appropriated for the purposes of this article to the administrative bodies of qualifying local health departments.

101240. The department shall have possession and control of all records, papers, equipment, and supplies held for the benefit or use of the Director of Benefit Payments in the performance of his or her duties, powers, purposes, responsibilities, and jurisdiction that are vested in the department by Section 101235.

101245. All officers and employees of the Director of Benefit Payments who are serving in the state civil service, other than as temporary employees, on July 1, 1978, and who are engaged in the performance of a function vested in the department by Section 101235 shall be transferred to the department. The status, positions, and rights of these persons shall not be affected by the transfer and shall be retained by them as officers and employees of the department pursuant to the State Civil Service Act, except for positions exempt from civil service.

101250. After determining the total amounts available to each area, the department shall notify the governing body of each local health department of that amount, and of the conditions governing its availability.

101255. No funds appropriated for the purposes of this article shall be allocated to any local health department unless the governing body of the local health department has appropriated an amount equal to at least twice the per capita allotment provided in subdivision (b) of Section 101230 for the same period from local funds for the support of the local health department. These local funds shall be wholly exclusive of any state or federal funds received or receivable. Actual expenditures of local funds, exclusive of state or federal funds received, shall be not less than the proportion of total expenditures.

101260. No funds appropriated for the purposes of this article shall be allocated to any local health department whose professional and technical personnel and whose organization and program do not meet the minimum standards established by the department.

101265. The basic and per capita allotments shall be paid quarterly to the administrative body of each qualifying local health department. Each quarterly payment may be adjusted on a basis of the actual expenditures during the previous quarter, if the adjustment is necessary to maintain the minimum proportional relationship of state and local expenditures as outlined in Section 101255. The department shall certify the amounts to be paid to each local health department each quarter to the Controller, who shall thereupon draw the necessary warrants, and the State Treasurer shall

pay to the administrative body of each local health department the certified amount. Any payments may be withheld by the department if a local health department fails to continue to meet the minimum standards established, provided that not less than 45 days' advance notice of intention to withhold payments, and the reasons therefor, shall be given to the governing body of the local health department.

Article 4. Transfer of Environmental Health and Sanitation Services

101275. Notwithstanding Section 101260, a county board of supervisors or health district board may, with the concurrence of the director, transfer the total function of providing environmental health and sanitation services and programs to a comprehensive environmental agency of the county other than the county or district health department. Such a county or district shall continue to receive funds appropriated for the purposes of this article if it complies with all other minimum standards established by the department and if the environmental health and sanitation services and programs are maintained at levels of quality and efficiency equal to or higher than the levels of the services and programs formerly provided by the county or district health department.

101280. If a transfer authorized by Section 101275 is made:

(a) Each agency shall employ as the immediate supervisor of the environmental health and sanitation services a director of environmental health who is a registered environmental health specialist and the agency shall employ an adequate number of registered environmental health specialists to carry on the program of environmental health and sanitation services.

(b) Wherever, in any statute, regulation, resolution, or order, a power is granted to, or a duty is imposed upon, a county or district health officer, county health department, or county health district pertaining to environmental health and sanitation services and programs transferred by the board of supervisors or health district board, these powers and duties shall be delegated by the local health officer to the director of environmental health, who shall thereafter administer these powers and duties.

(c) The department shall adopt regulations pertaining to minimum program and personnel requirements of environmental health and sanitation services and programs. The department shall periodically review these programs to determine if minimum requirements are met.

(d) Whenever the board of supervisors or health district board determines that the expenses of its environmental health director in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to environmental health and sanitation are not met by any fees prescribed by the state,

the board may adopt an ordinance or resolution prescribing fees that will pay the reasonable expenses of the environmental health director incurred in enforcement. The schedule of fees prescribed by ordinance or resolution of the board of supervisors or health district board shall be applicable in the area in which the environmental health director enforces any statute, order, quarantine, rule, or regulation prescribed by a state officer or department relating to environmental health and sanitation.

101285. Notwithstanding Section 101260, the county board of supervisors may, with the concurrence of the county officer providing the services, transfer all or any portion of the function of providing vector control services to any mosquito abatement district or vector control district formed pursuant to Chapter 5 (commencing with Section 2200) of Division 3. A county that chooses to transfer the services shall continue to receive funds appropriated for the purposes of this article if it complies with all other minimum standards and if the vector control program is maintained at a level that meets the minimum standards set by the department.

Article 5. Local Public Health Service Contract Options

101300. (a) (1) The board of supervisors of a county with a population of less than 40,000 may enter into a contract with the department and the department may enter into a contract with that county to organize and operate a local public health service in that county.

(2) Notwithstanding paragraph (1), only those counties that contracted with the department pursuant to Section 1157 in the 1990–91 fiscal year may contract with the department in the 1991–92 fiscal year ; the amount of county funding established in the contracts for the 1991–92 fiscal year shall be at least equal to the value of the services provided in the 1990–91 fiscal year.

(3) The department may conduct the local public health service either directly, or by contract with other agencies, or by some combination of these methods as agreed upon by the department and the board of supervisors of the county concerned.

(4) The board of supervisors may create a county board of public health or similar local advisory group.

(b) Any county proposing to contract with the department pursuant to this section in the 1992–93 fiscal year and each fiscal year thereafter shall submit to the department a notice of intent to contract adopted by the board of supervisors no later than March 1 of the fiscal year preceding the fiscal year for which the agreement will be in effect in accordance with procedures established by the department. A county may withdraw this notice no later than May 1 of the fiscal year preceding the fiscal year for which the agreement will be in effect in accordance with procedures established by the

department. If a county fails to withdraw its notice by this date, it shall be responsible for any and all necessary costs incurred by the department in providing or preparing to provide public health services in that county.

(c) A county contracting with the department pursuant to this section shall not be relieved of its public health care obligation under Section 101025.

(d) (1) Any county contracting with the department pursuant to this section shall pay, by the 15th of each month, the agreed contract amount.

(2) If a county does not make the agreed monthly payment, the department may terminate the county's participation in the program.

(e) The counties and the department shall work collectively to ensure that expenditures do not exceed the funds available for the program in any fiscal year.

(f) The Legislature hereby determines that an expedited contract process for contracts under this section is necessary. Contracts under this section shall be exempt from Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code.

(g) The state shall not incur any liability except as specified in this section.

(h) This section shall become operative July 1, 1991.

101305. Any counties that were eligible for organization and operation of local public health services by the department pursuant to Section 1157 as of January 1, 1988, shall continue to be eligible, notwithstanding an increase in total population beyond the 40,000 population limit of that section.

This section shall remain in effect until January 1, 1998, and on that date is repealed, unless a later enacted statute, that becomes effective on or before January 1, 1998, deletes or extends that date.

101307. (a) Counties contracting with the department pursuant to Section 101300 may enter into a contract with the department whereby the department's program that administers the Section 101300 contract agrees to assume responsibility for some or all of the administrative activities for some or all of the public health categorical programs of that county listed in subdivision (g). The responsibility for the provision of services under those programs shall remain with the county board of supervisors.

(b) For the purposes of this section, ''public health categorical programs'' means a public health program that is funded by federal or state allocation supported by specific legislation or regulations, and that is identified by the department to be implemented by local jurisdictions.

(c) Administrative costs, associated with the administration of those contracts between the department and the counties pursuant

to this section, shall be capped at the maximum allowable under each of the public health categorical programs.

(d) Each county intending to contract with the department for the fiscal year commencing July 1, 1994, shall submit to the department a notice of intent to contract adopted by the board of supervisors within 60 days of the effective date of this section. For each fiscal year thereafter, a notice of intent to contract adopted by the board of supervisors shall be submitted no later than August 1 of the fiscal year preceding the fiscal year for which the agreement will be in effect, in accordance with procedures established by the department. A county may withdraw this notice no later than September 15 of the fiscal year preceding the fiscal year for which the agreement will be in effect in accordance with procedures established by the department. If a county fails to withdraw its notice by this date, it shall be responsible for any and all necessary costs incurred by the department in providing or preparing to provide public health services in that county pursuant to this section.

(e) As a condition of contracting with the department, the department may establish uniform standards, forms, and procedures for conducting the administrative activities for those categorical programs.

(f) Any county that elects to contract with the department pursuant to this section shall, after receipt of program funds, pay by the 15th of each month, the agreed-upon contract amount for reimbursement for departmental costs of administration services. If a county does not make the agreed monthly payment, the department may after 60 days' written notice to the county terminate the services provided by the department pursuant to this section.

(g) The programs that may be subject to this section include, but are not limited to, all of the following:

(1) All maternal and child health programs, including, but not limited to, the following:

(A) California Children's Services, Article 5 (commencing with Section 123800) of Chapter 3 of Part 2.

(B) Child Health and Disability Prevention Program, Article 6 (commencing with Section 124025) of Chapter 3 of Part 2.

(C) Perinatal Health Care, Article 4 (commencing with Section 123550) of Chapter 2 of Part 2.

(2) The California Aids Program, Chapter 2 (commencing with Section 120800) of Part 4 of Division 105.

(3) Tobacco Use Prevention, Article 1 (commencing with Section 104350) of Chapter 1 of Part 3 of Division 103.

101310. In the event a health emergency is declared by the board of supervisors in a county or by a local health district board, or in the event a county health emergency is declared by the county health officer pursuant to Section 101080, the local health officer, shall have supervision and control over all environmental health and sanitation

programs and personnel employed by the county or district during the state of emergency.

CHAPTER 4. ADDITIONAL ADMINISTRATIVE PROVISIONS

Article 1. Enforcement, Fees, Reimbursements, and Taxes

101325. Whenever the governing body of any city or county determines that the expenses of its health officer or other officers or employees in the enforcement of any statute, order, quarantine, or regulation prescribed by a state officer or department relating to public health, requires or authorizes its health officer or other officers or employees to perform specified acts that are not met by fees prescribed by the state, the governing body may adopt an ordinance or resolution prescribing fees to pay the reasonable expenses of the health officer or other officers or employees incurred in the enforcement, and may authorize a direct assessment against the real property in cases where the real property is owned by the operator of a business and the property is the subject of the enforcement. The schedule of fees prescribed by ordinance or resolution of the governing body shall be applicable in the area in which the local health officer or other officers or employees enforce any statute, order, quarantine, or regulation prescribed by a state health officer or department relating to public health.

101330. On or before August of each year, the officer designated by the governing body to collect fees authorized by Section 101325, shall prepare a list of parcels of real property that are subject to these fees. On or before the tenth day of August of each year, the officer shall transmit the list to the county auditor and the auditor shall enter the amounts of the assessments against the respective parcels of land as they appear on the current assessment roll.

101335. The tax collector shall include the amounts of the assessments entered on the assessment roll pursuant to Section 101330 on bills for taxes levied against lots and parcels of land, and the assessments shall be listed separately on the tax bills. Thereafter, the assessment amounts shall be collected at the same time and in the same manner as county taxes are collected.

If a county collects the assessments on behalf of a city, the county may deduct its reasonable costs incurred for its collections services before remitting the balance to the city treasury.

101340. All laws applicable to the levy, collection, and enforcement of county taxes are applicable to special assessments made pursuant to this article and Article 4.

101345. In those instances where direct assessment is not authorized by Section 101325, if the officer charged with the billing and collection of the fees is a county officer, the officer may, with the approval of the governing body, record without fee, in the office of

the county recorder, a certificate specifying the amount, interest, penalty due, and the name and last known address of the person liable for these fees. If the officer charged with the billing and collection of these fees is a city officer, the officer, with the approval of the governing body may, in those instances where direct assessment is not authorized by Section 101325, record with reasonable fee charge, in the office of the county recorder a certificate specifying the amount, interest, penalty due, name, and last known address of the person liable for these fees. From the time of recording of the certificate, the amount required to be paid together with interest and penalty constitutes a lien upon all real property in the county owned or later acquired by the liable person. The lien created by recording this certificate shall have the force, effect, and priority of a judgment lien and shall continue for 10 years from the time of the recording unless released or otherwise discharged prior to that time. Prior to recording the lien with the county recorder, the lienor shall notify the person liable for the fees by certified mail of the intent to record the certificate.

101350. Any board of supervisors may levy a special sanitary tax, not to exceed one-half mill on the one dollar of assessed valuation, on all the property in the county, outside of any city.

The tax shall be in addition to all other taxes, and the fund created shall be used to prevent the introduction of, and to eradicate, dangerous, infectious, or communicable diseases, and for general sanitation purposes.

Article 2. County Health Administration for Cities

101375. When the governing body of a city in the county consents by resolution or ordinance, the county health officer shall enforce and observe in the city all of the following:

(a) Orders and quarantine regulations prescribed by the department and other regulations issued under this code.

(b) Statutes relating to the public health.

101380. The resolution or ordinance shall be adopted and a certified copy served on the clerk of the board of supervisors on or before the first day of March of any year, and the services of the county health officer in the city shall commence on the first day of July following service of notice. The services shall continue indefinitely until the governing body of the city terminates them by adoption of a resolution and ordinance and service of a certified copy on the clerk of the board of supervisors on or before the first day of March of any subsequent year. The services of the county health officer shall terminate on the first day of July following service of notice.

Article 3. Contracts for Local Health Administration

101400. The board of supervisors may contract with a city in the county, and the governing body of a city may contract with the county for the performance by health officers or other county employees of any or all enforcement functions within the city related to ordinances of public health and sanitation, and all inspections and other related functions.

101405. Whenever a contract has been duly entered into, the county health officer and his or her deputies shall exercise the same powers and duties in the city as are conferred upon health officers of the city by law.

101410. In the contract the city may provide, as specified in Section 101400, for payment by the city to the county to the county treasurer at times specified in the contract and shall be in an amount to repay the county for the entire cost of the services performed for the city as required in the enforcement of ordinances under the terms of the contract, as nearly as can be estimated or ascertained.

101415. The board of supervisors may contract with the governing body of a city in the county to secure the performance by the city health officer or other city health employees of any or all functions related to public health in any unincorporated territory adjacent to the city.

101420. Payment for the services specified in Section 101415 in the unincorporated territory shall be made by the county to the city treasurer.

101425. The board of supervisors or the governing body of any city or local health district may contract with the county superintendent of schools or with the governing board of any school district located wholly or partially in the county, city, or local health district for the performance by local health officers or other public health department employees of any or all of the functions and duties set forth in Chapter 9 (commencing with Section 49400) of Part 27 of the Education Code, relating to the health supervision of school buildings and of pupils enrolled in the schools of any or all elementary and high school districts over which the county superintendent of schools, or the governing board or a school district, has jurisdiction.

The contract may specify payment dates as agreed upon by the parties to the contract; payment shall be made as specified in the contract to the county treasurer, city treasurer or local health district.

Article 4. City Health Ordinances, Boards, and Officers

101450. The governing body of a city shall take measures necessary to preserve and protect the public health, including the regulation of sanitary matters in the city, and including if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws.

101455. This article does not prevent the appointment by the governing body of a board of health that shall be advisory to the health officer.

101460. Every governing body of a city shall appoint a health officer, except when the city has made other arrangements, as specified in this code, for the county or district health officer to exercise the same powers and duties within the city, as are conferred upon city health officers by law.

101465. Immediately after the appointment of the city health officer the governing body shall notify the director of the appointment and the name and address of the appointee.

101470. Each city health officer shall enforce and observe all of the following:

(a) Orders and ordinances of the governing body of the city pertaining to the public health.

(b) Orders, quarantine and other regulations, concerning the public health, prescribed by the department.

(c) Statutes relating to the public health.

101475. The city health officer may take any preventive measure that may be necessary to protect and preserve the public health from any public health hazard during any ''state of war emergency,'' ''state of emergency,'' or ''local emergency,'' as defined by Section 8558 of the Government Code, within his or her jurisdiction.

''Preventive measure'' means abatement, correction, removal or any other protective step that may be taken against any public health hazard that is caused by a disaster and affects the public health. Funds for these measures may be allowed pursuant to Sections 29127 to 29131, inclusive, and 53021 to 53023, inclusive, of the Government Code and from any other money appropriated by a board of supervisors of a county or governing body of a city to carry out the purposes of this section.

The city health officer, with consent of the board of supervisors of a county or the governing body of the city, may certify any public health hazard resulting from any disaster condition if certification is required for any federal or state disaster relief program.

CHAPTER 4. ACTIONS AGAINST PUBLIC ENTITIES

101500. All claims for money or damages against the district are governed by Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6 of Title 1 of the Government Code or by other statutes or regulations that are expressly applicable.

PART 4. SPECIAL HEALTH AUTHORITIES

CHAPTER 1. SONOMA COUNTY DENTAL HEALTH AUTHORITY

101525. (a) The Legislature finds and declares that it is necessary that a special authority be established in Sonoma County in order to meet the problems of the delivery of publicly assisted and indigent dental health care in the county. Because there is no general law under which this authority could be formed, the adoption of a special act and the formation of a special authority is required.

(b) The Board of Supervisors of Sonoma County may, by ordinance, establish the Sonoma County Dental Health Authority to receive state funds and technical assistance for the purpose of managing a dental health care delivery program for indigent persons and Medi-Cal recipients covered under the Denti-Cal program. The enabling ordinance shall specify the membership of the authority, the qualifications of members, the manner of appointment, selection, or removal of members, and their term of office, and any other matters that the board of supervisors deems necessary or convenient for the conduct of the authority's activities. The authority so established shall be considered an entity separate from the county, shall file the statement required by Section 53051 of the Government Code, and shall have the rights, powers, duties, privileges conferred by this chapter, the power to acquire, possess, and dispose of real or personal property, as may be necessary for the performance of its functions, to employ personnel and contract for services required to meet its obligations, and to sue or be sued. Any obligations of the authority, statutory, contractual, or otherwise, shall be the obligations solely of the authority and shall not be the obligations of the county or of the state unless expressly provided for in a contract or grant agreement between the authority and the county or the state.

(c) The authority shall bill the Medi-Cal program for services provided to Medi-Cal recipients.

(d) In the event the authority no longer functions for the purposes for which it was established, the board of supervisors may, by ordinance, terminate the authority at that time as the authority's then existing obligations have been satisfied or the authority's assets have been exhausted. Prior to the termination of the authority, the board of supervisors shall notify the department of its intent to terminate the authority and shall provide the department with an accounting of the assets and liabilities of the authority.

(e) Any assets of the authority shall be disposed of pursuant to provisions contained in the grant agreement entered into between the state and the authority pursuant to this chapter.

(f) Notwithstanding the provisions of this chapter, the department may not enter into any arrangement with the authority

to provide case management or fiscal intermediary services for dental health care provided to Medi-Cal recipients.

101530. (a) The department shall allocate any funds appropriated for that purpose to the Sonoma County Dental Health Authority for the provision of dental care and dental hygiene services for Medi-Cal to recipients covered under the Denti-Cal program, and for indigent persons in Sonoma County.

(b) The department shall permit the Sonoma County Dental Health Authority to impose a fee upon any indigent persons served by the program, commensurate with their ability to pay. An additional fee shall not be imposed upon Medi-Cal recipients for services covered by that program.

101535. (a) The department, after consultation with the Sonoma County Dental Health Authority, shall report to the Legislature on or before December 31, 1989, on the effectiveness of the pilot project provided for under this chapter. The report shall contain recommendations as to whether the program should be continued or expanded.

(b) The report shall include, but not be limited to, all of the following information, which the department shall take into consideration in its recommendation:

(1) The number of indigent patients served.

(2) The number of dentists, dental auxiliaries, and other persons who volunteer in the provision of dental care to the indigent patients.

(3) The dollar amount billed to the Denti-Cal program, which provides reimbursement for dental care services under the Medi-Cal program.

(4) The dollar amount paid to the pilot project by Denti-Cal.

(5) The dollar amount of treatment denied by Denti-Cal.

(6) The dollar amount paid by patients.

(7) The dollar amount of supplies and equipment donated to the program.

(8) The dollar amount paid by the project for overhead.

(9) The number of hours of service by volunteers.

CHAPTER 2. MONTEREY COUNTY SPECIAL HEALTH CARE AUTHORITY

Article 1. General Provisions

101550. The Board of Supervisors of the County of Monterey may by ordinance or resolution order the formation of the Monterey County Special Health Care Authority under this chapter that shall include all of the incorporated and unincorporated areas of the county.

101555. This chapter shall be known and may be cited as the Monterey County Special Health Care Authority Act.

101560. Unless the context otherwise requires, this article governs the construction of this chapter. As used in this chapter:

(a) ‘‘Authority’’ means the Monterey County Special Health Care Authority.

(b) ‘‘Board’’ means the Monterey County Special Health Care Authority Board.

(c) ‘‘County’’ means the County of Monterey.

(d) ‘‘Health care system’’ means any system established to arrange for the provision of medical services.

(e) ‘‘Public agency’’ means the United States, the State of California, any political subdivision, county, municipality, district, or agency of the State of California or of the United States and any department, bureau or commission of the State of California or of the United States.

(f) ‘‘Person’’ means any individual, firm, partnership, association, corporation, limited liability company, trust, business trust, or the receiver or trustee or conservator for any of the above, but does not include a public agency.

(g) ‘‘The professional advisory board’’ means that advisory board to the authority’s board composed of nine health and medical care professionals appointed by the Monterey County Board of Supervisors, five of whom shall be nominated by the Monterey County Medical Society, with at least one to be a member of the Monterey County Chapter of the American Academy of Family Practice, one of whom shall be nominated by Natividad Medical Center, one of whom shall be nominated by the Monterey County Hospital Administrators’ Association, and two of whom shall be nominated by other organizations in the County of Monterey representing other professional health care providers.

(h) ‘‘The community advisory board’’ means that advisory board to the authority’s board appointed by the Monterey County Board of Supervisors which is comprised of 15 persons who represent community and consumer interests and who do not directly earn their income from the provision of medical or health services.

(i) For the purposes of this part, the term ‘‘medical services or medical benefits’’ does not include dental care or dental benefits.

(j) For the purposes of this part, the term ‘‘health care’’ does not include dental care.

Article 2. Board of Directors

101575. The government of the authority shall be vested in a board of directors that shall consist of nine members, selected as follows:

(a) Five members, one from each supervisorial district, shall be appointed by the Monterey County Board of Supervisors.

(b) One member, who shall be a current member of the professional advisory board, shall be nominated by the authority's professional advisory board and confirmed by the Monterey County Board of Supervisors and serve a one-year term.

(c) One member, who shall be a current member of the community advisory board, shall be nominated by the authority's community advisory board and confirmed by the Monterey County Board of Supervisors and serve a one-year term.

(d) Two members, both of whom shall be residents of Monterey County, shall be appointed by the Governor. The Governor shall make the appointments from a list containing at least three nominations by the Monterey County Board of Supervisors.

101580. The board at its first meeting, and thereafter annually at the first meeting in January, shall elect a chair who shall preside at all meetings, and a vice chair who shall preside in his or her absence. In the event of their absence or inability to act, the members present, by an order entered in the minutes, shall select one of their members to act as chair pro tem, who, while so acting, shall have all of the authority of the chair.

101585. The board shall establish rules for its proceedings.

101590. A majority of the members of the board shall constitute a quorum for the transaction of business, and all official acts of the board shall require the affirmative vote of a majority of the members of the board.

101595. The acts of the board shall be expressed by motion, resolution, or ordinance.

101600. Except for initial staggered terms that may be established by the board, the term of office of each member shall be four years and, in addition, such time as necessary until the appointment and qualification of his or her successor.

101605. The bodies that originally nominated or appointed a member whose term has expired shall nominate or appoint the successor for a full term of four years, except that members who are nominated by the professional advisory board or by the community advisory board shall serve a one-year term.

101610. Any vacancy on the board shall be filled for the unexpired term by nomination or appointment by the bodies that originally nominated or appointed the member whose office has become vacant.

101615. The Professional Advisory Board shall review and comment on all proposed policies and actions of the board dealing with arrangements for health care within the board of jurisdiction.

101620. The Community Advisory Board shall review and comment on matters relating to the accessibility and availability of services arranged by the board.

Article 3. Powers of the Board

101625. The authority is hereby declared to be a body corporate and politic and shall have power:

(a) To have perpetual succession.

(b) To sue and be sued in the name of the authority in all actions and proceedings in all courts and tribunals of competent jurisdiction.

(c) To adopt a seal and alter it at pleasure.

(d) To take by grant, purchase, gift, devise, or lease, to hold, use and enjoy, and to lease, convey or dispose of, real and personal property of every kind, within or without the boundaries of the authority, necessary or convenient to the full exercise of its powers. The board may lease, mortgage, sell, or otherwise dispose of any real or personal property within or without the boundaries of the authority necessary to the full or convenient exercise of its powers.

(e) To make and enter into contracts with any public agency or person for the purposes of this chapter.

(f) To appoint and employ an executive director and other employees as may be necessary, including legal counsel, establish their compensation and define their powers and duties. The board shall prescribe the amounts and forms of fidelity bond of its officers and employees. The cost of these bonds shall be born by the authority. The employees and each of them shall serve at the pleasure of the board. The authority may also contract for the services of an independent contractor.

(g) To incur indebtedness.

(h) To purchase supplies, equipment, materials, property, or services.

(i) To establish policies relating to its purposes.

(j) To acquire or contract to acquire, rights-of-way, easements, privileges, or property of every kind within or without the boundaries of the authority, and construct, equip, maintain, and operate any and all works or improvements within or without the boundaries of the authority necessary, convenient, or proper to carry out any of the provisions, objects or purposes of this chapter, and to complete, extend, add to, repair, or otherwise improve any works or improvements acquired by it.

(k) To make contracts and enter into stipulations of any nature upon the terms and conditions that the board finds are for the best interest of the authority for the full exercise of the powers granted in this chapter.

(*l*) To accept gifts, contributions, grants, or loans from any public agency or person for the purposes this chapter.

The authority may do any and all things necessary in order to avail itself of gifts, contributions, grants or loans, and cooperate under any federal or state legislation in effect on January 25, 1982 or enacted after that date.

(m) To invest any surplus money in its treasury in the same manner as the County of Monterey and according to the same laws.

(n) To negotiate with service providers rates, charges, fees, rents, and to establish classifications of health care systems operated by the authority.

(o) To develop and implement health care delivery systems to promote quality care and cost efficiency.

(p) To provide health care delivery systems for any or all of the following:

(1) For all persons who are eligible to receive medical benefits under the Medi-Cal Act (Chapter 7 (commencing with Sec. 14000), Part 3, Division 9, Welfare and Institutions Code) in Monterey County through waiver, pilot project, or otherwise.

(2) For all persons in Monterey County who are eligible to receive medical benefits under both Titles XVIII and XIX of the Social Security Act.

(3) For all persons from Monterey County or any city in that county who are eligible to receive health care under Parts 4.5 (commencing with Section 16700) and 5 (commencing with Section 17000) of Division 9 of the Welfare and Institutions Code.

(q) To insure against any accident or destruction of its health care system or any part thereof. It may insure against loss of revenues from any cause. The district may also provide insurance as provided in Part 6 (commencing with Section 989) of Division 3.6 of Title 1 of the Government Code.

(r) To exercise powers that are expressly granted and powers that are reasonably implied from those express powers and necessary to carry out the purposes of this chapter.

(s) To do any and all things necessary to carry out the purposes of Part 3 of Division 1.

101630. Notwithstanding any other provision of law:

(a) The state or any state agency may enter into contracts with the authority for the authority to obtain or arrange for health care under the authority's health care systems, for all persons who are eligible to receive medical benefits under the Medi-Cal Act (Chapter 7 (commencing with Sec. 14000), Part 3. Division 9, Welfare and Institutions Code) in Monterey County through waiver, pilot project, or otherwise.

(b) The County of Monterey or any city in the County of Monterey may enter into contracts with the authority to obtain or provide health care services for all persons from Monterey County or any city in that county who are eligible to receive health care under Parts 4.5 (commencing with Section 16700) and 5 (commencing with Section 17000) of Division 9 of the Welfare and Institutions Code.

(c) The department shall pursue waivers of federal law as necessary, in order to carry out this section.

101635. All claims for money or damages against the authority are governed by Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6 of Title 1 of the Government Code or by other statutes or regulations expressly applicable.

101640. The Board of Supervisors of the County of Monterey may by ordinance or resolution order the dissolution of the authority by declaring that there is no need for the authority to function in the county. The dissolution shall become effective 180 days after the date of adoption of the resolution or ordinance ordering the dissolution.

As of the effective date of the dissolution of the authority, the authority shall be dissolved, disincorporated and extinguished, its existence shall be terminated and all of its corporate powers shall cease, except for winding up the affairs of the authority.

For the purpose of winding up the affairs of the dissolved authority, the County of Monterey shall be the successor.

Upon the effective date of dissolution, control over all of the moneys or funds, including on hand and moneys due, but uncollected, and all property, real or personal, of the authority shall be vested in the County of Monterey for the purpose of winding up the affairs of the authority.

The powers of the county in winding up the affairs of the authority and the distribution of assets of the authority, shall be in accordance with Article IV (commencing with Section 56500) of Chapter 9 of Part 4 of Division 1 of Title 6 of the Government Code.

This chapter shall prevail over the Government Code in case of any inconsistencies.

Monterey County shall remain a separate and distinct governmental agency separate and apart from the authority and shall have no liability for any debt, obligation or contract of any kind owed or incurred by the authority other than to wind up the affairs of the authority in accordance with this section and solely with the assets of the authority.

101645. (a) The board may by ordinance or resolution provide that each director of the authority board be paid a sum not to exceed fifty dollars ($50) remuneration from authority funds, for each board or committee meeting attended, but not exceeding the sum of one hundred dollars ($100) per month, plus actual expenses incurred in attending board or committee meetings at rates payable to officers and employees of the authority for their attendance at meetings within the scope of their employment.

(b) The board may, by ordinance or resolution, provide that each member of the professional advisory board be paid a sum not to exceed twenty-five dollars ($25) remuneration from authority funds, for each board or committee meeting attended, but not exceeding the sum of fifty dollars ($50) per month, plus his or her reasonable expenses for participating in authority business.

(c) The board may by ordinance or resolution provide that each member of the community advisory board be paid a sum not to exceed fifteen dollars ($15) remuneration from authority funds, for each board or committee meeting attended, but not exceeding the sum of thirty dollars ($30) per month, plus his or her reasonable expenses for participating in authority business.

(d) This section shall not apply to staff members of the authority.

101650. The board shall inform the Monterey County Board of Supervisors in writing of any amendment proposed by the authority to the Monterey County Special Health Care Authority Act prior to the authority requesting any legislative action on the amendment.

The board shall inform the Monterey County Board of Supervisors in writing of any change proposed by the authority to any state or federal rule or regulation that may have fiscal impact on the program or an impact on the quality of medical services or medical benefits prior to the authority requesting any change.

CHAPTER 3. SANTA BARBARA COUNTY SPECIAL HEALTH CARE AUTHORITY

Article 1. General Provisions

101675. This chapter shall be known and may be cited as the Santa Barbara Regional Health Authority Act.

101680. The Board of Supervisors of the County of Santa Barbara may, by ordinance or resolution, order the formation of the Santa Barbara Regional Health Authority under this chapter that shall include all of the incorporated and unincorporated areas of the county.

101685. Unless the context otherwise requires, this article governs the construction of this chapter. As used in this chapter:

(a) ''Authority'' means the Santa Barbara Regional Health Authority.

(b) ''Board'' means the Santa Barbara Regional Health Authority Board of Directors.

(c) ''County'' means the County of Santa Barbara.

(d) ''Health care system'' means any system established to arrange for the provision of medical services.

(e) ''Public agency'' means the United States, the State of California, any political subdivision, county, municipality, district, or agency of the State of California or of the United States and any department, bureau or commission of the State of California or of the United States.

(f) ''Person'' means any individual, firm, partnership, association, corporation, limited liability company, trust, business trust, or the receiver or trustee or conservator for any of the above, but does not include a public agency.

(g) ‘‘Professional advisory boards’’ means the boards appointed by the board of directors of the authority pursuant to its rules which shall consist of a representative cross-section of professional providers of health care services within the county.

(h) ‘‘Community advisory boards’’ means advisory boards to the authority’s board appointed by the board of directors of the authority which shall consist of persons who represent community and consumer interests and who do not directly earn their income from the provision of medical health services.

101690. The governing body of the authority shall be vested in a board of directors that shall consist of 11 members appointed by the county’s board of supervisors as follows:

(a) Three members shall be elected or appointed officers or employees of the county, at least one of whom shall be a member of the board of supervisors.

(b) Three members shall be county residents consisting of one who shall be a recipient of Medi-Cal, provided for under Sections 14000 and following, of the Welfare and Institutions Code, one of whom shall be a recipient of Medicare, provided for under Title XVIII of the federal Social Security Act, and one of whom shall be a representative of a community business that does not provide health care.

(c) Five members shall be representatives of providers of health care services in the county including: (1) two physicians, one of whom shall be appointed from a list established by the County Medical Society and the other from a list established by the hospitals within the county. One of the appointed physicians shall be a resident of and in practice in the fourth or fifth supervisorial district of the county; (2) two hospital administrators, one from hospitals located in either the first, second or third supervisorial districts of the county and the other from either the fourth or fifth supervisorial districts; and (3) one nonhospital or nonphysician health care provider.

101695. The board, at its first meeting, and annually thereafter at the first meeting in January, shall elect a chair who shall preside at all meetings, and a vice chair who shall preside in his or her absence. In the event of their absence or inability to act, the members present, by an order entered in the minutes, shall select one of their members to act as chair pro tempore, who, while so acting, shall have all of the authority of the chair.

101700. The board shall establish rules for its proceedings. There shall be at least four meetings per year. Board members shall be entitled to one hundred dollars ($100) remuneration from authority funds, for each board meeting attended and the authority may pay remuneration to board members attending meetings of committees of the board except that remuneration for attending board meetings and board committee meetings shall not exceed the sum of two hundred dollars ($200) per month, plus actual expenses incurred in

attending meetings at rates payable to county officers and employees. The per diem rate of one hundred dollars ($100) may be increased by the board subject to approval by the board of supervisors.

101705. A majority of the members of the board shall constitute a quorum for the transaction of business, and all official acts of the board shall require the affirmative vote of a majority of the members of the board.

101710. The acts of the board shall be expressed by motion, resolution or ordinance.

101715. Except for initial staggered terms that may be established by the board, the term of office of each noncounty member shall be two years and, in addition, time as necessary until the appointment and qualification of his or her successor. County officers or employees shall serve at the pleasure of the board of supervisors.

101720. Any vacancy on the board shall be filled for the unexpired term by the county's board of supervisors.

101725. Professional advisory and community advisory boards shall review and comment on proposed policies and actions of the board dealing with the arrangements for health care within the jurisdiction of the authority.

101730. The board may allow as a charge against the authority, reimbursement to members of professional and community advisory boards, of actually incurred expenses in attending meetings in amounts allowed by the board of supervisors to county officers and employees.

Article 2. Powers of the Authority

101750. The authority is hereby declared to be a body corporate and politic and it shall have power:

(a) To have perpetual succession.

(b) To sue and be sued in the name of the authority in all actions and proceedings in all courts and tribunals of competent jurisdiction.

(c) To adopt a seal and alter it at pleasure.

(d) To take by grant, purchase, gift, devise, or lease, to hold, use and enjoy, and to lease, convey or dispose of, real and personal property of every kind, within or without the boundaries of the authority, necessary or convenient to the full exercise of its powers. The board may lease, mortgage, sell, or otherwise dispose of any real or personal property within or without the boundaries of the authority necessary to the full or convenient exercise of its powers.

(e) To make and enter into contracts with any public agency or person for the purposes of this chapter. Members of the board shall be disqualified from voting on contracts in which they have a financial interest. Notwithstanding any other provision of law, members shall not be disqualified from continuing to serve as a

member of the board and a contract may not be avoided solely because of a member's financial interest.

(f) To appoint and employ an executive director and other employees as may be necessary, including legal counsel, fix their compensation and define their powers and duties. The board shall prescribe the amounts and forms of fidelity bond of its officers and employees. The cost of these bonds shall be borne by the authority. The authority may also contract for the services of an independent contractor.

(g) To incur indebtedness not exceeding revenue in any year.

(h) To purchase supplies, equipment, materials, property, or services.

(i) To establish policies relating to its purposes.

(j) To acquire or contract to acquire, rights-of-way, easements, privileges, or property of every kind within or without the boundaries of the authority, and construct, equip, maintain, and operate any and all works or improvements within or without the boundaries of the authority necessary, convenient, or proper to carry out any of the provisions, objects or purposes of this chapter, and to complete, extend, add to, repair, or otherwise improve any works or improvements acquired by it.

(k) To make contracts and enter into stipulations of any nature upon the terms and conditions that the board finds are for the best interest of the authority for the full exercise of the powers granted in this chapter.

(*l*) To accept gifts, contributions, grants or loans from any public agency or person for the purposes of this chapter. The authority may do any and all things necessary in order to avail itself of the gifts, contributions, grants or loans, and cooperate under any federal or state legislation in effect on March 25, 1982 or enacted after that date.

(m) To manage its moneys and to provide depository and auditing services pursuant to either of the methods applicable to special districts as set forth in the Government Code.

(n) To negotiate with service providers rates, charges, fees and rents, and to establish classifications of health care systems operated by the authority. Members of the board who are county officers and employees may vote to approve arrangements and agreements between the authority and the county as a service provider and these directors shall not thus be disqualified solely for the reason that they are employed by the county.

(o) To develop and implement health care delivery systems to promote quality care and cost efficiency and to provide appeal and grievance procedures available to both providers and consumers.

(p) To provide health care delivery systems for any or all of the following:

(1) For all persons who are eligible to receive medical benefits under the Medi-Cal Act, as set forth in Sections 14000 and following,

of the Welfare and Institutions Code in the county through waiver, pilot project, or otherwise.

(2) For all persons in the county who are eligible to receive medical benefits under both Titles XVIII and XIX of the federal Social Security Act.

(3) For all persons in the county who are eligible to receive medical benefits under Title XVIII of the federal Social Security Act.

(4) For all persons in the county who are eligible to receive medical benefits under publicly supported programs if the authority, and participating providers acting pursuant to subcontracts with the authority, agree to hold harmless the beneficiaries of the publicly supported programs if the contract between the sponsoring government agency and the authority does not ensure sufficient funding to cover program benefits.

(q) To insure against any accident or destruction of its health care system or any part thereof. It may insure against loss of revenues from any cause. The authority may also provide insurance as provided in Part 6 (commencing with Section 989) of Division 3.6 of Title 1 of the Government Code.

(r) To exercise powers that are expressly granted and powers that are reasonably implied from express powers and necessary to carry out the purposes of this chapter.

(s) To do any and all things necessary to carry out the purposes of this chapter.

101755. Notwithstanding any other provision of law, the state or any state agency may enter into contracts with the authority for the authority to obtain or arrange for health care under the authority's health care systems, for all persons who are eligible to receive medical benefits under the Medi-Cal Act, as set forth in Section 14000 et seq., of the Welfare and Institutions Code, in Santa Barbara County through waiver, pilot project, or otherwise.

101760. Notwithstanding any other provision of this chapter, the board of supervisors of the county may review major administrative decisions of the authority, excluding those involving personnel matters, upon appeal by the affected person and upon a majority vote of the board of supervisors. The board of supervisors may either approve, modify, reflect or repeal these decisions. The action of the board of supervisors shall be deemed to constitute a final administrative remedy. The board of supervisors and the authority shall mutually develop and agree on rules and regulations setting forth review procedures and guidelines to determine which decisions of the authority are major so as to confer appellate jurisdiction upon the board of supervisors. The board of supervisors shall adopt the mutually agreed upon rules and regulations by resolution or ordinance.

This section shall not be operative until adopted by resolution by the board of supervisors.

101765. Any licensed provider eligible to receive Medi-Cal reimbursement under law and who enters into a written contract with the authority under terms and conditions approved by the department shall be able to participate in this program as a provider. A written agreement shall not be required if any of the following circumstances apply:

(a) The provider renders any medically necessary emergency health care on a nonroutine basis.

(b) The provider renders services that are duly authorized by the authority, if the services are either seldom used or are rendered outside of the county.

101770. All claims for money or damages against the authority are governed by Part 3 (commencing with Section 900) and Part 4 (commencing with Section 940) of Division 3.6 of Title 1 of the Government Code, except as provided in those parts, or by other statutes or regulations expressly applicable to those parts.

101775. In the formation of the authority pursuant to this chapter, Section 54773 et seq., of the Government Code is not applicable.

101780. The board of supervisors may, by ordinance or resolution, order the dissolution of the authority by declaring that there is no need for the authority to function in the county. The dissolution shall become effective 180 days after the date of adoption of the resolution or ordinance ordering the dissolution.

As of the effective date of the dissolution of the authority, the authority shall be dissolved, disincorporated and extinguished; its existence shall be terminated and all of its corporate powers shall cease, except for winding up the affairs of the authority.

For the purpose of winding up the affairs of the dissolved authority, the County of Santa Barbara shall be the successor.

Upon the effective date of dissolution, control over all of the moneys or funds, including on hand and moneys due, but uncollected, and all property, real or personal, of the authority shall be vested in the County of Santa Barbara for the purpose of winding up the affairs of the authority.

The powers of the county in winding up the affairs of the authority and the distribution of assets of the authority, shall be in accordance with Article 4 (commencing with Section 56500) of Chapter 9 of Part 4 of Division 1 of Title 6 of the Government Code. The liability of the county as successor shall be limited to the assets of the authority.

101785. If the board of supervisors does not, by ordinance or resolution, order the formation of the authority under this chapter prior to January 1, 1986, this chapter is repealed as of January 1, 1986, unless a later enacted statute, chaptered before that date, deletes or extends that date.

On or before January 15, 1986, the board of supervisors shall report to the Secretary of State as to whether it has established the authority.

CHAPTER 4. VOLUNTARY HEALTH FACILITY PHILANTHROPIC SUPPORT ACT

101800. This Chapter shall be known and may be cited as the Voluntary Health Facility and Clinic Philanthropic Support Act.

101805. The Legislature finds and declares that, while there continues to be a need to focus on the deficiencies in the health care system and on corrective reform measures that might be taken, there is also need for focus on the enhancement of its strengths. Existing philanthropic support for health facilities and clinics is a strength which must be preserved and enhanced under any reform measure for all of the following reasons:

(a) Philanthropy imbues members of the community with a sense of pride in their voluntary nonprofit health facilities and clinics and creates a setting in which members of the community are willing to devote time and effort to improve health care available in the community in a way that government regulation could never replace.

(b) Philanthropy allows voluntary nonprofit institutions to conduct research and to engage in other innovative efforts to improve health care in California.

(c) Philanthropy provides required discretionary dollars for voluntary nonprofit institutions, which, in part, substitute for the absence of profits.

(d) Philanthropy allows hospitals to replace wornout and obsolete facilities when, in a period of high inflation, historical costs accumulated through depreciation are totally insufficient to provide for such replacement.

(e) Philanthropy pays for necessary expenditures that otherwise would have to be paid by patients or by government.

(f) Philanthropy may be discouraged by certain shortsighted actions of administrative agencies which, while purporting to serve a short-term purpose, seriously deter the vast benefits to the health care field inuring directly from philanthropy and voluntarism.

(g) Recent amendments to the federal tax laws to broaden the use of the standard deduction also have the effect of eliminating important incentives for philanthropy.

101810. It is, therefore, the intent of the Legislature to create an environment in which philanthropy and voluntarism in the health care field and the vast benefits arising from it for the citizens of California can be encouraged. The Legislature hereby declares it to be the policy of this state that philanthropic support for health care be encouraged and expanded, especially in support of experimental and innovative efforts to improve the health care delivery system.

101815. For purposes of any state law, whether enacted before or on or after January 1, 1980, which in any manner provides for regulation, review, or reporting of the budget, rates, or revenues of

health facilities, as defined in Section 1250, or clinics, as defined in Section 1204, including the provisions of Part 1.7 (commencing with Section 440), none of the following shall be treated directly, or indirectly, as revenues allocable to the cost of care provided by the health facility or clinic:

(a) A donor-designated or restricted grant, gift, endowment, or income therefrom, as defined in Section 405.423(b) of Title 42 of the Code of Federal Regulations, insofar as permitted by federal law.

(b) A grant or gift, or income from such grant or gift, which is not available for use as operating funds because of its designation by the governing board or entity of the health facility or clinic.

(c) A grant or similar payment which is made by a governmental entity and which is not available, under the terms of the grant or payment, for use as operating funds.

(d) Amounts attributable to the sale or mortgage of any real estate or other capital assets of the health facility or clinic which it acquired through a gift or grant, and which are not available for use as operating funds under the terms of the gift or grant or because of designation as provided in subdivision (b).

(e) A depreciation fund which is created by the health facility or clinic in order to meet a condition imposed by a third party for the third party's financing of a capital improvement of the health facility or clinic, provided the fund is used exclusively to make payments to such third party for the financing of such capital improvement.

(f) Funds used to defray the expense of fundraising.

101820. No state law shall be construed in such a way as to discourage philanthropic support of health facilities and clinics, or to otherwise hinder the use of such support for purposes determined by the recipients to be in the best interests of the physicians and patients it serves.

However, in enacting this article and Section 14106.2 of the Welfare and Institutions Code, the Legislature does not intend to place any restrictions on cost containment measures relating to health facilities which may be enacted in the future.

SEC. 4. Division 102 (commencing with Section 102100) is added to the Health and Safety Code, to read:

DIVISION 102. VITAL RECORDS AND HEALTH STATISTICS

PART 1. VITAL RECORDS

CHAPTER 1. GENERAL PROVISIONS

102100. Each live birth, fetal death, death, and marriage that occurs in the state shall be registered as provided in this part on the prescribed certificate forms. In addition, a report of every judgment of dissolution of marriage, legal separation, or nullity decree shall be

filed with the State Registrar, as provided in this part. All confidential information included in birth, fetal death, death, and marriage certificates and reports of dissolution of marriage, legal separation, or nullity that are required to be filed by this part, shall be exempt from the California Public Records Act contained in Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

102105. The department is charged with the uniform and thorough enforcement of this part throughout the state, and may adopt additional regulations for its enforcement.

102110. The State Registrar shall adopt regulations specifying both of the following:

(a) Procedures to assure the confidentiality of the confidential portion of the certificate of live birth, specified in subdivision (b) of Section 102425, and the medical and health report, specified in Section 102445.

(b) Procedures regarding access to records required by this part.

102115. The department may make and enforce regulations for the embalming, cremation, interment, disinterment and transportation of the dead in matters relating to communicable diseases.

102120. The State Registrar shall inform all local registrars which diseases are to be considered infectious, contagious, or communicable and dangerous to the public health, as decided by the department, in order that when deaths occur in which the diseases are involved, proper precautions may be taken to prevent their spread.

102125. All certificates of live birth, fetal death, or death shall be written legibly, in durable black ink, and a certificate is not complete and correct that does not supply all of the items of information called for, or satisfactorily account for their omission.

102130. All certificates of registry of marriage shall be written legibly and shall be photographically and micrographically reproducible. A certificate of registry of marriage is not complete and correct that does not supply all of the items of information called for, or satisfactorily account for their omission.

102135. (a) All physicians, informants, funeral directors, clergy, or judges and all other persons having knowledge of the facts, shall supply upon the prescribed forms any information that they possess regarding any birth, fetal death, death, or marriage upon demand of the state or local registrar.

(b) All physicians, informants, funeral directors, clergy, judges, public employees, or other persons who supply upon prescribed forms information that they possess regarding any birth, fetal death, death, or marriage shall in no case use a derogatory, demeaning, or colloquial racial or ethnic descriptor.

102140. No alteration or change in any respect shall be made on any certificate after its acceptance for registration by the local registrar, or on other records made in pursuance of this part, except where supplemental information required for statistical purposes is furnished.

102145. Every person in charge of a hospital or other institution to which persons are admitted for treatment or confinement shall make a record of the personal, medical and other information for each patient sufficient and adequate for the completion of a birth or death certificate.

102150. (a) When objection is made by either parent to the furnishing of information requested in items (3), (9), and (10) in the confidential portion of the certificate of live birth, specified in subdivision (b) of Section 102425, this information shall not be required to be entered on that portion of the certificate of live birth.

(b) A parent is not required to disclose his or her social security number as required by paragraph (14) of subdivision (b) of Section 102425 if the parent has good cause for not disclosing his or her social security number. Good cause shall be defined by regulations adopted by the State Department of Social Services.

102155. ''Absence of conflicting information relative to parentage'' as used in Chapter 5 (commencing with Section 102625) or Chapter 11 (commencing with Section 103225) includes entries such as ''unknown,'' ''not given,'' ''refused to state,'' or ''obviously fictitious names.''

CHAPTER 2. ADMINISTRATION

Article 1. State Administration

102175. The director shall be the State Registrar of Vital Statistics.

102180. The State Registrar is charged with the execution of this part in this state, and has supervisory power over local registrars, so that there shall be uniform compliance with all of the requirements of this part.

102185. The State Registrar may investigate cases of irregularity or violations of this part.

102190. When the State Registrar deems it necessary, he or she shall report cases of violation of any of the provisions of this part to the district attorney of the county where the violation occurred, with a statement of the facts and circumstances; and the district attorney shall forthwith initiate and promptly follow up with the necessary court proceedings.

102195. The Attorney General shall assist in the enforcement of this part upon request of the State Registrar.

102200. The State Registrar shall prescribe and furnish all record forms for use in carrying out the purposes of this part, or shall

prescribe the format, quality, and content of forms electronically produced in each county, and no record forms or formats other than those prescribed shall be used.

102205. The State Registrar shall prepare and issue detailed instructions as may be required to procure the uniform observance of this part and the maintenance of a satisfactory system of registration.

102210. The State Registrar shall establish registration districts within the State for the purposes of this part.

102215. The State Registrar of Vital Statistics may call into conference the local registrars or their chief deputies, in groups and at places within the state as may be designated by him or her, to meet with him or her or his or her duly authorized representatives, for the purpose of discussing problems dealing with registration of births, fetal deaths, deaths, and marriages, in order to promote uniformity of policy and procedure throughout the state in matters pertaining to vital registration; provided further, that the actual and necessary expenses incident to attendance at not more than one such meeting per year shall with the prior approval of the local legislative body be a legal charge against the local governmental unit.

102220. The State Registrar shall carefully examine the certificates received from the local registrars of births, deaths, and fetal deaths, and if they are incomplete or unsatisfactory shall require any further information that may be necessary to make the record complete and satisfactory.

102225. The State Registrar shall carefully examine the marriage certificates received from the county recorders, and if they are incomplete or unsatisfactory shall require any further information that may be necessary to make the record complete and satisfactory. Any certificates that are determined to be incomplete or unsatisfactory shall be returned to the county recorder within 90 days after receipt by the State Registrar. If a certificate is not returned to the county recorder within 90 days, the State Registrar shall register the certificate as presented.

102230. The State Registrar shall arrange and permanently preserve the certificates in a systematic manner and shall prepare and maintain a comprehensive and continuous index of all certificates registered.

102235. Notwithstanding any other provisions of law relating to retention of public records, the State Registrar may cause the original records of birth, death and marriage filed under this part to be destroyed if all of the following requirements have been met:

(a) One year has elapsed since the date of registration of the records.

(b) The birth, death, or marriage records have been reproduced onto microfilm or optical disk or by any other technique that does not permit additions, deletions, or changes to the original document in

compliance with the minimum standards or guidelines, or both, recommended by the American National Standards Institute or the Association for Information and Image Management for recording of permanent records or nonpermanent records, whichever applies.

(c) Adequate provisions are made that the permanent storage medium reflects additions or corrections to the records.

(d) A permanent copy is maintained in a manner that permits it to be used for all purposes served by the original record.

(e) A permanent copy has been stored at a separate physical location in a place and manner that will reasonably assure its preservation indefinitely against loss or destruction.

102240. Any certified photographic reproduction of any record stored on a permanent storage medium under this chapter shall be deemed to be a certification of the original record.

102245. On and after January 1, 1978, whenever the State Registrar receives a death certificate from a local registrar, the State Registrar shall determine whether the state records contain the birth certificate of the deceased or a reproduction thereof as authorized under this chapter. If the State Registrar has such a record of birth, it shall be revised to indicate the date of the death of the registrant, or, alternatively, a notation to that effect shall be entered in the State Registrar's index of births adjacent to the name of the deceased. The State Registrar, pursuant to an ongoing program, shall distribute, without charge, on a monthly basis to each county, a list of deceased registrants to enable local registrars and recorders to update their files. Upon receipt of such a list the local registrar or county recorder shall revise the local records or indexes accordingly.

Subject to the availability of funds appropriated for that purpose, the State Registrar may similarly revise or index birth records of registrants whose death certificates were filed prior to January 1, 1978.

102247. (a) There is hereby created in the State Treasury the Health Statistics Special Fund. The fund shall consist of revenues including, but not limited to, all of the following:

(1) Fees or charges remitted to the State Registrar for record search or issuance of certificates, permits, registrations, or other documents pursuant to Chapter 3 (commencing with Section 26800) of Part 3 of Division 2 of Title 3 of the Government Code, and Chapter 4 (commencing with Section 102525), Chapter 5 (commencing with Section 102625), Chapter 8 (commencing with Section 103050), and Chapter 15 (commencing with Section 103600), of Part 1, of Division 102.

(2) Funds remitted to the State Registrar by the federal Social Security Administration for participation in the enumeration at birth program.

(3) Funds remitted to the State Registrar by the National Center for Health Statistics pursuant to the federal Vital Statistics Cooperative Program.

(4) Funds deposited into the Vital Records Improvement Account pursuant to Section 103640.

(5) Any other funds collected by the State Registrar, except Children's Trust Fund fees collected pursuant to Section 18966 of the Welfare and Institutions Code, fees allocated to the Judicial Council pursuant to Section 1852 of the Family Code, and fees collected pursuant to Section 103645, all of which shall be deposited into the General Fund.

(b) Moneys in the Health Statistics Special Fund shall be expended by the State Registrar for the purpose of funding its existing programs and programs that may become necessary to carry out its mission, upon appropriation by the Legislature.

(c) Health Statistics Special Fund moneys shall be expended only for the purposes set forth in this section and Section 102249, and shall not be expended for any other purpose or for any other state program.

(d) It is the intent of the Legislature that the Health Statistics Special Fund provide for the following:

(1) Registration and preservation of vital event records and dissemination of vital event information to the public.

(2) Data analysis of vital statistics for population projections, health trends and patterns, epidemiologic research, and development of information to support new health policies.

(3) Development of uniform health data systems that are integrated, accessible, and useful in the collection of information on health status.

(e) This section shall become operative on July 1, 1995.

102249. (a) The State Registrar shall expend funds in the Health Statistics Special Fund, upon appropriation by the Legislature, for all of the following:

(1) Support existing programs within the State Registrar's office.

(2) Implement and support new programs within the State Registrar's office that meet its goals and objectives.

(3) Build a data system that will support policy analysis and program decisions at all levels, be useful to health care providers, local and community agencies, and the state, and ultimately benefit consumers of health care services.

(4) Develop and maintain public health data bases.

(5) Access and analyze data in order to develop and evaluate California's health policy.

(6) Conduct special studies and prepare statistical reports concerning the health status of Californians.

(7) Develop and maintain an automation system for vital event registration.

(8) Disseminate vital event information and statistical reports to the public.

(b) This section shall become operative on July 1, 1995.

102250. (a) There is a State Vital Record Improvement Account in the Health Statistics Special Fund.

(b) The remainder of the moneys in the account that are not subject to local allocations on July 1, 1995, pursuant to subdivision (a) of former Section 10040, shall be utilized by the State Registrar to improve and automate the processing of vital records maintained by the State Registrar.

(c) This section shall become operative July 1, 1995.

Article 2. Local Administration

102275. The health officer of any approved local health department, as defined in Article 1 (commencing with Section 101175) of Part 3 of Division 101 and approved thereunder, is the local registrar in and for all registration districts within that health jurisdiction and shall perform all the duties of local registrar of births and deaths.

102280. In other areas, the State Registrar shall appoint a local registrar of births and deaths for each registration district, whose term of office shall be four years. The State Registrar may remove such appointee forthwith for failure or neglect to perform his or her duty.

102285. The county recorder is the local registrar of marriages and shall perform all the duties of the local registrar of marriages.

102290. Each assistant or deputy of a local registrar may perform all of the duties of the local registrar in the name and place of his or her principal.

102295. Each local registrar is hereby charged with the enforcement of this part in his or her registration district under the supervision and direction of the State Registrar and shall make an immediate report to the State Registrar of any violation of this law coming to his or her knowledge.

102300. Each local registrar shall supply blank forms to persons who require them.

102305. The local registrar of births and deaths shall carefully examine each certificate before acceptance for registration and, if any are not completed in a manner consistent with the policies established by the State Registrar, he or she shall require further information to be furnished as may be necessary to make the record consistent with those policies before acceptance for registration.

102310. The local registrar of marriages shall carefully examine each certificate before acceptance for registration and, if it is incomplete or unsatisfactory, he or she or she shall require any

further information to be furnished as may be necessary to make the record satisfactory before acceptance for registration.

102315. The local registrar shall affix his or her signature to each certificate in attest to the date of acceptance for registration in his or her office.

102320. The local registrar shall number the certificates of live birth, fetal death, and death consecutively in separate series, beginning with number one for the first event in each calendar year.

102325. The local registrar shall number each certificate of marriage consecutively beginning with the number one for either the first event occurring, or first event registered in, each calendar year. Numbering may be based on either the year that the event occurs or the year of registration.

102330. The local registrar shall make a complete and accurate copy of each certificate accepted for registration and shall preserve it in his or her office as the local registrar's copy of the record in the manner directed by the State Registrar.

102335. Each local registrar of births and deaths, except a local registrar of a city and county shall transmit to the county recorder for a special county record at the same time the original certificates are forwarded to the State Registrar a copy of each original birth certificate and death certificate.

In lieu of the procedure outlined above in this section, the county recorder may make the copies of certificates for the special county record, in which case the original certificates shall be transmitted by the local registrar to the county recorder for this purpose, after which the county recorder shall forward the original certificates to the State Registrar pursuant to Section 102345.

102340. Any local registrar serving a county-wide health jurisdiction of over 550,000 population, as determined by the official 1950 census, and in whose office is maintained a central depository of birth and death records, is excepted from Section 102335.

102345. (a) The local registrar of births and deaths shall transmit each week to the State Registrar all original certificates accepted for registration by him or her during the preceding week.

(b) This section shall become operative on January 1, 1993.

102350. The county board of supervisors may, by resolution, require the local registrar to send a copy of each certificate of death to the physician and surgeon whose statement appears on the certificate pursuant to Section 102825.

102355. The local registrar of marriages shall transmit to the State Registrar on or before the fifth day of each month all original certificates of registry of marriage accepted for registration by him or her during the preceding month. Certificates shall be batched by calendar year of event prior to transmission. Certificates may be transmitted at more frequent intervals by arrangement with the State Registrar.

102360. The local registrar of births and deaths shall furnish to the registrar of voters or county clerk not later than the 15th day of each month a notification of all deceased persons 18 years of age and over whose deaths were registered with him or her or of whose deaths he or she was notified by the state registrar of vital statistics during the preceding month. This notification shall include at least the name, social security number, sex, age, birthplace, birthdate, place of residence, and date and place of death for each decedent. Copies of this notification list shall be sent at the same time to the county welfare department and the local district social security office.

102365. Notwithstanding any other law to the contrary, a local registrar of births and deaths, after one year from the date of registration and with the approval of, and under the supervision of, the State Registrar, may dispose of the local registrar's copies of the records, if both of the following exist:

(a) The original copies of the records are on file in the office of the State Registrar.

(b) Copies of the records are on file in the office of the county recorder. If the county recorder does not have copies of the records, he or she may accept the local registrar's copies as a special county record of the events.

102370. The county recorder is hereby authorized to receive original records or abstracts of records of any birth or death that were filed with any political subdivision prior to July 1, 1905, and to retain them as a special county record of the events.

102375. Special county records of birth certificates and death certificates transmitted and filed with the county recorder under this article shall be open for inspection by the public in accordance with regulations adopted by the department for local registrars.

Nothing in this section shall authorize the use of a certificate marked pursuant to subdivision (a) of former Section 10056.5 by any person compiling a business contact list.

102380. The county recorder and the local registrar of births and deaths, with the approval and under the supervision of the State Registrar and with the approval of the board of supervisors of any county or city and county by ordinance, may authorize the transfer of special county records of deaths and marriages and local registrar's records of deaths for events that occurred subsequent to July 1, 1905, to a private nonprofit agency or public agency that shall preserve the records for local public use. The receiving agency shall protect and preserve the records to assure access for any person who has a need or interest in reviewing the records, and shall prohibit the photocopying or sale of copies of the records, but may convert the records to microform format.

If the office of the local registrar or the county recorder does not have copies of the records, that office is hereby authorized to accept them from the county recorder or local registrar.

102385. If a public agency or private nonprofit agency that receives copies of records pursuant to this section is unable to assure the continued preservation and protection of those records for public use, the records shall be returned to the contributing local registrar or county recorder.

102390. Any record of death and marriage transferred to a public agency or private nonprofit agency pursuant to Section 102380 is exempt from Sections 102230 and 103245.

102395. Special county records of birth, death, and marriage and the local registrar's records of birth, death, and marriage shall be subject to Sections 26205.5 and 26205.7 of the Government Code.

CHAPTER 3. LIVE BIRTH REGISTRATION

Article 1. Duty of Registering Live Birth

102400. Each live birth shall be registered with the local registrar of births and deaths for the district in which the birth occurred within 10 days following the date of the event.

102405. For live births that occur in a hospital, the administrator of the hospital or a representative designated by the administrator in writing may sign the birth certificate certifying the fact of birth instead of the attending physician and surgeon, certified nurse midwife, or principal attendant if the physician and surgeon, certified nurse midwife, or principal attendant is not available to sign the certificate; and shall be responsible for registering the certificate with the local registrar within the time specified in Section 102400.

102410. For those live births occurring in a hospital, and upon a parent's request, a footprint shall be taken of the child prior to discharge from the facility and shall be made available to the parents. The footprint shall be placed on a sheet of paper that is separate from the birth certificate, shall only be prepared for the parents prior to discharge from the hospital, and need not be retained or kept on file.

102415. For live births that occur outside of a hospital, the physician in attendance at the birth; or in the absence of a physician, either one of the parents shall be responsible for entering the information on the certificate, securing the required signatures, and for registering the certificate with the local registrar.

Article 2. Content of Certificate of Live Birth

102425. (a) The certificate of live birth for any live birth occurring on or after January 1, 1980, shall contain those items necessary to establish the fact of the birth and shall contain only the following information:

(1) Full name and sex of child.

(2) Date of birth, including month, day, hour, and year.

(3) Planned place of birth and place of birth.

(4) Full name of father, birthplace, and date of birth of father including month, day, and year.

(5) Full birth name of mother, birthplace, and date of birth of mother including month, day, and year.

(6) Multiple births and birth order of multiple births.

(7) Signature, and relationship to child, of a parent or other informant, and date signed.

(8) Name, title, and mailing address of attending physician and surgeon or principal attendant, signature, and certification of live birth by attending physician and surgeon or principal attendant or certifier, date signed, and name and title of certifier if other than attending physician and surgeon or principal attendant.

(9) Date accepted for registration and signature of local registrar.

(10) A state birth certificate number and local registration district and number.

(11) A blank space for entry of date of death with a caption reading ‘‘Date of Death.’’

(b) In addition to the items listed in subdivision (a), the certificate of live birth shall contain the following medical and social information, provided that the information is kept confidential pursuant to Sections 102430 and 102447 and is clearly labeled ‘‘Confidential Information for Public Health Use Only’’:

(1) Birth weight.

(2) Pregnancy history.

(3) Race and ethnicity of mother and father.

(4) Residence address of mother.

(5) A blank space for entry of census tract for mother’s address.

(6) Month prenatal care began and number of prenatal visits.

(7) Date of last normal menses.

(8) Description of complications of pregnancy and concurrent illnesses, congenital malformation, and any complication of labor and delivery, including surgery; provided that this information is essential medical information and appears in total on the face of the certificate.

(9) Mother’s and father’s occupations and kind of business or industry.

(10) Education level of mother and father.

(11) Principal source of pay for prenatal care, which shall include all of the following: Medi-Cal, health maintenance organization or prepaid health plan, private insurance companies, medically indigent, self-pay, other sources which shall include, Medicare, workers’ compensation, Title V, other government or nongovernment programs, no charge, and other categories as determined by the State Department of Health Services.

This paragraph shall become inoperative on January 1, 1999, or on the implementation date of the decennial birth certificate revision due to occur on or about January 1, 1999, whichever occurs first.

(12) Expected principal source of pay for delivery, which shall include all of the following: Medi-Cal, health maintenance organization or prepaid health plan, private insurance companies, medically indigent, self-pay, other sources which shall include, Medicare, workers' compensation, Title V, other government or nongovernment programs, no charge, and other categories as determined by the State Department of Health Services.

This paragraph shall become inoperative on January 1, 1999, or on the implementation date of the decennial birth certificate revision due to occur on or about January 1, 1999, whichever occurs first.

(13) An indication of whether or not the child's parent desires the automatic issuance of a Social Security number to the child.

(14) On and after January 1, 1995, the social security numbers of the mother and father, unless subdivision (b) of Section 102150 applies.

(c) Item 8, specified in subdivision (b), shall be completed by the attending physician and surgeon or the attending physician's and surgeon's designated representative. The names and addresses of children born with congenital malformations, who require followup treatment, as determined by the child's physician and surgeon, shall be furnished by the physician and surgeon to the local health officer, if permission is granted by either parent of the child.

(d) The parent shall only be asked to sign the form after both the public portion and the confidential medical and social information items have been entered upon the certificate of live birth.

(e) The State Registrar shall instruct all local registrars to collect the information specified in this section with respect to certificates of live birth. The information shall be transcribed on the certificate of live birth in use at the time and shall be limited to the information specified in this section.

Information relating to concurrent illnesses, complications of pregnancy and delivery, and congenital malformations shall be completed by the physician and surgeon, or physician's and surgeon's designee, inserting in the space provided on the confidential portion of the certificate the appropriate number or numbers listed on the VS-10A supplemental worksheet. The VS-10A supplemental form shall be used as a worksheet only and shall not in any manner be linked with the identity of the child or the mother, nor submitted with the certificate to the State Registrar. All information transferred from the worksheet to the certificate shall be fully explained to the parent or other informant prior to the signing of the certificate. No questions relating to drug or alcohol abuse may be asked.

(f) If the implementation date of the decennial birth certificate revision occurs prior to January 1, 1999, within 30 days of this

implementation date the State Department of Health Services shall file a letter with the Secretary of the Senate and with the Chief Clerk of the Assembly, so certifying.

102430. (a) The second section of the certificate of live birth as specified in subdivision (b) of Section 102425 shall be confidential. Access to that portion of any certificate of live birth shall be limited to the following:

(1) Department staff.

(2) Local registrar's staff and local health department staff when approved by the local registrar or local health officer, respectively.

(3) Persons with a valid scientific interest as determined by the State Registrar, who are engaged in demographic, epidemiological or other similar studies related to health, and who agree to maintain confidentiality as prescribed by this part and by regulation of the State Registrar.

(4) The parent who signed the certificate or, if no parent signed the certificate, the mother.

(5) The person named on the certificate.

(6) Any person who has petitioned to adopt the person named on the certificate, subject to Section 102705 of the Health and Safety Code and Sections 9200 and 9203 of the Family Code.

(b) The department shall maintain an accurate record of all persons who are given access to the confidential portion of the certificate. The record shall include: the name of the person authorizing access; name, title, and organizational affiliation of persons given access; dates of access; and specific purpose for which information is to be used. The record of access shall be open to public inspection during normal operating hours of the department.

(c) All research proposed to be conducted using the confidential medical and social information on the birth certificate shall first be reviewed by the appropriate committee constituted for the protection of human subjects that is approved by the federal Department of Health and Human Services and has a general assurance pursuant to Part 46 of Title 45 of the Code of Federal Regulations. No information shall be released until the request for information has been reviewed by the Vital Statistics Advisory Committee and the committee has recommended to the State Registrar that the information shall be released.

102440. Notwithstanding Sections 102425 and 102430, the department may transmit to the Social Security Administration the information necessary to issue a Social Security number to a child in a case where the child's parent has requested the issuance pursuant to paragraph (13) of subdivision (b) of Section 102425.

102445. After public hearing and consultation with the Vital Statistics Advisory Committee, the State Registrar shall adopt regulations specifying the contents of a medical and health report and shall supply the necessary forms to hospitals and local registrars.

The contents of the report shall be limited to the medical, health, or social data necessary to evaluate or improve maternal and child health, as determined by the State Registrar.

The State Registrar shall make a finding that the specific items of information included in the report are not available from other sources at a comparable cost and that sufficient resources and a research design are available to analyze the data collected.

102447. Notwithstanding Section 102430, a parent's social security number contained in the confidential medical and social information portion of the child's certificate of live birth shall be accessible to the State Department of Social Services and district attorneys for the purposes of operating the Child Support Enforcement Program, as specified in Title IV-D of the federal Social Security Act.

102450. (a) For each registration of live birth submitted to the local registrar pursuant to Section 102400, the hospital administrator, or the person's representative, shall submit a completed medical and health report that meets the requirements of Section 102445. For live births that occur outside of a hospital, the medical and health report shall be completed and submitted by the local registrar when the local registrar receives the certificate of live birth for registration from the person designated in Section 102415.

(b) The medical and health report shall be submitted to the State Registrar by the local registrar for filing. Such report shall not be kept on file in the offices of the local registrars.

102455. (a) The medical and health report required pursuant to Section 102445 shall be clearly labeled ''Confidential Information for Public Health Use Only.'' The parent or informant shall be informed of the purposes for collecting the information, its confidential nature, and that completing the specific items is voluntary.

(b) When objection is made by either parent to the furnishing of information requested in a specific item or items in the medical and health report that information shall not be entered.

(c) The mother, father or child shall not be identified by name or any other means in the medical and health report.

102460. With the exception of statistical tabulation purposes, the medical and health report shall be kept confidential and access to the report shall be limited to the following persons:

(a) State and local registrar's staff.

(b) State and local health department staff.

(c) Persons with a valid educational or scientific interest, as determined by the State Registrar, who are engaged in demographic and epidemiological studies for health purposes.

The department shall maintain an accurate record of all persons who are given access to the report. The record shall include: the name of the persons authorizing access; name, title, and organizational affiliation of persons given access; dates of access; and specific purpose for which information is to be used. The record of

access shall be open to public inspection during normal operating hours of the department.

102465. (a) The State Registrar shall appoint a Vital Statistics Advisory Committee that shall have the following duties:

(1) Review and make recommendations to the State Registrar as to the adequacy of procedures to assure accuracy and confidentiality of personal health and medical information.

(2) Review the findings of the committee for the protection of human subjects pursuant to subdivision (c) of Section 102430 and make recommendations to the State Registrar regarding all requests for studies that propose to use confidential information with respect to whether a legitimate scientific interest is presented and whether the significance of the project justifies use of the confidential information.

(3) Assure that all research conducted using the data from birth certificates is consistent with guidelines provided by an appropriately constituted committee for the protection of human subjects of the department, as specified in subdivision (c) of Section 102430.

(4) Review and make recommendations to the State Registrar as to proposals for addition or deletion of items on the certificate of live birth and advise the State Registrar on the content and format of the certificate.

(5) Take testimony and make recommendations to the State Registrar regarding changes in the birth registration system.

(b) The Vital Statistics Advisory Committee shall include representatives from the users, providers, and informant groups who are involved in the process of the provision and collection of information for and the use of the certificate of live birth, and shall include the chairpersons of the Assembly Health Committee and the Senate Health and Welfare Committee or their designated representative, and shall have a majority of lay persons in its composition. The State Registrar shall make every effort to ensure that committee membership is representative of the community at large. Consideration shall be given to providing access to relevant classes of persons including, but not limited to, women, men, racial and ethnic minorities, in proportion to their representation in the affected population.

Membership on the committee shall be for a term of three years, appointments to be made on a staggered basis to allow for one-third membership to change annually.

102470. The State Registrar shall publish within 30 days of receipt of recommendations by the Vital Statistics Advisory Committee, made pursuant to Section 102465, (1) a list of the recommendations adopted, and (2) a list of the recommendations not adopted, with reasons for the action.

102475. (a) Any person who releases a copy of the confidential portion of the certificate of live birth, except as specifically provided by this part, shall be guilty of a misdemeanor, punishable by a fine of five hundred dollars ($500) or six months in jail. The criminal penalty shall not preclude suit for civil or punitive damages by any individuals harmed by the unauthorized release.

(b) Any person who is the subject of, or the source of information for, a birth certificate, who has reason to believe there has been linkage of confidential information with his or her identity and disclosure of the confidential information to a person not specified in subdivision (a) of Section 102430, shall have a civil right of action against the person releasing the information and may seek punitive damages.

Article 3. Foundling Registration

102500. A certificate of finding of an unidentified live child of less than one year of age shall be registered with the local registrar of births and deaths by the person or institution with whom the child is placed, within four days following the finding.

102505. The certificate shall include the name, sex, color or race, the date and place of finding, and the name of the person or institution with whom the child is placed.

102510. The person or institution with whom the child is placed shall give the child a name; the place in which the child is found shall be known as the legal place of birth; and the date of birth shall be determined as closely as possible and shall be known as the legal date of birth.

102515. The certificate of finding shall be handled in the same manner and shall serve all the purposes of a certificate of live birth.

102520. If the child is later identified and a certificate of birth found or obtained, the fact shall be reported to the State Registrar and he or she shall enter this upon the certificate of finding, with citation to the certificate of birth.

CHAPTER 4. DELAYED REGISTRATION OF BIRTH

Article 1. General Provisions

102525. This chapter is not exclusive of Chapters 3 (commencing with Section 102400) and 12 (commencing with Section 103450), but offer an alternative method of establishing a record of birth.

102530. Delayed certificates of birth issued pursuant to this chapter shall not be considered as evidence in any action or proceeding involving estates of decedents or in any proceeding to establish heirship unless the affidavit of at least one person who knew the facts was filed at the time of obtaining the certificate.

102535. An application may be filed with the State Registrar for the delayed registration of birth of any person born in this state whose birth is not registered. The application may be made only by the person whose birth is being registered if he or she is 18 years of age or over at the time of filing the application. If the person whose birth is being registered is under 18 years of age at the time of filing the application, the application may be made only by his or her mother, father, legal guardian, or the attending physician or principal attendant at birth.

Article 2. Application

102550. The application shall be made on the forms prescribed and furnished by the State Registrar and shall contain information and shall be accompanied by affidavits and documentary evidence as required to enable the State Registrar to determine whether the birth did in fact occur at the place and date alleged.

Article 3. Evidence

102575. ''Affidavit,'' as used in this chapter, is defined as a written statement executed under oath by a person who at the time of birth was at least 5 years old and had knowledge of the facts of birth and shall include the full name of the person whose birth is being registered, the names of his or her parents, the date and place of his or her birth and the basis of the affiant's knowledge of these facts.

102580. ''Documentary evidence,'' as used in this chapter, is defined as original or certified copies of a record that was executed at least five years prior to the date of application, and that substantiates the date and place of birth of the person whose birth is being registered; except that if the person whose birth is being registered is under 12 years of age the record shall have been executed only at least two years before the date of application. Examples of documentary evidence that shall generally be considered acceptable are hospital records of birth, baptismal certificates or other church records, school records, census records, social security records, military service records, voting registration records, birth certificate of child of person whose birth is being registered, certificates of registry of marriage, and newspaper notices of birth.

102585. For births that are being registered under this chapter there shall be required documentary evidence and affidavits as follows:

(a) Two pieces of documentary evidence, at least one of which shall support the parentage.

(b) One piece of documentary evidence and one affidavit executed by the physician or other principal attendant.

(c) One piece of documentary evidence and two affidavits executed by either the mother, father, or other persons having knowledge of the facts of birth.

Article 4. Registration

102600. Upon receipt by the State Registrar of an application for delayed registration of birth and payment of the required fee, he or she shall review the application together with the affidavits and documentary evidence accompanying it and shall accept the application if the application and evidence submitted comply with this chapter. After acceptance by the State Registrar the application shall constitute a delayed certificate of birth, and the State Registrar shall permanently preserve the certificates in a systematic manner and shall prepare and maintain a comprehensive and continuous index of all the certificates.

102605. The State Registrar shall send a certified copy of the delayed certificate of birth to the applicant without additional cost.

102610. The State Registrar shall send certified copies of the delayed certificate of birth to the local registrar and the county recorder within which area the birth occurred and in whose offices copies of records of the year of occurrence of the event are on file.

CHAPTER 5. CERTIFICATES OF BIRTH FOLLOWING ADOPTION, LEGITIMATION, COURT DETERMINATION OF PATERNITY, AND ACKNOWLEDGMENT

Article 1. Adoption

102625. The clerk of the court shall complete a report upon a form provided for that purpose and forward the report to the State Registrar within five days after a decree of adoption has been entered declaring a child legally adopted by any court in the state. The report shall be forwarded within five days after an interlocutory decree of adoption becomes a final decree of adoption, and not earlier.

102630. The court reports of adoption that are received by the State Registrar for births that occurred in another state, the District of Columbia, in any territory of the United States, or Canada shall be transmitted to the registration authority of the place of birth.

102635. A new birth certificate shall be established by the State Registrar upon receipt of a report of adoption from any court of record that has jurisdiction of the child of this state, another state, the District of Columbia, in any territory of the United States, or in any foreign country, for any child born in California and whose certificate of birth is on file in the office of the State Registrar.

102640. When requested by the adopting parent or parents, a new certificate shall not be established by the State Registrar.

102645. The new birth certificate shall bear the name of the child as shown in the report of adoption, the names and ages of his or her adopting parents, the date and place of birth, and no reference shall be made in the new birth certificate to the adoption of the child. The new certificate shall be identical with a birth certificate registered for the birth of a child of natural parents, except, when requested by the adopting parents, the new birth certificate shall not include the specific name and address of the hospital or other facility where the birth occurred, the color and race of the parents, or both.

102650. Notwithstanding other provisions in this article, when a child is adopted by an unmarried man or woman, the new certificate shall, if the adopting parent so requests, reflect the fact that it is a single-parent adoption.

102660. If both adopting parents were in the home at the time of the initial placement of the child for adoption the newly amended birth record may include the names of both adopting parents despite the death of one of the adopting parents, upon receipt of an order from the court granting the adoption that directs under the authority of Section 8615 of the Family Code that the names of both adopting parents shall be included on the newly amended birth record.

102670. Notwithstanding any other provision of law, an adopting parent who has adopted a child for whom an amended record has already been prepared under authority of this article may have another amended record prepared for the child, upon application, furnishing a copy of the court order made in an action brought pursuant to Section 8615 of the Family Code, and payment of the required fee.

102675. At any time after the issuance of a new birth certificate another amended certificate may be issued, at the request of the adopting parents, that omits any or all of the following:

(a) The specific name and address of the hospital or other facility where the birth occurred.

(b) The city and county of birth.

(c) The color and race of the parents.

102680. The new birth certificate shall supplant any birth certificate previously registered for the child and shall be the only birth certificate open to public inspection.

102685. When a new birth certificate is established under this article, the State Registrar shall inform the local registrar and the county recorder whose records contain copies of the original certificate, who shall forward the copies to the State Registrar for filing with the original certificate, if it is practical for him or her to do so. If it is impractical for him or her to forward the copy to the State Registrar, he or she shall effectually seal a cover over the copy in a manner as not to deface or destroy the copy and forward a verified statement of his or her action to the State Registrar. Thereafter the

information contained in the record shall be available only as provided in this article.

102690. For court reports of adoptions received from any court of record of this State, another state, the District of Columbia, or in any territory of the United States, that has jurisdiction of a child born in this State and for whom no original record of birth is on file in the Office of the State Registrar the court report of adoption shall constitute a court order delayed birth registration; provided, the court report contains a statement of the date and place of birth.

102695. A court report of adoption received from any court of record in this State, wherein the birth occurred outside the United States, the Territories of the United States, or Canada shall constitute a court order delayed registration of birth; provided, the court report contains a statement of the date and place of birth.

102700. The court report of adoption shall be filed with the original record of birth, that shall remain as a part of the records of the State Registrar.

102705. All records and information specified in this article, other than the newly issued birth certificate, shall be available only upon the order of the superior court of the county of residence of the adopted child or the superior court of the county granting the order of adoption.

No such order shall be granted by the superior court unless a verified petition setting forth facts showing the necessity of the order has been presented to the court and good and compelling cause is shown for the granting of the order. The clerk of the superior court shall send a copy of the petition to the State Department of Social Services and the department shall send a copy of all records and information it has concerning the adopted person with the name and address of the natural parents removed to the court. The court must review these records before making an order and the order should so state. If the petition is by or on behalf of an adopted child who has attained majority, these facts shall be given great weight, but the granting of any petition is solely within the sound discretion of the court.

The name and address of the natural parents shall be given to the petitioner only if he or she can demonstrate that the name and address, or either of them, are necessary to assist him or her in establishing a legal right.

102710. The State Registrar shall furnish a certified copy of the newly amended record of birth prepared under authority of this article to the registrant without additional cost.

Article 2. Adjudication of Facts of Parentage

102725. Whenever the existence or nonexistence of the parent and child relationship has been determined by a court of this state or

a court of another state, and upon receipt of a certified copy of the court order, application, and payment of the required fee, the State Registrar shall establish a new birth certificate for the child in the manner prescribed in Article 1 (commencing with Section 102625), if the original record of birth is on file in the office of the State Registrar.

102730. All records and information specified in this article, other than the newly issued birth certificate, shall be available only upon order of a court of record.

102735. The State Registrar shall furnish a certified copy of the newly amended record of birth prepared under authority of this article to the registrant without additional cost.

Article 3. Acknowledgement of Paternity

102750. Whenever the mother and father acknowledge paternity of a child by affidavit, and in the absence of conflicting information on the originally registered certificate of live birth, an application including the affidavits may be filed with the office of the State Registrar upon a form provided for that purpose.

102755. Upon receipt of the application and payment of the required fee, and in the absence of conflicting information on the originally registered certificate of live birth, the State Registrar shall review the application for acceptance for filing, and if accepted shall establish a new birth certificate for the child in the manner prescribed in Article 1 (commencing with Section 102625), if the original record of birth is on file in the office of the State Registrar.

102760. All records and information specified in this article, other than the newly issued birth certificate, shall be available only upon order of a court of record.

102765. The State Registrar shall furnish a certified copy of the new record of birth prepared under authority of this article to the registrant with additional cost.

CHAPTER 6. DEATH REGISTRATION

Article 1. Duty of Registering Death

102775. Each death shall be registered with the local registrar of births and deaths in the district in which the death was officially pronounced or the body was found, within eight calendar days after death and prior to any disposition of the human remains.

102780. A funeral director, or person acting in lieu thereof, shall prepare the certificate and register it with the local registrar.

102785. The State Registrar, at his or her discretion, may incorporate computer or telephone facsimile technology, or both, in the statewide program of death and fetal death registration,

including, but not limited to, the issuing of permits for disposition of human remains.

Nothing in this section shall limit the ability of local districts to file certificates of death and fetal death manually within the local registration districts.

102790. The funeral director shall obtain the required information other than medical and health section data from the person or source best qualified to supply this information.

102795. The medical and health section data and the time of death shall be completed and attested to by the physician and surgeon last in attendance, or in the case of a patient in a skilled nursing or intermediate care facility at the time of death, by the physician and surgeon last in attendance or by a licensed physician assistant under the supervision of the physician and surgeon last in attendance if the physician and surgeon or licensed physician assistant is legally authorized to certify and attest to these facts, and if the physician assistant has visited the patient within 72 hours of the patient's death. In the event the licensed physician assistant certifies the medical and health section data and the time of death, then the physician assistant shall also provide on the document the name of the last attending physician and surgeon and provide the coroner with a copy of the certificate of death. However, the medical health section data and the time of death shall be completed and attested to by the coroner in those cases in which he or she is required to complete the medical and health section data and certify and attest to these facts.

102800. The medical and health section data and the physician's or coroner's certification shall be completed by the attending physician within 15 hours after the death, or by the coroner within three days after examination of the body.

The physician shall within 15 hours after the death deposit the certificate at the place of death, or deliver it to the attending funeral director at his or her place of business or at the office of the physician.

102805. An embalmer may authorize his or her signature to be affixed to the certificate after he or she has embalmed a body, as required by this chapter, by a written special power of attorney that shall be retained for a period of one year.

Article 2. Responsibility of Attending Physician

102825. The physician and surgeon last in attendance, or in the case of a patient in a skilled nursing or intermediate care facility at the time of death, the physician and surgeon last in attendance or a licensed physician assistant under the supervision of the physician and surgeon last in attendance, on a deceased person shall state on the certificate of death the disease or condition directly leading to death, antecedent causes, other significant conditions contributing to death and any other medical and health section data as may be

required on the certificate; he or she shall also specify the time in attendance, the time he or she last saw the deceased person alive, and the hour and day on which death occurred, except in deaths required to be investigated by the coroner. The physician and surgeon or physician assistant shall specifically indicate the existence of any cancer as defined in subdivision (e) of Section 103885, of which the physician and surgeon or physician assistant has actual knowledge.

A physician and surgeon may designate, one or more other physicians and surgeons who have access to the physician and surgeon's records, to act as agent for the physician and surgeon for purposes of the performance of his or her duties under this section, provided that any person so designated acts in consultation with the physician and surgeon.

Article 3. Responsibility of Coroner

102850. A physician and surgeon, physician assistant, funeral director, or other person shall immediately notify the coroner when he or she has knowledge of a death that occurred or has charge of a body in which death occurred under any of the following circumstances:

(a) Without medical attendance.

(b) During the continued absence of the attending physician and surgeon.

(c) Where the attending physician and surgeon or the physician assistant is unable to state the cause of death.

(d) Where suicide is suspected.

(e) Following an injury or an accident.

(f) Under circumstances as to afford a reasonable ground to suspect that the death was caused by the criminal act of another.

Any person who does not notify the coroner as required by this section is guilty of a misdemeanor.

102855. The coroner whose duty it is to investigate such deaths shall ascertain as many as possible of the facts required by this chapter.

102860. The coroner shall state on the certificate of death the disease or condition directly leading to death, antecedent causes, other significant conditions contributing to death and other medical and health section data as may be required on the certificate, and the hour and day on which death occurred. The coroner shall specifically indicate the existence of any cancer, as defined in subdivision (e) of Section 103885, of which he or she has actual knowledge.

The coroner shall within three days after examining the body deliver the death certificate to the attending funeral director.

102865. In any case involving an infant under the age of one year where the gross autopsy results in a presumed diagnosis of sudden

infant death syndrome, the coroner shall, within 24 hours of the gross autopsy, notify the local health officer, as defined in Section 123740.

102870. In deaths investigated by the coroner or medical examiner where he or she is unable to establish the identity of the body or human remains by visual means, fingerprints, or other identifying data, the coroner or medical examiner may have a qualified dentist, as determined by the coroner or medical examiner, carry out a dental examination of the body or human remains. If the coroner or medical examiner with the aid of the dental examination and other identifying findings is still unable to establish the identity of the body or human remains, he or she shall prepare and forward the dental examination records to the Department of Justice on forms supplied by the Department of Justice for that purpose.

The Department of Justice shall act as a repository or computer center, or both, with respect to those dental examination records. The Department of Justice shall compare the dental examination records with dental records filed with it pursuant to Section 11114 of the Penal Code, shall determine which scoring probabilities are the highest for purposes of identification, and shall submit the information to the coroner or medical examiner who prepared and forwarded the dental examination records.

Not later than three years following implementation of the dental identification program required by this section and Section 11114 of the Penal Code, the Department of Justice shall submit a report on the program to the Legislature.

Article 4. Content of Certificate of Death

102875. The certificate of death shall be divided into two sections. The first section shall contain those items necessary to establish the fact of the death, including all of the following and those other items as the State Registrar may designate:

(a) Personal data concerning decedent including full name, sex, color or race, marital status, name of spouse, date of birth and age at death, birthplace, usual residence, and occupation and industry or business.

(b) Date of death, including month, day, and year.

(c) Place of death.

(d) Full name of father and birthplace of father, and full maiden name of mother and birthplace of mother.

(e) Informant.

(f) Disposition of body information including signature and license number of embalmer if body embalmed or name of embalmer if affixed by attorney-in-fact; name of funeral director, or person acting as such; and date and place of interment or removal.

(g) Certification and signature of attending physician or certification and signature of coroner when required to act by law.

(h) Date accepted for registration and signature of local registrar.

The second section shall contain those items relating to medical and health data, including all of the following and other items as the State Registrar may designate:

(a) Disease or conditions leading directly to death and antecedent causes.

(b) Operations and major findings thereof.

(c) Accident and injury information.

102880. (a) A certificate of death shall include information as to whether the decedent has performed military service and, if so, the period of military service.

(b) The sum of twenty-two thousand five hundred dollars ($22,500) is hereby appropriated from the General Fund to the Vital Statistics Branch of the department to revise the certificate of death in accordance with this section.

(c) This section shall remain in effect only until January 1, 1995, and as of that date is repealed, unless a later enacted statute, that is chaptered before January 1, 1995, deletes or extends that date.

Article 5. American Indians

102900. The Legislature finds and declares all of the following:

(a) Birth and death certificate-linking studies done by the department in 1974 and repeated in 1984, show unacceptably high rates of error in the completion of death certificate information recording ethnicity for American Indian infants.

(b) Official vital data on deaths for American Indians in the State of California indicate an implausible death rate equal to one-half of the United States rate for all races and one-quarter of the rate for American Indians in all states.

(c) Good demographic data on the American Indian people within the state does not exist and the data that does exist is fragmented and difficult to access and compile.

(d) The lack of accurate vital data on American Indians in California results in a significant loss of federal funds for the provision of health care and promotion services to American Indian people residing in 37 rural counties within the state.

102905. (a) The Rural Health Division of the department shall cause to be undertaken a three-year study for the purpose of establishing more valid statistics regarding American Indian death rates, including rates for the 10 leading causes of death for American Indians within the 37 designated rural Indian counties as follows: Humboldt, Shasta, Siskiyou, Modoc, Del Norte, Mendocino, Lake, Sonoma, Glenn, Butte, Colusa, Plumas, Yuba, Yolo, Tehama, Sutter, El Dorado, Nevada, Placer, Sierra, Tulare, Tuolumne, Amador, Mariposa, Calaveras, Fresno, Kings, Madera, Mono, Inyo, Riverside,

San Bernardino, Imperial, Lassen, Santa Barbara, Trinity, and San Diego.

(b) This study shall enlist the fullest possible participation of the Indian community and specifically the Indian clinics currently providing health care services to rural Indians of the state. This project shall be administered in a manner that allows for input from, and consultation with, concerned tribes and tribal organizations and American Indian-controlled health care corporations.

(c) This study shall identify methods to improve the quality of official state data on Indian mortality and carry out activities to achieve that goal, including the provision of training and the development of educational materials for morticians and coroners operating within the state.

102910. For the purpose of conducting the three-year study required pursuant to Section 102905, the department is hereby encouraged to contract with a federally recognized tribe or tribal organization or an American Indian-controlled health care corporation or research institution having a record of good standing with the Commissioner of Corporations and the Indian Health program within the department, and established competence in the area of records management.

102915. The study shall be conducted in three phases, as follows:

(a) Phase one of the study shall include research design and data acquisition, including funds for the purchase of data from tribal, federal, state, and county sources and the encoding of this data to a computer-readable form.

(b) Phase two of the study shall include a computerized matching of the American Indian-specific data with the officially known deaths within the state for a selected two-year period, and all necessary statistical analysis and validation of any findings.

(c) Phase three shall include the dissemination of the findings from the study, including efforts to improve the collection of vital event data on the American Indian population within the state.

102920. The department shall report to the Legislature on or before January 1, 1994, on the implementation of this article. The department also shall report to the Legislature, on or before four years after the date that the initial funding is received to implement this article, on the results of the study required by this article.

102925. The state department shall begin to implement the activities referred to in Sections 102905, 102910, 102915, and 102920 only upon an appropriation for the specific purpose of funding the activities.

CHAPTER 7. FETAL DEATH REGISTRATION

Article 1. Duty of Registering Fetal Death

102950. Each fetal death in which the fetus has advanced to or beyond the twentieth week of uterogestation shall be registered with the local registrar of births and deaths of the district in which the fetal death was officially pronounced within eight calendar days following the event and prior to any disposition of the fetus.

102955. A funeral director, or if there is no funeral director, the person acting in lieu thereof, shall prepare the certificate and register it with the local registrar.

102960. A funeral director shall obtain the required information other than medical and health section data from the person or source best qualified to supply this information.

Article 2. Responsibility of Attending Physician

102975. The physician, if any, in attendance on the delivery of a fetus shall within 15 hours after the delivery state on the certificate of fetal death the time of fetal death or delivery, the direct causes of the fetal death, the conditions, if any, that gave rise to these causes, and other medical and health section data as may be required on the certificate, and shall sign the certificate in attest to these facts.

The physician shall within 15 hours after the death deposit the certificate at the place of death, or deliver it to the attending funeral director at his or her place of business or at the office of the physician.

Article 3. Responsibility of Coroner

103000. All other fetal deaths required to be registered under this chapter shall be handled as are deaths without medical attendance.

103005. The coroner shall within three days after examination of the fetus state on the certificate of fetal death the time of fetal death, the direct causes of the fetal death, the conditions, if any, that gave rise to these causes, and other medical and health section data as may be required on the certificate, and shall sign the certificate in attest to these facts. The coroner shall within three days after examining the body deliver the death certificate to the attending funeral director.

Article 4. Content of Certificate of Fetal Death

103025. The certificate of fetal death shall contain items as may be designated by the State Registrar and shall be divided into two sections; the first section shall contain those items necessary to establish the fact of the fetal death and the second section shall contain those items relating to medical and health data.

CHAPTER 8. PERMITS FOR DISPOSITION OF HUMAN REMAINS

103050. No person shall dispose of human remains unless (a) there has been obtained and filed with a local registrar a death certificate, as provided in Chapter 6 (commencing with Section 102775) of this part, and (b) there has been obtained from a local registrar a permit for disposition.

103055. (a) If the certificate of death is properly executed and complete, the local registrar of births and deaths shall issue a permit for disposition, that in all cases, shall specify any one of the following:

(1) The name of the cemetery where the remains shall be interred.

(2) Burial at sea as provided in Section 7117.

(3) The address of the location where the cremated remains will be kept, as provided in Section 7054.6, under the conditions the state registrar may approve, including, but not limited to, conditions in keeping with public sensibilities, applicable laws, and reasonable assurances that the disposition will be carried out in accordance with the prescribed conditions and will not constitute a private or public nuisance.

(b) Notwithstanding any other provisions of this part relative to issuance of a permit for disposition, whenever the death occurred from a disease declared by the state department to be infectious, contagious, or communicable and dangerous to the public health, no permit for the disposition of the body shall be issued by the local registrar, except under those conditions as may be prescribed by the state department and local health officers.

103060. A permit for disposition for the purpose of removing cremated remains from the place of cremation or interment shall include a description of the final place of disposition sufficient to identify the place and shall be issued by the local registrar to the person having the right to control the disposition of the remains under Section 7100 upon the application of that person.

A permit for disposition shall be issued under this section only upon the signed acknowledgement by the person making application that trespass and nuisance laws apply to the disposition and that the permit gives no right of unrestricted access to property not owned by the person for the purpose of disposing of the remains.

The person to whom the permit for disposition was issued shall sign the permit, endorse upon it the date of final disposition and, within 10 days, return the first copy of the permit so endorsed to the local registrar of the district in which the disposition took place. The third copy of the permit shall be returned to the office of issuance. After one year the local registrar may destroy any original or duplicate permit retained by him or her pursuant to this section.

103065. (a) Upon the presentation of a certificate of death properly executed and completed in accordance with the policies

and procedures of the county coroner in which the death occurred that are not in conflict with state law, the permit for disposition required by Sections 103050, 103055, and 103060 shall be issued by any local registrar pursuant to this section. The local registrar issuing the permit for disposition pursuant to this section shall promptly forward the death certificate and a duplicate of the permit for disposition to the local registrar of the district in which death occurred or the body was found.

(b) The applicant for a permit under this section shall pay a fee of six dollars ($6) to the issuing registrar. Thirty percent of the fee shall be transferred by the issuing registrar to the local registrar of the county where the death occurred and 40 percent shall be transferred to the State Registrar for the administration of this section.

(c) Applicants for a permit for disposition pursuant to this section shall not be subject to Section 103675.

103070. The body of any person whose death occurs in this state, or whose body is found in the state, or that is brought in from outside the state, shall not be temporarily held pending disposition more than eight calendar days after death, unless a permit for disposition is issued by the local registrar of the registration district in which the death occurred or the body was found.

103075. The permit shall accompany the body to its destination, where, if within this state, it shall be delivered to the person in charge of the place of interment.

103080. The person in charge of the place of interment, or the funeral director or person acting as funeral director if no person is in charge, shall sign the permit, endorse upon it the date of interment or cremation, and, within 10 days, return the first copy of the permit so endorsed to the local registrar of the district in which the interment took place. The third copy of the permit shall be returned to the office of issuance. After one year the local registrar may destroy any original or duplicate permit retained by the local registrar pursuant to this section.

103085. When human remains are transported from outside the state into a registration district in California for interment, the permit for disposition, issued in accordance with the law and health regulations of the place where the death occurred, shall be accepted by the local registrar of the district into which the human remains have been transported, as a basis upon which he or she shall issue a local permit, noting upon the face of the permit the fact that human remains were shipped in for interment and the place of death.

103090. This chapter does not prevent a funeral director from removing a body from the registration district where the death occurred or the body was found to another registration district in the same or another county in a funeral director’s conveyance for the purpose of preparing the body for interment or shipment.

103095. A permit issued in one county or city is valid and sufficient in any county it specifies as the place of interment.

103100. If any cemetery is located partly in one registration district and partly in another, only one permit shall be required for interment and a permit authorizing interment in the cemetery shall entitle interment to be made within or without the district to which the permit is directed. The permit shall be returned to the registration district in which the interment is made irrespective of the district to which it is directed. The local registrar of the district in which the interment is made shall forthwith file the permit on presentation without charge.

103105. Permits for the disinterment or removal of interred remains shall be required, as specified in Part 2 (commencing with Section 7500) of Division 7.

CHAPTER 9. MARRIAGE REGISTRATION

Article 1. General Provisions

103125. The forms for the application for license to marry, the certificate of registry of marriage including the license to marry, and the marriage certificate shall be prescribed by the State Registrar.

Article 2. Duty of Registering

103150. Each marriage that is performed shall be registered by the person performing the ceremony as provided by Chapter 2 (commencing with Section 420) of Part 3 of Division 3 of the Family Code.

Article 3. Content of Certificate of Registry of Marriage

103175. The certificate of registry of marriage shall contain as nearly as can be ascertained all of the following and other items as the State Registrar may designate: The first section shall include the personal data of parties married, including the date of birth, full name, birthplace, residence, names and birthplaces of the parents, maiden name of the mothers, the number of previous marriages, marital status, and the maiden name of the female if previously married; the second section shall include the signatures of parties married, license to marry, county and date of issue of license, and the marriage license number; and the third section shall include the certification of the person performing the ceremony, that shall show his or her official position including the denomination if he or she is a priest, minister or clergyman, and the signature and address of one or more witnesses to the marriage ceremony. The person performing the marriage ceremony shall also type or print his or her name and

address on the certificate. The certificate shall not contain any reference to the race or color of parties married.

103180. (a) Sections 103150 and 103175 do not apply to marriages entered into pursuant to Section 307 of the Family Code. Subdivisions (b) and (c) govern the registration and the content of the License and Certificate of Declaration of Marriage of those marriages.

(b) Each marriage entered into pursuant to Section 307 of the Family Code shall be registered by the parties entering into the marriage or by a witness who signed under paragraph (2) of subdivision (a) of Section 307 within four days after the ceremony with the local registrar of marriages for the county in which the License and Certificate of Declaration of Marriage was issued.

(c) The License and Certificate of Declaration of Marriage entered into pursuant to Section 307 of the Family Code shall contain as nearly as can be ascertained the following:

(1) The personal data of parties married, including the date of birth, full name, birthplace, residence, names and birthplaces of their parents, maiden name of their mothers, the number of previous marriages, marital status, and the maiden name of the female, if previously married and if her name has been changed.

(2) The license to marry.

(3) The county and date of issuance of the license.

(4) The marriage license number.

(5) The certification of the parties entering into the marriage, that shall show the following:

(A) The fact, time, and place of entering into the marriage.

(B) The signature and address of two witnesses to the marriage ceremony.

(C) The religious society or denomination of the parties married, and that the marriage was entered into in accordance with the rules and customs of that religious society or denomination.

(6) The signatures of the parties married.

(7) Any other items that the State Registrar shall designate.

The License and Certificate of Declaration of Marriage shall not contain any reference to the race or color of parties married or to a person performing or solemnizing the marriage.

CHAPTER 10. FINAL DECREES OF DISSOLUTION OF MARRIAGE, OR LEGAL SEPARATION

103200. The county clerk of each county shall send a copy of every judgment of dissolution of marriage, of legal separation, and of declaration of nullity to the State Registrar monthly. If a judgment of dissolution of marriage is vacated, the county clerk shall send a copy of the order or dismissal to the State Registrar.

103205. The State Registrar shall maintain a comprehensive and continuous index of all decrees received under Section 103200.

CHAPTER 11. AMENDMENT OF RECORDS

Article 1. Amendment of a Record of Birth, Death or Marriage

103225. Whenever the facts are not correctly stated in any certificate of birth, death, fetal death, or marriage already registered, the person asserting that the error exists may make an affidavit under oath stating the changes necessary to make the record correct, that shall be supported by the affidavit of one other credible person having knowledge of the facts, and file it with the state or local registrar.

103230. Section 103225 shall be applicable to certificates of birth only in the absence of conflicting information relative to parentage on the originally registered certificate of birth.

103235. If the amendment relates to a certificate that has not been transmitted to the State Registrar, the local registrar shall review the amendment for acceptance for filing, and if accepted shall file the amendment and shall note the fact of the amendment, with its date, on the otherwise unaltered original certificate.

103240. If the amendment relates to a certificate that has been transmitted to the State Registrar, the amendment shall be transmitted to the State Registrar who shall review it for acceptance for filing.

103245. If the amendment is accepted, the State Registrar shall transmit copies of the amendment to the local registrar and county recorder in whose offices copies of the original record and information are on file.

103250. The State Registrar shall send a certified copy of the newly amended record of birth, death or marriage to the applicant without additional charge, except for those amendments that are filed within one year of the date of occurrence of the event.

103255. The amendment shall be filed with and become a part of the record to which it pertains.

103260. (a) A person born in this state whose birth is registered in this state, or the person's conservator, or if a minor, the person's parent or guardian, may submit a written request to the state registrar for a new birth certificate on the ground that his or her existing birth certificate contains a derogatory, demeaning, or colloquial racial descriptor. For purposes of this section, a derogatory, demeaning, or colloquial racial descriptor means any term that the registrant determines is insulting to a racial group.

(b) The State Registrar shall review the request, and if the request identifies the term that the registrant has determined is a derogatory, demeaning, or colloquial racial descriptor, identifies the accurate racial descriptor, and is accompanied with the payment of the fee required by Section 103700, then the State Registrar shall issue a new birth certificate with the accurate racial descriptor identified in the

request and shall transmit copies of the new birth certificate to the following:

(1) The local registrar and county recorder in whose offices copies of the previously issued birth certificate are on file. Upon receipt of the new birth certificate, the local registrar and county recorder shall transmit any copies of the previously issued birth certificate to the State Registrar if it is practical for him or her to do so. If it is impractical for him or her to forward all the copies to the state registrar, he or she shall effectually seal a cover over the copy in a manner as not to deface or destroy the copy and forward a verified statement of his or her action to the state registrar.

(2) The registrant.

(c) The new birth certificate shall supplant any previously issued birth certificate registered for the registrant and shall be the only birth certificate of the registrant open to public inspection. The request and previously issued birth certificate shall remain as part of the records of the State Registrar. All records and information referred to in this section, other than the newly issued birth certificate, shall be available only upon the written request of the registrant or an order of a court of competent jurisdiction.

Article 2. Amendment of a Death Record of a Previously Unidentified Body

103275. The coroner having jurisdiction shall register with the local registrar of births and deaths a certificate of death giving the name of the person and all statistical particulars that have been discovered concerning him or her, in the case of the identification of a person previously unidentified at the time of the original registration of the death.

103280. This amendment to the record shall be handled in the manner prescribed in Article 1 (commencing with Section 103225).

Article 3. Amendment of Medical and Health Section Data on Death, Fetal Death, and Live Birth Records

103300. Notwithstanding other provisions in this part relative to amendment of records, whenever the information originally furnished in the medical and health data section of any record of death, fetal death or live birth is modified by supplemental information relative thereto, the certifying physician or coroner having knowledge of this information may make a declaration as provided in Section 2015.5 of the Code of Civil Procedure stating the changes necessary to make the information correct and file it with the state or local registrar.

103305. This amendment shall be handled in the manner prescribed in Article 1 (commencing with Section 103225).

Article 4. Supplemental Name Reports

103325. When any certificate of birth of a living child is registered without the name of the child being entered thereon, the local registrar shall make out and deliver to the parents of the child a special blank for a supplemental report of the name of the child.

103330. The parents shall complete the report and return it to the local registrar as soon as the child is named.

103335. The State Registrar shall send a certified copy of the newly amended record of birth to the applicant without additional cost, except for those amendments that are filed within one year of the date of occurrence of the event.

103340. This amendment to the record shall be handled in the manner prescribed in Article 1 (commencing with Section 103225).

Article 5. Amendment of Birth Certificate to Delete Racial Slurs

103350. The purpose of this article is to provide a remedy for correction of birth certificates that contain entries regarding race or color that, in the opinion of the registrant, constitute racial slurs or are otherwise offensive.

103355. Any person who was born in this state and whose birth is registered in this state may apply to the State Registrar for the establishment and issuance of a new birth certificate and the sealing of the original if the person certifies that the entry or entries in the original birth certificate regarding race or color contain a term or terms that in the opinion of the registrant, constitute racial slurs or are otherwise offensive. The application shall identify the offensive terms to be deleted and indicate the proper entries for race or color to be substituted. The determination as to whether the entries to be deleted are offensive shall be left to the judgment of the applicant and the State Registrar shall give deference to that determination.

103360. Upon receipt of the application and payment of the required fee, the State Registrar shall establish a new birth certificate for the person.

103365. The entry for race or color in the new certificate shall be as indicated in the application. No reference shall be made in the new birth certificate that it is not the original birth certificate of the registrant. The new birth certificate shall supplant any birth certificate previously registered for the registrant and shall be the only birth certificate open to public inspection.

103370. The State Registrar shall transmit a certified copy of a birth certificate newly established under this article to the registrant without additional charge.

103375. When a new birth certificate is established pursuant to this article, the State Registrar shall inform the local registrar and the county recorder whose records contain copies of the original

certificate, who shall forward the copies to the State Registrar for filing with the original certificate, if it is practical for him or her to do so. If it is impractical for him or her to forward the copy to the State Registrar, he or she shall effectually seal a cover over the copy in a manner as not to deface or destroy the copy and forward a verified statement of his or her action to the State Registrar.

Article 6. Amendment of Birth Record to Reflect Court Order Change of Name

103400. Whenever a person born in this state has his or her name changed by order of a court of this state, another state, the District of Columbia, or any territory of the United States, an application including an affidavit of this fact may be filed with the office of the State Registrar upon a form provided for that purpose.

103405. Upon receipt of the application, affidavit, certified copy of the court order and payment of the required fee, the State Registrar shall review the amendment for acceptance for filing, and if accepted, shall file the amendment and shall note the fact of the amendment on the otherwise unaltered original birth certificate. The amendment shall be filed with and become a part of the record to which it pertains, if the original record of birth is on file in the office of the State Registrar.

103410. The State Registrar shall furnish a certified copy of the newly amended record of birth prepared under authority of this article to the registrant without additional cost.

Article 7. Revision of Birth Records to Reflect Change of Sex

103425. Whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for the person reflecting the change of gender and any change of name accomplished by an order of a court of this state, another state, the District of Columbia, or any territory of the United States. A petition for the issuance of a new birth certificate in those cases shall be filed with the superior court of the county where the petitioner resides.

103430. (a) The petition shall be accompanied by an affidavit of a physician documenting the sex change, and a certified copy of the court order changing the applicant’s name (if applicable).

(b) The petition shall be heard at the time appointed by the court and objections may be filed by any person who can, in those objections, show to the court good reason against the change of birth certificate. At the hearing, the court may examine on oath the petitioner, and any other person having knowledge of facts relevant to the application. At the conclusion of the hearing the court shall

make an order to issue a new certificate, or dismissing the petition, as to the court may seem right and proper.

(c) A certified copy of the decree of the court ordering the new birth certificate, shall within 30 days from the date of the decree, be filed with the State Registrar. Upon receipt thereof together with the fee prescribed by Section 103725, the State Registrar shall establish a new birth certificate for the applicant.

(d) The new birth certificate shall indicate the sex of the registrant as it has been surgically altered and shall reflect any change of name specified in the application if accompanied by a court order, as prescribed by Section 103425. No reference shall be made in the new birth certificate, nor shall its form in any way indicate, that it is not the original birth certificate of the registrant.

103435. In lieu of separate proceedings, a single petition for a change of name and issuance of a new birth certificate reflecting a change of gender may be filed with the superior court. With respect to such a petition, the court shall follow the procedure set forth in Title 8 (commencing with Section 1275) of Part III of the Code of Civil Procedure. A certified copy of the decree of the court issued pursuant to this section shall within 30 days be filed with both the Secretary of State and the State Registrar. Upon its receipt, the State Registrar shall establish a new birth certificate as provided in this article.

103440. The new birth certificate shall supplant any birth certificate previously registered for the applicant and shall be the only birth certificate open to public inspection. The application and supporting affidavit shall be filed with the original record of birth, that shall remain as a part of the records of the State Registrar. All records and information specified in this article, other than the newly issued birth certificate, shall be available only upon written request of the registrant or an order of a court of record.

When a new birth certificate is established under this article, the State Registrar shall transmit copies of the newly established birth certificate for filing to the local registrar and the county recorder whose records contain copies of the original certificate, who shall forward the copies of the original certificate to the State Registrar for filing with the original certificate, if it is practical for him or her to do so. If it is impractical for him or her to forward the copy to the State Registrar, he or she shall effectually seal a cover over the copy of the original certificate in a manner as not to deface or destroy the copy and forward a verified statement of his or her action to the State Registrar. Thereafter the information contained in the record shall be available only upon written request of the registrant or on order of a court of record.

103445. The State Registrar shall transmit a certified copy of a birth certificate newly established under this article to the registrant without additional charge.

CHAPTER 12. COURT PROCEEDINGS TO ESTABLISH RECORD OF BIRTH, DEATH OR MARRIAGE

103450. A verified petition may be filed by any beneficially interested person with the county clerk of the superior court in and for (a) the county in which the birth, death or marriage is alleged to have occurred, or (b) the county of residence of the person whose birth or marriage it is sought to establish, or (c) the county in which the person was domiciled at the date of death, if the person has died, for an order to judicially establish the fact of, and the time and place of a birth, death or marriage that is not registered or for which a certified copy is not obtainable.

103455. The petition shall be verified and shall contain all the facts necessary to enable the court to determine the fact of and the time and place of the birth, death, or marriage upon the proofs adduced in behalf of the petitioner at the hearing.

103460. If the time and place of birth are not known, the petition shall contain all of the facts known to the petitioner or otherwise available and a statement of the probable time and place of birth as accurately as the circumstances permit. The petition shall be verified as to the known facts only.

103465. Upon the filing of the petition a hearing shall be fixed by the clerk and at the convenience of the court set at a time not less than five nor more than 10 days after the filing of the petition. The hearing may be held in chambers. The court, for good cause, may continue the hearing beyond the 10-day period.

103470. The fee for filing the petition shall be six dollars ($6), plus the law library fee of the county. In counties having more than one superior court judge, the petition may be heard by any judge thereof hearing probate matters, or if a probate department has been designated for hearing probate matters, the clerk shall assign the matter to the probate department for hearing.

103475. If, upon the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the birth, death, or marriage did in fact occur at the time and place shown by the proofs adduced at the hearing.

103480. If the time and place of birth are not known, the court shall receive and consider evidence and testimony as may be available and from the facts adduced may, by order, fix the time and place that the court finds to be a probable time and place of birth of the person in relation to whom the petition has been filed, as the time and place of birth. The time and place so fixed shall thereafter for all purposes be the time and place of birth of the person.

103485. The order shall be made in the form and upon the blank prescribed and furnished by the State Registrar and shall become effective upon a filing of a certified copy with the State Registrar.

Every order determining the date of birth made pursuant to this chapter shall establish a presumption that the matter contained therein is a true and accurate statement of the time of birth. The presumption established by this section is a presumption affecting the burden of proof.

103490. The State Registrar shall send certified copies of the court order delayed certificate to the local registrar and the county recorder within which area the event occurred and in whose offices copies of records of the year of occurrence of the event are on file, except that if the event occurred outside the State, a certified copy shall be sent only to the county recorder of the county in which the petitioner resides.

CHAPTER 13. RECORDING CERTIFICATION OF FOREIGN BIRTHS AND DEATHS

103500. A certification of birth or of birth data issued by an agency of the government of the United States to authenticate a birth of a child to a United States citizen outside of the United States may be recorded in the office of a county recorder in the last county of permanent residence of one or both parents of the child if the last permanent residence in the United States of one or both parents of the child was in California. A certification of death or death data issued by an agency of the government of the United States to authenticate the death of a United States citizen outside of the United States may be recorded in the office of the county recorder in the last county of permanent residence if the last permanent residence in the United States of the citizen was in California.

103505. A certification of birth outside of the United States, upon recordation by the county recorder, shall be indexed in the county recorder's birth index in the year of occurrence of the birth.

CHAPTER 14. CERTIFIED COPY AND VERIFICATION OF RECORDS

103525. The State Registrar, local registrar or county recorder shall, upon request and payment of the required fee, supply to any applicant a certified copy of the record of any birth, fetal death, death, marriage, or marriage dissolution registered with the official.

When the original forms of certificates of live birth furnished by the State Registrar contain a printed section at the bottom containing medical and social data or labeled ''Confidential Information for Public Health Use Only,'' that section shall not be reproduced in a certified copy of the record except as specifically authorized in Section 102430.

103530. Certified copies of certificates of births shall be issued only when the applicant for the certified copy is able to furnish

information, exclusive of file numbers, adequate for identification and location of the amended record.

103535. Upon application of a parent, the local registrar or county recorder shall request a copy of a new birth certificate amended under Article 1 (commencing with Section 102625) of this chapter and Article 2 (commencing with Section 102725) of Chapter 5, from the State Registrar. When such a request is received, the State Registrar shall send a copy of the new certificate to the local registrar or county recorder who shall then issue certified copies from the document. The copy of the new certificate returned to the local registrar or county recorder under this procedure shall be filed in the same manner as the copies of other certificates representing births that occurred during the same time period.

103540. Prior to issuing a certified copy of a birth record, the State Registrar, local registrar, or county recorder shall determine whether their respective birth records or index to the records have been revised pursuant to Section 102245 to indicate the death of the registrant whose birth record is requested. If the records or index have been so revised, the certified copy provided the applicant shall display the legend ''DECEASED,'' which shall be indelibly printed or stamped, in boldface style not less than one-half inch in height, within near proximity to the space reserved for the registrant's name. The State Registrar shall adopt regulations to implement this section.

103545. Certified copies of birth, fetal death, death, and marriage records may be made only by the State Registrar, by duly appointed and acting local registrars during their term of office, and by county recorders.

103550. Any birth, fetal death, death, or marriage record that was registered within a period of one year from the date of the event under the provisions of this part, or any copy of the record or part thereof, properly certified by the State Registrar, local registrar, or county recorder, is prima facie evidence in all courts and places of the facts stated therein.

103555. A short form of certification of birth registration that shall contain only identification information may be issued by the State Registrar, by the county recorder, or by any local registrar.

103560. A short form of certification of death registration, including only identification information and excluding the medical statement of the cause of death, may be issued by the State Registrar, county recorder, or any local registrar, upon forms prescribed and furnished by the State Registrar.

103565. The Office of the State Registrar, upon request, may furnish the United States Public Health Service with vital statistics relating to births, deaths, marriages, and marriage dissolutions for utilization in the national vital statistics program. Such vital statistics may be furnished on a contract reimbursement or other satisfactory basis that will insure that the reimbursement shall not be less than the

cost to the state nor exceed the federal government's fair share of the cost of the statewide vital statistics registration and reporting system.

103570. A certification limited to a statement as to the date of birth of any child needed for admission to school or for the purpose of securing employment shall be issued without fee by the local registrar or county recorder upon request of any parents or guardian.

103575. The state or local registrar or county recorder may, without fee verify a date and place of birth, when the applicant can present sufficient information to identify the birth record.

103580. The State Registrar, local registrar or county recorder may use a printed, stamped or photographically reproduced facsimile signature in certifying to a record in his or her office provided the certification has the seal of his or her office affixed thereto.

103585. Certified copies or certification of abstract information required to be filed under authority of Chapter 10 (commencing with Section 103200) in the offices of the State Registrar and county clerks shall not include information relative to occupation, highest school grade completed, color or race, religious denomination, previous marriages ended by death, divorce or annulment, or children.

103590. (a) The State Registrar shall, upon request and payment of a fee, as provided in subdivision (c), supply to any applicant a decorative heirloom certificate, as described in subdivision (b), of any birth registered with that official.

When the original form of the certificate of a live birth furnished by the State Registrar contains a printed section at the bottom containing medical and social data or labeled ''Confidential Information for Public Health Use Only,'' that section shall not be reproduced in the copy of the record. If the original form of the certificate of live birth has been sealed, the information on the sealed certificate shall not be included on the decorative heirloom certificate.

(b) The decorative heirloom certificate issued under subdivision (a) shall be of a distinctive design as determined by the department and shall include the seal of the State of California and a facsimile of the State Registrar's signature, but shall include no elected official's signature. The certificate shall only contain identification information, as determined by the State Registrar.

(c) The fee required for the decorative heirloom birth certificate issued pursuant to this section shall be thirty-two dollars ($32) until December 31, 1988, at which time the fee shall be reduced to thirty dollars ($30). Until December 31, 1988, not less than ten dollars ($10) of the fee shall be allocated to the State Children's Trust Fund established in Section 18969 of the Welfare and Institutions Code. After December 31, 1988, not less than fifteen dollars ($15) of the fee shall be allocated to the State Children's Trust Fund. The remainder

of the fee shall be utilized to reimburse the State Department of Health Services and the State Registrar, in part, for the administrative costs of developing, preparing, and providing the decorative heirloom certificate.

103595. (a) The State Registrar shall, upon request and payment of a fee, as provided in subdivision (c), supply to any applicant a decorative heirloom certificate, as described in subdivision (b), of any marriage registered with that official.

(b) The decorative heirloom certificate issued under subdivision (a) shall be of a distinctive design as determined by the state department and shall include the seal of the State of California and a facsimile of the State Registrar's signature, but shall include no elected official's signature. The certificate shall only contain identification information, as determined by the State Registrar.

(c) The fee required for the decorative heirloom certificate issued pursuant to this section shall be fifteen dollars ($15). The fee shall be utilized to reimburse the state department for the administrative costs of developing, preparing, and providing the decorative heirloom certificate and for a public awareness and advertising program to inform the public of the availability of the decorative heirloom certificate. The fee shall be deposited into the General Fund.

CHAPTER 15. FEES OF STATE AND LOCAL REGISTRARS

Article 1. General Provisions

103600. The State Registrar and local registrars shall keep a true and correct account of all fees received by them.

103605. The money collected by the State Registrar shall be deposited with the Treasurer for credit to the Health Statistics Special Fund, except for the Children's Trust Fund fees collected pursuant to Section 18966 of the Welfare and Institutions Code, the fees allocated to the Judicial Council pursuant to Section 1852 of the Family Code, and the fees collected pursuant to Section 103645, all of which shall be deposited in the General Fund.

This section shall become operative on July 1, 1995.

103610. The money collected by the local registrar shall be paid by him or her into the county or city treasury.

103615. Notwithstanding any other provision of law, no fees other than those provided for in this part shall be charged for the registration of births and deaths or for the issuance of any permits for disposition of human remains.

Article 2. Fee for Certified Copy or Search of Records

103625. (a) A fee of three dollars ($3) shall be paid by the applicant for a certified copy of a fetal death or death record.

(b) (1) A fee of three dollars ($3) shall be paid by a public agency or licensed private adoption agency applicant for a certified copy of a birth certificate that the agency is required to obtain in the ordinary course of business. A fee of seven dollars ($7) shall be paid by any other applicant for a certified copy of a birth certificate. Four dollars ($4) of any seven-dollar ($7) fee is exempt from subdivision (e) and shall be paid to either a county children's trust fund or to the State Children's Trust Fund, in conformity with Article 5 (commencing with Section 18965) of Chapter 11 of Part 6 of Division 9 of the Welfare and Institutions Code.

(2) (A) As a pilot project, Contra Costa, Los Angeles, Orange, Sacramento, San Diego, Santa Clara, and Tulare Counties may increase the fee for a certified copy of a birth certificate by up to three dollars ($3), through December 31, 1996, for the purpose of providing dependency mediation services in the juvenile court. Public agencies shall be exempt from paying this portion of the fee. However, if a county increases this fee, neither the revenue generated from the fee increase nor the increased expenditures made for these services shall be considered in determining the court's progress towards achieving its cost reduction goals pursuant to Section 68113 of the Government Code if the net effect of the revenue and expenditures is a cost increase. In each county participating in the pilot project up to 5 percent of the revenue generated from the fee increase may be apportioned to the county recorder for the additional accounting costs of the program.

(B) On or before December 31, 1995, each participating county shall submit an independent study of the project to the Legislature. The study shall consider the effectiveness of mediation, the cost-avoidance realized, what model of juvenile court mediation should be promoted statewide, and at what point mediation is most effective.

(C) The presiding judge of the superior court of each participating county shall designate a person who will facilitate access to case files and any other data necessary for the independent study.

(D) Variables to be evaluated and measured to indicate the success of the pilot projects shall include, but not be limited to:

(i) At least 75 percent of all participants should be satisfied or very satisfied with the dependency mediation process.

(ii) The range of creative solutions for resolution of the families' problems within the development of the court ordered plan shall increase by 10 percent.

(iii) At least 70 percent of matters coming before the court should be settled in less time using dependency mediation than if adjudicated.

(iv) Dependency mediation shall result in a 25 percent reduction in foster care placements.

(c) A fee of three dollars ($3) shall be paid by a public agency applicant for a certified copy of a marriage record, that has been filed with the county recorder or county clerk, that the agency is required to obtain in the ordinary course of business. A fee of six dollars ($6) shall be paid by any other applicant for a certified copy of a marriage record that has been filed with the county recorder or county clerk. Three dollars ($3) of any six-dollar ($6) fee is exempt from subdivision (e) and shall be transmitted monthly by each local registrar, county recorder, and county clerk to the state for deposit into the General Fund as provided by Section 1852 of the Family Code.

(d) A fee of three dollars ($3) shall be paid by a public agency applicant for a certified copy of a marriage dissolution record obtained from the State Registrar that the agency is required to obtain in the ordinary course of business. A fee of six dollars ($6) shall be paid by any other applicant for a certified copy of a marriage dissolution record obtained from the State Registrar.

(e) Each local registrar, county recorder, or county clerk collecting a fee pursuant to this section shall transmit 15 percent of the fee for each certified copy to the State Registrar by the 10th day of the month following the month in which the fee was received.

(f) The additional three dollars ($3) authorized to be charged to applicants other than public agency applicants for certified copies of marriage records by subdivision (c) may be increased pursuant to Section 100430.

103630. If the information supplied by the applicant is not sufficient to enable the State Registrar to supply the certified copy of any record for which application is made and the applicant, after written request by the State Registrar, does not furnish the necessary information within 30 days of the date of the request, the State Registrar shall retain the fee.

103635. Overpayment of the required fee received in the office of the State Registrar shall be retained, except any overpayment shall be refunded upon written request of the applicant within one year or when overpayment is in excess of two dollars ($2).

103640. (a) Commencing January 1, 1992, in addition to the fees prescribed by subdivisions (a) to (d), inclusive, of Section 103625, all applicants for certified copies of the records described in those subdivisions shall pay an additional fee of two dollars ($2), that shall be collected by the State Registrar, the local registrar, county recorder, or county clerk, as the case may be.

(b) Except as provided in paragraph (2), the local public official charged with the collection of the additional fee established pursuant to subdivision (a) may create a Vital and Health Statistics Trust Fund. The fees collected by local public officials pursuant to subdivision (a) shall be distributed as follows:

(1) Commencing January 1, 1992, and ending December 31, 1992, one dollar ($1) of each two dollars ($2) collected shall be deposited with the State Registrar in the State Vital Record Improvement Account established pursuant to Section 102250.

(2) Commencing January 1, 1993, ninety cents ($0.90) of each two dollars ($2) collected shall be deposited with the State Registrar in the State Vital Record Improvement Account established pursuant to Section 102250.

(3) The remainder of each two dollars ($2) collected shall be deposited into the collecting agency's Vital and Health Statistics Trust Fund.

(4) Any local public official that does not establish a local Vital and Health Statistics Trust Fund shall forward the entire two dollars ($2) fee to the State Registrar, who shall deposit the fees into the State Vital Record Improvement Account established pursuant to Section 102250.

(5) Fees collected by the State Registrar shall be deposited into the State Vital Record Improvement Account established pursuant to Section 102250.

(c) Moneys in each Vital and Health Statistics Trust Fund shall be available to the public official charged with the collection of fees pursuant to this section to defray the administrative costs of collecting and reporting with respect to those fees and for the other costs, as follows:

(1) Modernization of vital record operations, including improvement, automation, and technical support of vital record systems.

(2) Improvement in the collection and analysis of health-related birth and death certificate information, and other community health data collection and analysis, as appropriate.

(d) Funds collected pursuant to this section shall not be used to supplant existing funding that is necessary for the daily operation of vital record systems. It is the intent of the Legislature that funds collected pursuant to this section be used to enhance service to the public, to improve analytical capabilities of state and local health authorities in addressing the health needs of newborn children, maternal health problems, and to analyze the health status of the general population.

(e) Each county shall annually submit a report to the State Registrar by March 1, containing information on the amount of revenues collected pursuant to this section for the previous calendar year and on how the revenues were expended and for what purpose.

(f) This section shall remain in effect only until January 1, 1997, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1997, deletes or extends that date.

(g) It is the intent of the Legislature that the Vital Record Improvement Project be completed by January 1, 1997, and that the one dollar ($1) surcharge used to fund this project be discontinued at that time.

(h) This section shall become operative on July 1, 1995.

103645. (a) In addition to the fees prescribed by subdivisions (a) to (d), inclusive, of Section 103625, any applicant for a certified copy of any records described in those subdivisions shall pay an additional fee of one dollar ($1) to the State Registrar. Each local registrar, county recorder, or county clerk collecting the additional fee pursuant to this section shall transmit the entire fee to the State Registrar by the 10th day of the month following the month in which the fee was received.

(b) This section shall remain in effect only until January 1, 1997, and as of that date is repealed unless a later enacted statute that is enacted before January 1, 1997, deletes or extends that date.

103650. The fee for any search of the files and records performed by the custodian of the records for a specific record when no certified copy is made shall be paid in advance by the applicant. The fee shall be the same as the fee required in Section 103625.

103655. No fee shall be charged any publisher or editor of, or reporter employed by, a newspaper of general circulation or a news service to inspect, in the course and scope of his or her position or employment, any certificate of live birth, fetal death, or marriage, or any other certificate required by this part to be filed in the Office of the State Registrar or the office of any local registrar or county recorder, or any index of the certificates.

103660. No fee shall be charged by the State Registrar or local registrar of births and deaths for services rendered to any public entity, except for issuance of a permit for disposition of human remains or for making a copy of a record.

As used in this section, ‘‘public entity’’ includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Article 3. Other Fees

103675. Except as otherwise provided in Section 103065, the fee for issuance of a permit for disposition of human remains is two dollars ($2) payable to the local registrar of births and deaths by the applicant for the permit, when the permit is issued during regularly scheduled office hours of the local registrar of births and deaths.

103680. (a) Effective January 1, 1991, an additional fee of three dollars ($3) for issuance of a permit for disposition of human remains pursuant to Section 103675 shall be payable to the local registrar of births and deaths by the applicant for the permit. This amount shall be exempt from any adjustment made pursuant to Section 100430.

(b) Notwithstanding any other provision of law, the local registrar of births and deaths shall pay into the Peace Officers' Training Fund, by the 10th of the month following the end of each calendar quarter one dollar ($1) of the fee collected pursuant to subdivision (a) for the training of peace officer members of county coroners' offices. The remaining funds collected pursuant to subdivision (a) shall be paid into the county treasury to be expended for indigent burial.

103685. An additional fee of three dollars ($3) shall be paid for the issuance of a permit for disposition, when the permit is required to be issued outside the regularly scheduled office hours of the local registrar of births and deaths.

103690. Notwithstanding any other provision of law, the local registrar of births and deaths shall pay to the State Registrar by the 10th of the month following the end of each calendar quarter one-half of the fees collected under authority of Section 103675.

103695. A fee of eleven dollars ($11) shall be paid to the State Registrar by the applicant at the time of application for a delayed birth registration under Chapter 4 (commencing with Section 102525) or a court order to establish a record of birth, death, or marriage pursuant to Chapter 12 (commencing with Section 103450). Upon acceptance of the application the State Registrar shall retain the fee.

103700. A fee of eleven dollars ($11) shall be paid to the State Registrar by the applicant for an amendment to a birth, death, or marriage record under provisions of Articles 1 (commencing with Section 103225), 4 (commencing with Section 103325), and 5 (commencing with Section 103350) of Chapter 11, except for those amendments that are filed within one year of the date of occurrence of the event.

103705. A fee of eleven dollars ($11) shall be paid to the State Registrar by the applicant for the preparation of an amended record that shall include a certified copy of the newly amended record under Section 102670.

103710. A fee of eleven dollars ($11) shall be paid to the State Registrar by the applicant or when applicable, by the county clerk for the establishment of an amended record of birth under Articles 1 (commencing with Section 102625), and 2 (commencing with Section 102725) of Chapter 5, except where the required fee has been paid or an exception to the fee is provided under Section 103730.

103715. A fee of eleven dollars ($11) shall be paid to the State Registrar by the applicant for the establishment of a new record of

birth under Article 3 (commencing with Section 102750) of Chapter 5.

103720. A fee of eleven dollars ($11) shall be paid to the State Registrar by the applicant for the establishment of an amended record of birth under Article 6 (commencing with Section 103400) of Chapter 11.

103725. A fee of eleven dollars ($11) shall be paid to the State Registrar by the applicant for establishment of a new record of birth under Article 7 (commencing with Section 103425) of Chapter 11.

103730. A fee of eleven dollars ($11) for each individual being adopted shall be paid to the county clerk at the time of filing the petition in an adoption proceeding, except for agency adoptions in which the adoption fee is waived and a statement from the agency to this effect is filed with the petition, and that fee shall be paid monthly by the county clerk to the State Registrar of Vital Statistics for the services required by statute of that office.

CHAPTER 16. COMPENSATION OF APPOINTED LOCAL REGISTRARS OF BIRTHS AND DEATHS

103750. For local registrars serving under authority of Section 102280 the State Registrar shall quarterly certify to the auditors of the several counties the number of births and deaths properly registered, with the names of the local registrars and the amounts due each at the rates fixed by this part.

103755. All amounts shall be paid by the treasurer of the county in which the registration district is located, upon warrants drawn by the auditor; provided, that no fee shall be paid by the county to any local registrar who is also a city or county officer or employee and whose salary is by law the sole compensation for his or her services.

103760. Each local registrar entitled to compensation shall be paid the sum of fifty cents ($0.50) for each birth certificate and each death certificate properly and completely made out and registered with him or her, and correctly recorded and promptly returned by him or her to the State Registrar and out of the fees he or she shall pay the subregistrar the sum of thirty cents ($0.30) in each case where the certificate is registered with the subregistrar.

103765. If no births or no deaths were registered during any week the local registrar is entitled to be paid the sum of fifty cents ($0.50) for each report to that effect, but only if the report is made promptly as required by this part.

CHAPTER 17. PENALTIES

Article 1. Misdemeanors

103775. Every person, except a parent informant for a certificate of live birth, who is responsible for supplying information who refuses or fails to furnish correctly any information in his or her possession that is required by this part, or furnishes false information affecting any certificate or record required by this part, is guilty of a misdemeanor.

103780. Every person who willfully alters or knowingly possesses more than one altered document, other than as permitted by this part, or falsifies any certificate of birth, fetal death, death, or registry of marriage, or any record established by this part is guilty of a misdemeanor.

103785. Every person who is required to fill out a certificate of birth, fetal death, death, or registry of marriage and register it with the local registrar, or deliver it, upon request, to any person charged with the duty of registering it, and who fails, neglects, or refuses to perform such duty in the manner required by this part is guilty of a misdemeanor.

103790. Every local registrar, deputy registrar, or subregistrar, who fails, neglects, or refuses to perform his or her duty as required by this part and by the instructions and directions of the State Registrar thereunder, is guilty of a misdemeanor.

103795. Any person who uses any information from a certificate of live birth that is stamped with the notation authorized under subdivision (a) of Section 10056.5 is guilty of a misdemeanor.

Article 2. Felony

103800. Any person who willfully makes or files or causes to be made or filed a false certificate or affidavit under Chapter 4 (commencing with Section 102525) is guilty of a felony. The subject is also liable to the State of California for a civil penalty in the amount of five thousand dollars ($5,000). The civil penalty may be recovered in an action filed by the Attorney General in any court of competent jurisdiction. A penalty so recovered shall be paid into the State Treasury to the credit of the General Fund.

PART 2. POPULATION AND PUBLIC HEALTH SURVEILLANCE

CHAPTER 1. BIRTH DEFECTS MONITORING PROGRAM

103825. The Legislature hereby finds and declares that birth defects, stillbirths, and miscarriages represent problems of public

health importance about which too little is known; that these conditions lead to severe mental anguish on the part of parents and relatives and frequently to high medical care costs; and that a system to obtain more information about these conditions could result in development of preventive measures to decrease their incidence in the future. Therefore, it is the intent of the Legislature in enacting this section to accomplish all of the following:

(a) To maintain an ongoing program of birth defects monitoring statewide. ''Birth defect'' as used in this chapter means any medical problem of organ structure, function, or chemistry of possible genetic or prenatal origin.

(b) To provide information on the incidence, prevalence, and trends of birth defects, stillbirths, and miscarriages.

(c) To provide information to determine whether environmental hazards are associated with birth defects, stillbirths, and miscarriages.

(d) To provide information as to other possible causes of birth defects, stillbirths, and miscarriages.

(e) To develop prevention strategies for reducing the incidence of birth defects, stillbirths, and miscarriages.

(f) To conduct interview studies about the causes of birth defects.

(g) To affirm the authority of the state department to contract with a qualified entity to operate the birth defects monitoring program statewide.

103830. The director shall maintain a system for the collection of information, necessary to accomplish the purposes of this chapter. The director shall require health facilities, with 15 days' notice, to make available to authorized program staff the medical records of children suspected or diagnosed as having birth defects, including the medical records of their mothers. In addition, health facilities shall make available the medical records of mothers suspected or diagnosed with stillbirths or miscarriages and other records of persons who may serve as controls for interview studies about the causes of birth defects. If it is necessary to photocopy records made available under this section, copying expenses shall be paid by the state department.

''Health facilities'' as used in this section means general acute care hospitals, and physician-owned or operated clinics, as defined in Section 1200, that regularly provide services for the diagnosis or treatment of birth defects, genetic counseling, or prenatal diagnostic services.

103835. The birth defects monitoring program shall operate statewide. It is the intent of the Legislature that the adequacy of program resources shall be assessed annually, and that the annual assessment shall include a consideration of at least all the following factors:

(a) The numbers of births in the state.

(b) The scope of program activities.

(c) Any urgent situation requiring extraordinary commitment of present or planned program staff or resources.

103840. The director shall use the information collected pursuant to Section 103830 and information available from other reporting systems and health providers to conduct studies to investigate the causes of birth defects, stillbirths, and miscarriages and to determine and evaluate measures designed to prevent their occurrence. The department's investigation of poor reproductive outcomes shall not be limited to geographic, temporal, or occupational associations, but may include investigation of past exposures.

103845. The director shall appoint an advisory committee to advise on the implementation of this chapter. Each of the disciplines of epidemiology, hospital administration, biostatistics, maternal and child health and public health shall be represented on the committee. At least one of the members shall be a representative of the manufacturing industry.

103850. (a) All information collected and analyzed pursuant to this chapter shall be confidential insofar as the identity of the individual patient is concerned and shall be used solely for the purposes provided in this chapter. Access to the information shall be limited to authorized program staff, and persons with a valid scientific interest, who meet qualifications as determined by the director, who are engaged in demographic, epidemiological or other similar studies related to health, and who agree, in writing, to maintain confidentiality.

(b) The department shall maintain an accurate record of all persons who are given access to the information in the system. The record shall include: the name of the person authorizing access; name, title, and organizational affiliation of persons given access; dates of access; and the specific purpose for which information is to be used. The record of access shall be open to public inspection during normal operating hours of the state department.

(c) All research proposed to be conducted by persons other than program staff, using the information in the system, shall first be reviewed and approved by the director and the State Committee for the Protection of Human Subjects. Satisfaction of the terms of the director's rules for data access shall be deemed to establish a valid scientific interest for purposes of subdivision (a), entitling the researcher to review records collected pursuant to Section 103830 and to contact case subjects and controls.

(d) Whenever program staff, pursuing program objectives, deems it necessary to contact case subjects and controls, program staff shall submit a protocol describing the research to the director and to the State Committee for the Protection of Human Subjects. Once a protocol is approved by that committee, program staff shall be deemed to have established a bona fide research purpose, and shall be entitled to complete the approved project and contact case

subjects and controls without securing any additional approvals or waivers from any entity.

(e) Nothing in this section shall prohibit the publishing by the department of statistical compilations relating to birth defects, stillbirth, or miscarriage that do not in any way identify individual cases or individual sources of information.

(f) Any person who, in violation of a written agreement to maintain confidentiality, discloses any information provided pursuant to this section, or who uses information provided pursuant to this section in a manner other than as approved pursuant to this section may be denied further access to any confidential information maintained by the department. That person shall also be subject to a civil penalty of five hundred dollars ($500). The penalty provided in this section shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of the department or any person.

103855. The department may enter into a contract for the establishment and implementation of the birth defects monitoring program. The contract shall include provisions requiring full compliance with all the requirements of this chapter. The term of the contract may be in excess of one year, but no longer than three years. Funds shall be allocated in accordance with the state Budget Act. Funds withheld from the contractor at the conclusion of a fiscal year until specified tasks are completed shall be released promptly on proof of substantial completion, and shall not be offset against any funding for the subsequent fiscal year.

CHAPTER 2. CALIFORNIA TUMOR REGISTRY

103875. (a) The department shall conduct a program of epidemiological assessments of the incidence of cancer. The program shall encompass all areas of the state for which cancer incidence data are available. The program shall include the monitoring of cancers associated with suspected carcinogens encountered by the general public both in occupational locations and in the environment generally.

(b) The program shall be under the direction of the director, who may enter into contracts as are necessary for the conduct of the program and may accept, on behalf of the state, grants of public or private funds for the program. The director shall analyze available incidence data and prepare reports and perform studies as necessary to identify cancer hazards to the public health and their remedies.

(c) It is the intent of the Legislature that an appropriation be included in each Budget Act in an amount sufficient to provide for the annual cost of the program.

103880. The Resource for Cancer Epidemiology of the department shall investigate and formulate a set of options and

implementation plans for utilizing the California Tumor Registry in epidemiological research on the effects of Agent Orange exposure on Vietnam veterans. The options and plans shall take into consideration the existing programs and capabilities of the Department of Veterans Affairs, and shall be reported to the Legislature by June 30, 1985.

This section shall remain in effect only until January 1, 1995, and as of that date is repealed, unless a later enacted statute, that is chaptered before January 1, 1995, deletes or extends that date.

103885. (a) The director shall establish a statewide system for the collection of information determining the incidence of cancer, using population-based tumor registries modeled after the Cancer Surveillance Program of Orange County. As of the effective date of this section the director shall begin phasing in the statewide cancer reporting system. By July 1, 1988, all county or regional registries shall be implemented or initiated. By July 1, 1990, the statewide cancer reporting system shall be fully operational. Within 60 days of the effective date of this section, the director shall submit an implementation and funding schedule to the Legislature.

(b) The department may designate any demographic parts of the state as regional cancer incidence reporting areas and may establish regional cancer registries, with the responsibility and authority to carry out the intent of this section in designated areas. Designated regional registries shall provide, on a timely basis, cancer incidence data as designated by the state department to the department. The department may contract with an agency, including, but not limited to, a health systems agency, single county health department, multicounty health department grouping, or nonprofit professional association, representing a designated cancer reporting region for the purposes of collecting and collating cancer incidence data.

(c) The director shall designate cancer as a disease required to be reported in the state or any demographic parts of the state in which cancer information is collected under this section. All cancers diagnosed or treated in the reporting area shall thereafter be reported to the representative of the department authorized to compile the cancer data, or any individual, agency, or organization designated to cooperate with that representative.

(d) (1) Any hospital or other facility providing therapy to cancer patients within an area designated as a cancer reporting area shall report each case of cancer to the department or the authorized representative of the department in a format prescribed by the department. If the hospital or other facility fails to report in a format prescribed by the department, the department’s authorized representative may access the information from the hospital or the facility and report it in the appropriate format. In these cases, the hospital or other health facility shall reimburse the state department or the authorized representative for its cost to access and report the information.

(2) Any physician and surgeon, dentist, podiatrist, or other health care practitioner diagnosing or providing treatment for cancer patients shall report each cancer case to the department or the authorized representative of the department except for those cases directly referred to a treatment facility or those previously admitted to a treatment facility for diagnosis or treatment of that instance of cancer.

(e) Any hospital or other facility that is required to reimburse the department or its authorized representative for the cost to access and report the information pursuant to subdivision (d) shall provide payment to the department or its authorized representative within 60 days of the date this payment is demanded. In the event any hospital or other facility fails to make the payment to the department or its authorized representative within 60 days of the date the payment is demanded, the department or its authorized representative may, at its discretion, assess a late fee not to exceed $1^1/_2$ percent per month of the outstanding balance. Further, in the event that the department or its authorized representative takes a legal action to recover its costs and any associated fees, and the department or its authorized representative receives a judgment in its favor, the hospital or other facility shall also reimburse the department or its authorized representative for any additional costs it incurred to pursue the legal action. Late fees and payments made to the department by hospitals or other facilities pursuant to this subdivision shall be considered as reimbursements of the additional costs incurred by the department.

(f) All physicians and surgeon, hospitals, outpatient clinics, nursing homes and all other facilities, individuals or agencies providing diagnostic or treatment services to patients with cancer shall grant to the department or the authorized representative access to all records that would identify cases of cancer or would establish characteristics of the cancer, treatment of the cancer, or medical status of any identified cancer patient. Willful failure to grant access to those records shall be punishable by a fine of up to five hundred dollars ($500) each day access is refused. Any fines collected pursuant to this subdivision shall be deposited in the General Fund.

(g) All information reported pursuant to this section shall be confidential as provided in Section 100330, except that the department and any regional cancer registry designated by the department shall use the information to determine the sources of malignant neoplasms and evaluate measures designed to eliminate, alleviate, or ameliorate their effect. The department and any regional cancer registry designated by the department may enter into agreements to furnish confidential information to other states' cancer registries, federal cancer control agencies, local health officers, or health researchers for the purposes set forth in this subdivision if those out-of-state registries, agencies, officers, or

researchers agree in writing to maintain the confidentiality of the information, and in the case of researchers, if they have obtained the approval of their committee for the protection of human subjects established in accordance with Part 46 (commencing with Section 46.101) of Title 45 of the Code of Federal Regulations.

(h) For the purpose of this section, ‘‘cancer’’ means all malignant neoplasms, regardless of the tissue of origin, including malignant lymphoma, Hodgkins disease, and leukemia, but excluding basal cell and squamous cell carcinoma of the skin.

(i) Nothing in this section shall preempt the authority of facilities or individuals, providing diagnostic or treatment services to patients with cancer, to maintain their own facility-based tumor registries.

(j) It is the intent of the Legislature that the department, in establishing a system pursuant to this section, maximize the use of available federal funds.

CHAPTER 3. DISORDERS CHARACTERIZED BY LAPSES OF CONSCIOUSNESS

103900. (a) Every physician and surgeon shall report immediately to the local health officer in writing, the name, date of birth, and address of every patient at least 14 years of age or older whom the physician and surgeon has diagnosed as having a case of a disorder characterized by lapses of consciousness. However, if a physician and surgeon reasonably and in good faith believes that the reporting of a patient will serve the public interest, he or she may report a patient’s condition even if it may not be required under the department’s definition of disorders characterized by lapses of consciousness pursuant to subdivision (d).

(b) The local health officer shall report in writing to the Department of Motor Vehicles the name, age, and address, of every person reported to it as a case of a disorder characterized by lapses of consciousness.

(c) These reports shall be for the information of the Department of Motor Vehicles in enforcing the Vehicle Code, and shall be kept confidential and used solely for the purpose of determining the eligibility of any person to operate a motor vehicle on the highways of this state.

(d) The department, in cooperation with the Department of Motor Vehicles, shall define disorders characterized by lapses of consciousness based upon existing clinical standards for that definition for purposes of this section and shall include Alzheimer’s disease and those related disorders that are severe enough to be likely to impair a person’s ability to operate a motor vehicle in the definition. The department, in cooperation with the Department of Motor Vehicles, shall list those circumstances that shall not require reporting pursuant to subdivision (a) because the patient is unable

to ever operate a motor vehicle or is otherwise unlikely to represent a danger that requires reporting. The department shall consult with professional medical organizations whose members have specific expertise in the diagnosis and treatment of those disorders in the development of the definition of what constitutes a disorder characterized by lapses of consciousness as well as definitions of functional severity to guide reporting so that diagnosed cases reported pursuant to this section are only those where there is reason to believe that the patients' conditions are likely to impair their ability to operate a motor vehicle. The department shall complete the definition on or before January 1, 1992.

(e) The Department of Motor Vehicles shall, in consultation with the professional medical organizations specified in subdivision (d), develop guidelines designed to enhance the monitoring of patients affected with disorders specified in this section in order to assist with the patients' compliance with restrictions imposed by the Department of Motor Vehicles on the patients' licenses to operate a motor vehicle. The guidelines shall be completed on or before January 1, 1992.

(f) A physician and surgeon who reports a patient diagnosed as a case of a disorder characterized by lapses of consciousness pursuant to this section shall not be civilly or criminally liable to any patient for making any report required or authorized by this section.

CHAPTER 4. REYES SYNDROME

103925. (a) The Legislature finds and declares the following:

(1) The cause and the cure of Reyes Syndrome are unknown, and the number of incidences of this disease is also unknown.

(2) Where the scope of a medical problem is unknown, the amount of research funds is usually small. Therefore, it is necessary to define the extent of this medical problem.

(b) A physician and surgeon attending a patient diagnosed as having Reyes Syndrome shall report that condition, within seven days of the diagnosis, to the department on report forms prescribed by the department.

SEC. 5. Division 103 (commencing with Section 104100) is added to the Health and Safety Code, to read:

DIVISION 103. DISEASE PREVENTION AND HEALTH PROMOTION

PART 1. CHRONIC DISEASE

CHAPTER 1. CARDIOVASCULAR DISEASE

104100. The Legislature finds and declares that high blood pressure, also known as hypertension, is a widespread and serious public health problem in California. This condition, when untreated, is a major contributor to heart disease, stroke, kidney disease, and related cardiovascular morbidity and mortality. Although high blood pressure can be effectively controlled through the use of now well established antihypertensive drugs, treatment is not always adequately utilized.

It is estimated that there are two million adults in California who have high blood pressure. It is further estimated, based on national data, that no more than 71 percent of all adult Californians with high blood pressure are aware of their condition, and that of those who are aware, only 40 percent are being effectively treated. Thus, of some two million California adults with high blood pressure, only about 568,000 have their condition adequately controlled. Unless the problem of uncontrolled high blood pressure among some 1,432,000 adults is promptly addressed, many of these individuals will experience preventable serious illness, disability and death. In addition, the state will continue to face unnecessary medical and welfare costs resulting from high blood pressure and its resulting effects. Consequently, it is necessary to provide for expanded statewide efforts, interface with relevant federal legislation, establish and maintain appropriate guidelines, and enhance high blood pressure control activities at the community level. Coordination of local and state efforts in the planning, implementation, and evaluation of high blood pressure control activities is required, in order to improve allocations and utilization of resources to control high blood pressure in the states population.

104105. The department shall conduct a program for the control of high blood pressure. The program shall include, but not be limited to, all of the following:

(a) Support of local community high blood pressure control programs to improve the quality and distribution of high blood pressure control services.

(b) Promotion of consumer participation in high blood pressure control efforts.

(c) Statewide coordination of high blood pressure control activities.

(d) Planning, including development, adoption, periodic review, and revision of a state plan for high blood pressure control; and assistance to local agencies in their planning efforts.

(e) Gathering, analysis, and dissemination of epidemiologic data and information on high blood pressure and its resulting effects, and support of high blood pressure research.

(f) Development and maintenance of a clearinghouse for high blood pressure information, materials, and services.

(g) Promotion of local and regional councils on high blood pressure control.

(h) Evaluation of high blood pressure control efforts.

(i) Education of patients, health professionals, and the general public.

104110. Local community high blood pressure control programs may include any or all of the following program components:

(a) Screening.

(b) Detection.

(c) Referral and followup.

(d) Diagnostic evaluation.

(e) Adherence management.

(f) Dropout retrieval.

(g) Patient education.

(h) Public education.

(i) Provider education.

(j) Such other components consistent with applicable federal program requirements as the department may deem desirable in controlling high blood pressure and are reflected in the state plan for high blood pressure control.

104115. The department may enter into contracts with local public and private nonprofit agencies for the purpose of operating community high blood pressure control programs.

104120. The department shall establish standards for applications for funding, review of proposals, funding awards, technical assistance, monitoring, and evaluation of local programs as it may deem necessary for the implementation of this chapter.

104125. No services provided pursuant to this chapter shall substitute for other obligations of a unit of local government, including those required by state law.

Funds appropriated to carry out the purposes of this chapter shall be supplemental to those available from the federal government and shall not duplicate, nor shall they replace, any commitments made by the federal government to support high blood pressure control, including any formula allocations for which California would be eligible whether or not this chapter is enacted into law.

104130. Local community high blood pressure control programs funded pursuant to this chapter shall make maximum use of third party payments and other resources to support their efforts.

104135. The department may receive and expend funds for high blood pressure control pursuant to this chapter from federal and other available sources and may use such funds, along with available state funds, to support a unified high blood pressure control program.

104140. It is the intent of the Legislature that the department shall utilize available federal funds for carrying out the purposes of this chapter.

CHAPTER 2. CANCER (Reserved)

CHAPTER 3. CHRONIC OBSTRUCTIVE PULMONARY DISEASE (Reserved)

CHAPTER 4. DIABETES (Reserved)

CHAPTER 5. BLINDNESS AND OTHER CHRONIC DISEASE

104300. The department shall maintain a program for the prevention of blindness, including, but not limited to:

(a) Studies to determine the number, distribution, and nature of conditions leading to blindness among the population of the state.

(b) Investigations into the causes of blindness for the purpose of developing control procedures.

(c) Consultations with, and assistance to, local agencies directed toward education for the prevention of blindness, the early identification of conditions leading to blindness, and the application of methods for reducing the amount of blindness resulting from preventable conditions.

104305. The department may enter into agreements with any public or private organization, agency, or individual to carry out its duties and responsibilities with respect to the prevention of blindness.

PART 2. INJURY PREVENTION AND CONTROL

CHAPTER 1. UNINTENTIONAL INJURY STUDY AND CONTROL

104325. The department may maintain a program of accidental injury study and control, including but not limited to, all of the following:

(a) The conduct of studies to determine the health and human components of accidental injury.

(b) The study of factors associated with prompt and efficient emergency treatment of accidental injuries.

(c) The study of human and environmental factors in the occurrence of accidental injury.

(d) The development of control programs to reduce the frequency and severity of accidental injuries resulting from health and other human factors, either alone or in combination with environmental factors.

(e) Consultation with and assistance to local health departments and other agencies in the development and maintenance of programs for the prevention and control of accidental injuries.

104330. The department may enter into agreements with any public or private organization, agency, or individual to carry out its duties and responsibilities with respect to accidental injury study and control. In any situation where these activities may duplicate or overlap the activities of another state department or agency, the department shall confer with that department or agency in order to avoid duplication.

PART 3. RISK REDUCTION

CHAPTER 1. TOBACCO CONTROL

Article 1. Tobacco Use Prevention

104350. (a) The Legislature finds and declares as follows:

(1) Smoking is the single most important source of preventable disease and premature death in California.

(2) More than 30 percent of coronary heart disease cases are attributable to cigarette smoking.

(3) More than 30 percent of all annual cancer deaths are attributable to smoking, with lung cancer now the leading cancer killer in women as well as men.

(4) Smoking is responsible for one-quarter of all deaths caused by fire.

(5) Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.

(6) More than 80 percent of chronic obstructive lung diseases including emphysema and chronic bronchitis are attributable to smoking.

(7) Tobacco-related disease places a tremendous financial burden upon the persons with the disease, their families, the health care delivery system, and society as a whole. California spends five billion six hundred million dollars ($5,600,000,000) a year in direct and indirect costs on smoking-related illnesses.

(8) The elimination of smoking is the number one weapon against four of the five leading causes of death in California.

(9) Keeping children and young adults from beginning to use tobacco and encouraging all persons to quit tobacco use shall be the highest priority in disease prevention for the State of California. More

than 60 percent of all smokers begin smoking by the age of 14, and 90 percent begin by the age of 19.

(10) The State of California shall play a leading role in promoting a smoke-free society by the year 2000 and thereby supporting the National Health Status Objectives for the year 2000 relating to smoking and tobacco use.

(b) It is the intent of the Legislature, therefore, to require the department, local lead agencies, and the State Department of Education to cooperatively and individually conduct activities directed at the prevention of tobacco use and tobacco-related diseases. The campaign shall focus on health promotion, disease prevention, and risk reduction, utilizing a ''wellness'' perspective that encourages self-esteem and positive decisionmaking techniques. It is also the intent of the Legislature that, for the purpose of program planning and program evaluation, the department provide data and technical information on tobacco-related diseases, tobacco use and its consequences, and effective personal and community interventions to prevent tobacco use.

104355. The following definitions shall apply to this article:

(a) ''Grantee'' means any public or private nonprofit entity approved by the department or the State Department of Education to receive funds pursuant to this article. Grantees may include, but are not limited to, hospitals, community clinics, local health departments, voluntary health organizations, Indian tribes, colleges and universities, county offices of education, school districts, health maintenance organizations, professional health associations, and professional health education associations.

(b) ''Tobacco-related disease'' means any of the following:

(1) Coronary heart disease.

(2) Cerebrovascular disease.

(3) Cancer, including cancers of the lung, larynx, esophagus, bladder, pancreas, and mouth.

(4) Chronic obstructive lung diseases, including emphysema, chronic bronchitis, asthma, and related lung disorders.

(5) Conditions where smoking or tobacco use has been determined to be a risk factor for excess disability and illness, including burns due to smoking-related fires.

(c) ''Tobacco use'' means the consumption of tobacco products by burning, chewing, inhalation, or other forms of ingestion.

(d) ''Voluntary health organization'' means a nonprofit organization organized for purposes related to health, including, but not limited to, an organization devoted to the research of cancer, heart disease, or diseases of the lung.

(e) ''Committee'' means the Tobacco Education Oversight Committee.

(f) ''The department'' means the State Department of Health Services.

(g) ‘‘Service provider’’ means an agency or organization that enters into an agreement with the local lead agency or state department to provide services under this article.

(h) ‘‘Direct services’’ means the provision of preventive health education services to targeted populations.

(i) ‘‘Local plan’’ means a plan submitted pursuant to Section 104400.

(j) ‘‘Preventive health education against tobacco use’’ means programs of instruction intended to dissuade individuals from beginning to smoke, to encourage smoking cessation, or to provide information on the health effects of tobacco on the user, children, and nonsmokers. These programs may include a focus on health promotion, disease prevention, and risk reduction, utilizing a ‘‘wellness perspective’’ that encourages self-esteem and positive decisionmaking techniques.

(k) ‘‘Targeted populations’’ means those population groups specified in Sections 104360 and 104385.

(*l*) ‘‘Local lead agencies’’ means those agencies designated as local lead agencies pursuant to Section 104400.

104360. The following target populations, at a minimum, shall be the focus of the campaign implemented pursuant to this article:

(a) School-age youth and their families in the schools and in the community.

(b) Black, Hispanic, Native American, and Asian-Pacific American populations, pregnant women, and current smokers.

104365. (a) There is hereby created the Tobacco Education and Research Oversight Committee in state government that shall advise the department and the State Department of Education with respect to policy development, integration, and evaluation of tobacco education programs funded under this article, and for development of a master plan for the future implementation of tobacco education programs.

(b) The Tobacco Education Oversight Committee shall be composed of 13 members to be appointed as follows:

(1) Two members representing volunteer health organizations dedicated to the reduction of tobacco use appointed by the Speaker of the Assembly.

(2) One member representing an organization that represents health care employees appointed by the Senate Rules Committee.

(3) One member of a professional education association, such as an association of teachers, appointed by the Senate Rules Committee.

(4) One member of a university facility with expertise in programs intended to reduce tobacco use appointed by the Governor.

(5) Two representatives of a target population group appointed by the Governor.

(6) One representative of the department appointed by the Governor.

(7) One representative of the State Department of Education appointed by the Superintendent of Public Instruction.

(8) One member representing the interests of the general public appointed by the Governor.

(9) One representative of local health departments appointed by the Governor.

(10) One member representing a volunteer health organization dedicated to the reduction of tobacco associated injury appointed by the Governor.

(11) One member from the Tobacco Related Disease Research Program appointed by the Governor.

(c) Members shall serve for a term of two years, renewable at the option of the appointing authority. The initial appointments of members shall be for two or three years, to be drawn by random lot at the first meeting. The committee shall be staffed by the department's coordinator of the program created pursuant to Section 104375.

(d) The committee shall meet as often as it deems necessary, but shall meet not less than four times per year.

(e) The members of the committee shall serve without compensation, but shall be reimbursed for necessary travel expenses incurred in the performance of the duties of the committee.

104370. The committee shall be advisory to the department, the University of California, and State Department of Education for the following purposes:

(a) Evaluation of research, school- and community-based programs funded under this article as necessary in order to assess the overall effectiveness of efforts made by the programs to reduce the use of tobacco products. In order to evaluate tobacco education, research, and cessation programs, the committee shall seek the cooperation and assistance of the department, the State Department of Education, county offices of education, local lead agencies, administrative representatives, target populations, school officials, and researchers. A principal measurement of effectiveness shall be reduction of smoking rates among a given target population.

(b) Facilitation of programs directed at reducing and eliminating tobacco use that are operated jointly by more than one agency or entity. The committee shall propose strategies for the coordination of proposed programs administered by the department, the University of California, and the State Department of Education in order to avoid the duplication of services and to maximize the public benefit of the programs.

(c) Make recommendations to the department, the University of California, and the State Department of Education regarding the most appropriate criteria for the selection of, standards of the

operation of, and the types of programs to be funded under this article.

(d) Reporting to the Legislature on or before January 1 of each year on the number and amount of tobacco education programs funded by the Health Education Account, created by Section 30122 of the Revenue and Taxation Code, the amount of money in the account, any moneys previously appropriated to the department, the University of California, and the State Department of Education but unspent by the departments, a description and assessment of all programs funded under this article, and recommendations for any necessary policy changes or improvements for tobacco education programs.

(e) Ensuring that the most current research findings regarding tobacco use prevention are applied in designing the tobacco education programs administered by the department and the State Department of Education. The department and the State Department of Education shall apply the most current findings and recommendations of research including research funded by the Research Account of the Cigarette and Tobacco Products Surtax Fund created by Section 30122 of the Revenue and Taxation Code.

(f) Based on the results of programs supported by this article and any other proven methodologies available to the committee, produce a comprehensive master plan for implementing tobacco education programs throughout this state for the prevention and cessation of tobacco use. The master plan shall include implementation strategies for each target population specified in Section 104360 for programs throughout this state. The Tobacco Education and Research Oversight Committee shall submit the master plan to the Legislature on or before January 1, 1991, and shall be updated every two years thereafter until a progress report is completed on January 15, 2000. The master plan and its revisions shall include recommendations on administrative arrangements, funding priorities, integration and coordination of approaches by the department, the University of California, and the State Department of Education and their support systems, as well as progress reports relating to each target population. The master plan shall establish a goal of achieving a 75-percent reduction in tobacco consumption in California by the year 1999.

104375. (a) To prevent tobacco-related diseases and diminish tobacco use, the department shall establish within the department a program on tobacco use and health to reduce tobacco use in California by conducting health education interventions and behavior change programs at the state level, in the community, and other nonschool settings.

(b) The department shall conduct statewide surveillance of tobacco-related behaviors, knowledge, and attitudes and evaluate the department’s local and state tobacco control programs under this article. At a minimum, these evaluation activities shall utilize

scientifically appropriate methods for monitoring the annual progress of the program in reducing the adult smoking prevalence from the 1993 benchmark rate of 20 percent and reducing cigarette consumption from the 1993 per capita benchmark rate of 4.84 packs per quarter. These surveillance and evaluation activities may include, but need not be limited to, the following:

(1) Be based on sound evaluation principles and include, to the extent feasible, elements of controlled experimental methods.

(2) Monitor the overall statewide effect of health education efforts on smoking and tobacco use, and, to the extent feasible, the resulting effects on health.

(3) Monitor the effect of the programs on individual target populations identified by this article or designated by the department as meriting special attention.

(4) Provide an evaluation of the comparative effectiveness of individual program designs that shall be used in funding decisions and program modifications.

(5) Incorporate other aspects into the evaluation that have been identified by the department in consultation with state and local advisory groups, local lead agencies, and other interested parties.

(6) Funds permitting, utilize a sample size that is adequate to produce county, regional, and ethnic specific estimates.

(c) The department shall produce or contract for, and update biennially, a description of programs determined to be effective in reducing smoking and tobacco use, and the identification of portions of target populations that need information regarding the hazards of tobacco use. The department, in consultation with the State Department of Education, shall conduct, or contract for an evaluation of the effectiveness of the tobacco use prevention and education program as implemented in the public schools that receive funding for tobacco use prevention education pursuant to Sections 104420, 104425, 104435, and 104445. The purpose of the evaluation shall be to direct the most efficient allocation of resources appropriated under this article to accomplish the maximum prevention and reduction of tobacco use. The comprehensive evaluation shall be designed to measure the extent to which programs funded pursuant to this article promote the goals identified in this article and in Proposition 99 of the November 1988 general election. All information resulting from the evaluation shall be made available to the State Department of Education for purposes of improving its ability to implement and oversee the provision of effective tobacco use prevention education programs. The evaluator shall:

(1) Assess the effectiveness of tobacco use prevention education programs designed to prevent and reduce tobacco use among students. In support of this primary goal, the evaluation shall:

(A) Report findings on the effectiveness of programs and strategies currently in use in California schools that prevent and reduce tobacco use.

(B) Select a research strategy that will identify formal and informal factors that might account for differences in tobacco use by students, including, but not limited to, formal education prevention strategies.

(C) Incorporate in the evaluation quantitative as well as qualitative data. The data shall include, but are not limited to:

(i) Student data, including attitudes, knowledge, and behavior based upon a statistically valid random sample of school districts and students.

(ii) Curriculum data, including diversity of curricula, evidence of appropriateness to grade level, gender, and ethnicity, and the extent of the inclusion of prevention approaches identified in research literature.

(iii) School data, including intensity of emphasis on tobacco use prevention and evidence of counseling or treatment referral systems.

(iv) Community data, including the existence of parent networks and the participation of community service organizations including local lead agencies, in prevention.

(2) Develop and test a regular tobacco use prevention and education information system for use by the State Department of Education, using the resulting information to establish the extent of implementation of tobacco use prevention education programs statewide and the degree of student exposure to these programs at selected grade levels.

(3) Ensure provision of a fourth administration of a statewide, biennial survey of attitudes toward tobacco and prevalence of tobacco use among public school students. To the extent possible, existing survey data shall be utilized.

(4) Provide recommendations to the Legislature and the State Department of Education on tobacco use prevention education program changes.

(5) Assist the State Department of Education in identifying and developing instructional materials and curricula in school-based programs, designed to enhance the prevention of and encouraging the cessation of the continuing use of, tobacco products. The materials and curricula shall address the specific needs of persons in grades 4 to 12, inclusive, and in adult education programs.

(d) School districts shall agree, as a condition of receiving money pursuant to this article, to participate in the evaluation if chosen by the evaluator.

(e) (1) The department shall contract with one or more qualified agencies for production and implementation of an ongoing public awareness of tobacco-related diseases by developing an information campaign using a variety of media approaches. The department shall

issue a request for proposals biennially. Any media campaign funded with this part shall stress the importance of both preventing the initiation of tobacco use and quitting smoking and shall be based on professional market research and surveys necessary to determine the most effective method of diminishing tobacco use among specified target populations. Initial media efforts shall be directed to specific target populations. The contractors selected shall be provided with all available survey information resulting from ongoing programs funded under this article. Priority shall be given to minor children, ages 6 to 14, inclusive. The medium used shall be determined to be the most effective at reaching this targeted age group. With respect to the broadcast media, the message shall be aired at times expected to reach the priority age group. With respect to the print media, publications to be used shall be those that appeal to the priority age group.

(2) No media campaign funded pursuant to this article shall feature in any manner the image or voice of any elected public official or candidate for elected office, or directly represent the views of any elected public official or candidate for elected office.

(f) The department shall provide or contract for training, consultation, support, and continuing education to health professionals, and others interested in developing programs and services directed at preventing tobacco use and promoting smoking cessation, utilizing, when available and determined appropriate by the department, the expertise of universities in this state and schools of public health. The training, consultation, support, and continuing education shall include advice and support in creating a smoke-free environment.

(g) The department shall conduct an awards program to acknowledge the outstanding achievements of those communities, organizations, and groups that have fostered movement toward a smoke-free society or have reduced the consumption of tobacco.

(h) The department shall issue guidelines for local plans for education against tobacco use. The guidelines shall require local public health departments to provide services directed at preventing tobacco use and promoting smoking cessation to the target populations enumerated in Section 104360 and to persons under 19 years of age who no longer attend school and to youth attending school who are not served through State Department of Education funded programs. The guidelines shall require for each target population to be served a description of the services to be provided, an estimate of the number to be served, an estimate of the success rate, and a method to determine to what extent goals have been achieved. Beginning with the 1990–91 fiscal year, and for each fiscal year thereafter, the guidelines shall require local lead agencies to describe how local funding decisions will take into account evaluations of program effectiveness and efficiency. The guidelines

shall require the submission of a budget and information on staffing configurations.

(i) By December 31, 1989, the department shall issue guidelines for fiscal year 1989–90 and by July 1, 1990, the department shall issue guidelines to local lead agencies on how to prepare a local plan for a comprehensive community intervention program against tobacco use.

(j) The department shall provide technical assistance to local lead agencies for the development of plans required by Section 104400 so that the local lead agencies are able to comply with the schedule for the submission of plans specified in Section 104400. The technical assistance shall include, but not be limited to, the following:

(1) Developing and disseminating preventive health education program options for local communities.

(2) Providing training, consultation, and technical assistance to local health departments, local advisory committees, and service providers.

(k) The department shall receive and approve local plans submitted by local lead agencies and provide technical assistance and guidance as necessary to ensure the compliance of the local lead agencies with this article. Every effort shall be made to approve or provide a list of necessary amendments to a local plan within 30 days of receipt of the local plan. The department may authorize a local lead agency to begin implementation of its local plan on a provisional basis, with final approval of the local plan contingent on satisfying conditions specified by the department.

(*l*) The department shall work in collaboration with the public and private sectors in implementing the activities required of the department and provide access upon request to local plans, program statistics, and other readily available information.

(m) The department shall provide staff, assistance, and support needed by the committee.

(n) In consultation with the committee, the department shall develop a comprehensive master plan for implementing tobacco education programs throughout the state for the prevention and cessation of tobacco use.

(o) The department shall consult regularly with the University of California regarding trends in the frequency and the cost of treating tobacco-related diseases and the success of research efforts to reduce tobacco use and limit its adverse health effects.

(p) The department shall establish, in consultation with the State Department of Education and county offices of education, a data collection and data management program to study effective tobacco use interventions. Under this program the department may contract for studies and evaluations in school-based and community-based programs. The department shall consult with the State Department

of Education regarding the collection and evaluation of program data.

(1) The department shall require, by contract, that local lead agencies use a uniform management data and information system that will permit comparisons of workload, unit costs, and outcome measurements on a statewide basis. The department shall specify data reporting requirements for local lead agencies and their subcontractors.

(2) The department shall approve local lead agency and grantee computer software and hardware in order to ensure systemwide compatibility and capacity to expand. Departmental guidelines for local plans shall require local lead agencies to set forth their hardware and software plans and needs.

(3) The department may contract for the development or operation of a computerized management information system.

(4) The department shall consult the State Department of Education regarding computer software and hardware systems for school-based programs.

104380. (a) Funds appropriated to the department for local lead agencies for purposes of this article shall be allocated prospectively, on a quarterly basis in accordance with this section.

(b) No local lead agency shall be allocated less than one hundred ten thousand dollars ($110,000).

(c) (1) Except as provided in subdivision (b), counties not listed in subdivision (d) shall receive an allocation based on each county's proportion of the statewide population.

(2) Counties that receive their allocations pursuant to paragraph (1) shall receive 73 percent of their 1990–91 fiscal year allocation.

(d) Except as provided in subdivision (b), the balance of the funds after the allocation contained in subdivision (c) have been made, shall be allocated to the following specified counties in accordance with the following percentages:

COUNTY	ALLOCATION
Alameda	4.7427%
Contra Costa	1.8032%
Fresno	2.6855%
Kern	1.7083%
Lake	0.1826%
Los Angeles	43.8057%
Mendocino	0.2664%
Merced	0.7244%
Monterey	1.2937%
Orange	5.1382%
Placer	0.3697%

Riverside	3.1828%
Sacramento	3.2922%
San Bernardino	3.7972%
San Diego	5.9971%
San Francisco	5.3898%
San Joaquin	1.7413%
San Luis Obispo	0.8096%
San Mateo	1.4582%
Santa Barbara	0.7918%
Santa Clara	5.2450%
Santa Cruz	0.7709%
Stanislaus	1.2793%
Tulare	1.3768%
Ventura	1.5472%
Yolo	0.6004%

(e) Except as provided in subdivision (b), the allocation for those counties in which a city health department which is a local lead agency as defined by subdivision (*l*) of Section 104355 is located shall be apportioned among the local lead agencies in that county based on their jurisdiction's proportionate share of the countywide population.

(f) Reductions in allocations necessary to comply with subdivision (b) shall be distributed among the counties listed in subdivision (d) proportionately based on the table contained in subdivision (d).

(g) The department shall use population estimates for 1989 for each county and for each city as specified in the Department of Finance E-1 Report.

(h) Payments shall be made prospectively, on a quarterly basis, to local jurisdictions.

(i) (1) The department shall conduct a fiscal and program review on a regular basis.

(2) If the department determines that any county is not in compliance with any provision of this chapter, the county shall submit to the department, within 60 days, a plan for complying with this article.

(3) The department may withhold funds from counties that are not in compliance with this chapter in the same manner as the department is authorized under Chapter 5 (commencing with Section 16940) of Part 4.7 of Division 9 of the Welfare and Institutions Code.

104385. (a) The department shall award and administer grants for projects directed at the prevention of tobacco-related diseases. The purpose of the grant program is to conduct health education and

promotion activities targeted to high-risk persons and groups in order to reduce the number of persons beginning to use tobacco, continuing to use tobacco, or developing tobacco-related diseases. The grants shall provide funds to eligible grantees, as determined by the department. In awarding grants, the department shall select a variety of projects and grantees.

(b) The department shall develop criteria and standards for the allocation of grant awards which consider the need to balance target populations to be served, project types of rural suburban and urban projects, and consider the current regional availability of similar services. Target populations may include, but not be limited to, children, young adults, pregnant women, low-income individuals, Black, Hispanic, Native American, and Asian-Pacific Islander populations, current smokers, and school-aged youth no longer attending school classes. The grant awards may also be made to school districts for nonclassroom, districtwide efforts to reduce tobacco use. The department shall develop mechanisms to evaluate all programs and shall require any program funded under this article to provide statistics on the impact of the program.

(c) The department shall give priority to grantees who do the following:

(1) Demonstrate community support for the project.

(2) Design the project to coordinate with other community services including local health programs, school-based programs, or voluntary health organizations.

(3) Design the project to utilize and enhance existing services and resources.

(4) Serve a target population at high risk of starting tobacco use or developing tobacco-related illnesses.

(5) Demonstrate an understanding of the role community norms have in influencing behavioral change regarding tobacco use.

(6) Indicate promising innovative approaches to diminishing tobacco use among target groups and permit those approaches to be replicated by others.

104390. (a) The department may provide program support services to local tobacco use prevention programs, that shall include, but need not be limited to, all of the following:

(1) Data collection.

(2) Educational materials.

(3) Evaluation.

(4) Technical assistance.

(5) Training.

(6) Transfer of information among programs.

(b) Services funded under this section may be awarded through a competitive request for proposal process or directly to another state agency, the Regents of the University of California, the federal

government, or an auxiliary organization of the California State University.

(c) Grantees of services under this section shall demonstrate the ability to do both of the following:

(1) Improve the delivery of local tobacco use prevention programs directed at the targeted populations.

(2) Design programs to provide statewide and regional services to support local implementation of tobacco use prevention programs.

104395. The department shall expand the Child Health and Disability Prevention (CHDP) Program contained in Article 6 (commencing with Section 124025) of Chapter 3 of Part 2 of Division 106 as follows:

(a) Any child between birth and 90 days after entrance into first grade, all persons under 21 years of age who are eligible for the California Medical Assistance Program, and any person under 19 years of age whose family income is not more than 200 percent of the federal poverty level shall be eligible for services under the program in the county of which they are a resident. The department shall adopt regulations specifying which age groups shall be given certain types of screening tests and recommendations for referral.

(b) The first source of referral under the program shall be the child's usual source of health care. If referral is required and no regular source of health care can be identified, the facility or provider providing health screening and evaluation services shall provide a list of three qualified sources of care, without prejudice for or against any specific source.

(c) The department shall issue protocols for an antitobacco education component of the child health and disability prevention medical examination. The protocols shall include the following: dissuading children from beginning to smoke, encouraging smoking cessation, and providing information on the health effects of tobacco use on the user, children, and nonsmokers. The protocols shall also include a focus on health promotion, disease prevention, and risk reduction, utilizing a ''wellness'' perspective that encourages self-esteem and positive decisionmaking techniques, and referral to an appropriate community smoking cessation program.

(d) Notwithstanding any other provision of law, the department shall ensure that a portion of the funds in the Child Health Disability Prevention Program budget is used to facilitate the integration of the medical and dental components of all aspects of that program.

(e) The department shall expand its support and monitoring of county child health and disability prevention program efforts to provide all of the following:

(1) Review of a representative, statistically valid, randomly selected sample of child health and disability prevention health assessments, including, but not limited to, dental assessments, which result in the discovery of conditions which require followup diagnosis

and treatment, including but not limited to dental treatment, and which qualify for services under this section. The purpose of the survey and followup reviews of local programs is to determine whether necessary diagnosis and treatment services are being provided, and the degree to which those services comply with the intent of the act that added this subdivision. These survey reviews shall include all counties and shall be conducted at least three times a year.

(2) At least once a year, as part of regular visits to county child health and disability prevention programs to provide technical assistance, support services and monitoring and evaluation of program performance, department staff shall review the effectiveness of the mandated treatment program. The purpose of this review is to assure that the county is providing appropriate followup services for conditions discovered during child health and disability prevention health assessments. This review shall be done in conjunction with the ongoing survey activity of the Child Health and Disability Prevention Branch of the department and shall utilize data resulting from that activity.

(3) If the department establishes that a county has failed to provide treatment services mandated by the act that added this subdivision, the department shall require the county to submit a plan of correction within 90 days. If the department finds that substantial correction has not occurred within 90 days following receipt of the correction plan, it may require the county to enter into a contract pursuant to Section 16934.5 of the Welfare and Institutions Code for the remainder of the fiscal year and the following fiscal year, and for this purpose shall withhold the same percentage of funds as are withheld from other counties participating in the program pursuant to Section 16934.5 of the Welfare and Institutions Code.

104400. (a) (1) Except as provided in paragraph (2), each county health department or city health department as provided in Section 16800 of the Welfare and Institutions Code shall be the lead local agency for its county. The local lead agency shall have the overall responsibility for the success of the programs funded pursuant to this article in its county.

(2) Counties contracting with the department for the provision of health care services pursuant to Section 16809 of the Welfare and Institutions Code may elect to enter into an arrangement with the department for the administration and provision of funds and services subject to this article in their counties. In those cases, the department shall act as the local lead agency for that county.

(b) The local lead agency shall do all of the following:

(1) Provide, or contract for, preventive health education against tobacco services to targeted populations.

(2) Establish a coordinated information, referral, outreach, and intake system for preventive health education against tobacco services for targeted populations.

(3) Administer funds in accordance with this article, and department guidelines.

(4) Establish a uniform data collection system in compliance with standards and guidelines issued by the department, and submit audit and fiscal reports as required by the department.

(5) Coordinate services authorized by this article within and between county service providers.

(6) Provide technical assistance to service providers.

(7) Review, and suggest improvements to proposed county school district antitobacco plans. Prepare a letter for the county officer of education setting forth conclusions of the review. Work closely with the county office of education to ensure effective coordination of local school and nonschool antitobacco efforts.

(8) Coordinate activities with other governmental agencies.

(c) The local plans described in paragraph (4) of subdivision (b) shall include all of the following:

(1) A description of the targeted population, including age, race, ethnicity, language, education, income levels, its status as urban or rural, transportation needs, and any other information which the local lead agency determines is relevant.

(2) Local data on smoking and tobacco use among the targeted population.

(3) Goals for how many persons of the targeted population will be reached by health education, how many will participate in a smoking prevention or cessation program, and how many will quit or not start smoking as a result.

(4) A description of the direct services to be provided under the plan, including the services to be provided to the targeted populations enumerated in Section 104360 and schoolage youth who do not receive services through public school programs.

(5) Cost estimates for programs identified in the plan.

104405. Local lead agencies shall obtain the involvement and participation of local community organizations with special experience and expertise in community health education against tobacco usage, including representatives of high-risk populations. Local lead agencies shall include in their plan submitted pursuant to Section 104400 a description of how they shall fulfill this requirement. Representatives of these local groups shall assist and advise the local lead agency in all aspects of the local plan implemented pursuant to this article.

104410. The following goals and priorities shall govern funding services provided under this article pursuant to local plans:

(a) The provisions of preventive health education against tobacco use aimed at targeted populations, including pregnant women,

mothers of young children, and minorities, school dropouts, and other school-aged youth who would otherwise be unserved.

(b) The provisions of preventive health education against tobacco use aimed at school-age youth and their families in the community.

(c) The provision of preventive health education against tobacco use aimed at the workplace and the community.

104415. (a) Local lead agencies shall attempt to ensure that preventive education against tobacco use for targeted populations is provided in a way that reaches all geographic areas of the county.

(b) In choosing among eligible service providers available to serve the targeted populations described in subdivision (a), the local lead agency shall give priority to programs presently providing preventive health education, case management services to the targeted populations which are compatible with preventive health education against tobacco use, or other services in which preventive health education against tobacco use can be incorporated in a logical and efficient manner.

104420. The State Department of Education shall provide the leadership for the successful implementation of this article in programs administered by local public and private schools, school districts, and county offices of education. The State Department of Education shall do all of the following:

(a) Provide a planning and technical assistance program to carry out its responsibilities under this article.

(b) Provide guidelines for schools, school districts, and school district consortia to follow in the preparation of plans for implementation of antitobacco use programs for schoolage populations. The guidelines shall:

(1) Require the applicant agency to select one or more model program designs and shall permit the applicant to modify the model program designs to take special local needs and conditions into account.

(2) Require the applicant agency to prepare for each target population to be served a description of the service to be provided, an estimate of the number to be served, an estimate of the success rate and a method to determine to what extent goals have been achieved.

(3) Require plan submissions to include a staffing configuration and a budget setting forth use and distribution of funds in a clear and detailed manner.

(c) Prepare model program designs and information for local schools, local school districts, consortia, and county offices of education to follow in establishing direct service programs to targeted populations. Model program designs shall, to the extent feasible, be based on studies and evaluations that determine which service delivery systems are effective in reducing tobacco use and are cost-effective. The State Department of Education shall consult with

the department, and school districts with existing antitobacco programs in the preparation of model program designs and information.

(d) Provide technical assistance for local schools, local school districts, and county offices of education regarding the prevention and cessation of tobacco use. In fulfilling its technical assistance responsibilities, the State Department of Education may establish a center for tobacco use prevention that shall identify, maintain, and develop instructional materials and curricula encouraging the prevention or cessation of tobacco use. The State Department of Education shall consult with the department and others with expertise in antitobacco materials or curricula in the preparation of these materials and curricula.

(e) Monitor the implementation of programs that it has approved under this article to ensure successful implementation.

(f) Prepare guidelines within 180 days of the effective date of this article for a school-based program of outreach, education, intervention, counseling, peer counseling, and other activities to reduce and prevent smoking among schoolage youth.

(g) Assist county offices of education to employ a tobacco use prevention coordinator to assist local schools and local public and community agencies in preventing tobacco use by pupils.

(h) Train the tobacco use prevention coordinators of county offices of education so that they are:

(1) Familiar with relevant research regarding the effectiveness of various kinds of antitobacco use programs.

(2) Familiar with department guidelines and requirements for submission, review, and approval of school-based plans.

(3) Able to provide effective technical assistance to schools and school districts.

(i) Establish a tobacco use prevention innovation program effort directed at specific pupil populations.

(j) Establish a competitive grants program to develop innovative programs promoting the avoidance, abatement, and cessation of tobacco use among pupils.

(k) Establish a tobacco-free school recognition awards program.

(*l*) As a condition of receiving funds pursuant to this article, the State Department of Education, county offices of education, and local school districts shall ensure that they coordinate their efforts toward smoking prevention and cessation with the lead local agency in the community where the local school district is located.

(m) (1) Develop, in coordination with the county offices of education, a formula that allocates funds for school-based, antitobacco education programs to school districts and county offices of education for all students in grades 4 to 8, inclusive, on the basis of the average daily attendance (ADA) of pupils. School districts shall

provide tobacco-use prevention instruction for students, grades 4 to 8, inclusive, that address the following essential topics:

(A) Immediate and long-term undesirable physiologic, cosmetic, and social consequences of tobacco use.

(B) Reasons that adolescents say they smoke or use tobacco.

(C) Peer norms and social influences that promote tobacco use.

(D) Refusal skills for resisting social influences that promote tobacco use.

(2) Develop a competitive grants program administered by the State Department of Education directed at students in grades 9 to 12, inclusive. The purpose of the grant program shall be to conduct tobacco-use prevention and cessation activities targeted to high-risk students and groups in order to reduce the number of persons beginning to use tobacco, or continuing to use tobacco. The State Department of Education shall consult with local lead agencies, the Tobacco Education and Research Oversight Committee, and representatives from nonprofit groups dedicated to the reduction of tobacco-associated disease in making grant award determinations. Grant award amounts shall be determined by available funds. The State Department of Education shall give priority to programs, including, but not limited to, the following:

(A) Target current smokers and students most at risk for beginning to use tobacco.

(B) Offer or refer students to cessation classes for current smokers.

(C) Utilize existing anti-smoking resources, including local anti-smoking efforts by local lead agencies and competitive grant recipients.

(n) (1) Allocate funds for administration to county offices of education for implementation of Tobacco Use Prevention Programs. The funds shall be allocated according to the following schedule based on average daily attendance in the prior year credited to all elementary, high, and unified school districts, and to all county superintendents of schools within the county as certified by the Superintendent of Public Instruction:

(A) For counties with over 400,000 average daily attendance, thirty cents ($0.30) per average daily attendance.

(B) For counties with more than 100,000 and less then 400,000 average daily attendance, sixty-five cents ($0.65) per average daily attendance.

(C) For counties with more than 50,000 and less than 100,000 average daily attendance, ninety cents ($0.90) per average daily attendance.

(D) For counties with more than 25,000 and less than 50,000 average daily attendance, one dollar ($1) per average daily attendance.

(E) For counties with less than 25,000 average daily attendance, twenty-five thousand dollars ($25,000).

(2) In the event that funds appropriated for this purpose are insufficient, the Superintendent of Public Instruction shall prorate available funds among participating county offices of education.

(o) Allocate funds appropriated by the act adding this subdivision for local assistance to school districts and county offices of education based on average daily attendance reported in the second principal apportionment in the prior fiscal year. Those school districts and county offices of education that receive one hundred thousand dollars ($100,000) or more of local assistance pursuant to this part shall target 30 percent of those funds for allocation to schools that enroll a disproportionate share of students at risk for tobacco use.

(p) (1) Provide that all school districts and county offices of education that receive funding under subdivision (o) make reasonable progress toward providing a tobacco-free environment in school facilities for students and employees.

(2) All school districts and county offices of education that receive funding pursuant to paragraph (1) shall adopt and enforce a tobacco-free campus policy no later than July 1, 1995. The policy shall prohibit the use of tobacco products, any time, in district-owned or leased buildings, on district property and in district vehicles. Information about the policy and enforcement procedures shall be communicated clearly to school personnel, parents, students, and the larger community. Signs stating ''Tobacco use is prohibited'' shall be prominently displayed at all entrances to school property. Information about smoking cessation support programs shall be made available and encouraged for students and staff. Any school district or county office of education that does not have a tobacco-free district policy implemented by July 1, 1995, shall not be eligible to apply for funds from the Cigarette and Tobacco Products Surtax Fund in the 1995–96 fiscal year and until the tobacco-free policy is implemented. Funds that are withheld from school districts that fail to comply with the tobacco-free policy shall be available for allocation to school districts implementing a tobacco-use prevention education program, pursuant to subdivision (m).

104425. (a) The State Department of Education shall award and administer grants for projects directed at the prevention of tobacco use among school-age children. The purpose of the grant program is to conduct health education and tobacco information activities targeted to school-age children in order to reduce the number of persons beginning to use, or continuing to use, tobacco. The grants shall provide funds to eligible grantees, as determined by the State Department of Education. The State Department of Education shall select a variety of grantees and innovative and promising projects.

(b) The State Department of Education shall develop criteria and standards for the allocation of grant awards, that consider the need

to balance (1) target populations to be served; (2) project type; (3) rural, suburban, and urban projects, and consider the local availability of similar services. The department shall evaluate all grant programs by employing statistics that describe the impact of a grant program.

(c) The State Department of Education shall give priority to grantees who do the following:

(1) Design the project to coordinate with other community services including local health agencies, voluntary health organizations, and parent organizations.

(2) Design the project to utilize and develop existing services and resources.

(3) Demonstrate an understanding of the role that society, the environment, and community norms have in influencing tobacco usage.

(4) Indicate promising innovative approaches to diminishing tobacco use among school-age children and permit those approaches to be replicated by others.

104430. (a) The State Department of Education shall make available funds appropriated to it from the Health Education Account in the Cigarette and Tobacco Products Surtax Fund for the implementation of Section 104425 according to the following schedule:

(1) (A) Not less than two-thirds of that amount shall be awarded to local educational agencies. Funds allocated pursuant to paragraphs (2) and (3) shall not be considered funds for distribution to local educational agencies.

(B) Not less than two hundred thousand dollars ($200,000) of the amount subject to subparagraph (A) shall be made available for proportionate awards to applicant education centers pursuant to Article 6 (commencing with Section 33380) of Chapter 3 of Part 20 of the Education Code, for tobacco use prevention projects.

(2) Not less than two hundred thousand dollars ($200,000) of the amount awarded pursuant to Section 104425 shall be used for the support of statewide program evaluation.

(3) Not more than nine hundred thousand dollars ($900,000) of the amount awarded pursuant to Section 104425 shall be awarded as grants for technical assistance, implementation strategies, and regional coordinating activities related to tobacco use prevention pursuant to subdivision (c) of Section 104425.

(b) Any amount that exceeds the amounts specified in subdivision (a) shall be allocated for competitive grants pursuant to subdivision (c) of Section 104425.

(c) On and after January 1, 1992, funding to which this section applies shall be made available only upon a determination by the Legislative Analyst and the Tobacco Education Oversight Committee, in the evaluation required by Section 104460, indicating

that the tobacco use prevention program meets the purpose of this article.

104435. County offices of education shall do all of the following:

(a) Provide technical assistance and training to school districts and consortia of school districts regarding planning and preparation of antitobacco programs plans pursuant to State Department of Education guidelines.

(b) Receive and approve plans submitted by school districts and provide technical assistance and guidance as necessary to ensure the compliance of school districts with this article. Every effort shall be made to approve or provide a list of necessary amendments to a school district plan within 30 days of receipt. The county office of education may authorize a school district to begin implementation of its plan on a provisional basis, with final approval of the local plan contingent on satisfying specified conditions.

(c) Certify to the State Department of Education that a school district has met the conditions specified in the department's guidelines and that funds reserved for the school district's antitobacco programs may be released.

(d) Provide for appropriate coordination between school districts programs and local antitobacco use programs funded by the local lead agency.

104440. Local lead agencies shall be ineligible for awards under the competitive grants program, unless the local lead agency is participant within a consortium of community-based organizations or nonprofit organizations.

104445. In awarding grants under the competitive grants program, the department shall give preference to all of the following:

(a) Nonprofit or community-based organizations.

(b) Current contractors that meet both of the following requirements:

(1) Have demonstrated effectiveness and capacity in providing tobacco education services.

(2) Serve populations and areas with substantial unmet service needs.

(c) Proposals that provide new or expanded services to geographic areas or target populations underserved, as determined by the department.

104450. (a) The State Department of Education shall develop a common reporting format for districts receiving tobacco-use-prevention funds under this article.

(b) The format required by subdivision (a) shall be designed to provide annual data on all of the following:

(1) Tobacco-use-prevention education program expenditures.

(2) Tobacco-use-prevention education program instructional and other services to targeted and general student populations.

(3) Tobacco-use-prevention education program staff development and parent training.

(4) Other information determined to be appropriate by the department.

(c) The information provided by the format required by subdivision (a) shall be in a quantitative format that describes the number of individuals who are served and the number of individuals receiving each type of service.

(d) In addition to the requirements of subdivision (c), the information to be provided by the format required by subdivision (a) shall include, at a minimum, all of the following:

(1) (A) The number of students receiving tobacco-use-prevention instruction and the type of curriculum used.

(B) The format required by subdivision (a) shall show, by category, those students listed for the purpose of subparagraph (A), in each target group listed in Section 104360.

(2) Other programmatic activities directly targeted to students, and the number of students participating in each.

(3) The types of staff development or other tobacco-use-prevention training and, by staff classification, the number of staff members receiving the training.

(4) The number of parents receiving training and the types of training provided.

(5) The types of programs geared toward community involvement and the number of people served by each type.

(6) The types of services provided to target populations that are in addition to services provided to other students.

(7) The number and size of schools that are tobacco-free.

(8) The ways in which money appropriated for the purpose of this article has been spent, including the following categories: salaries, including, but limited to, personnel, and substitute teacher costs; benefits; travel; consultant services; operating expenses, including, but not limited to, curriculum and instructional materials, supplies, other; capital outlay; and indirect costs.

(e) (1) Each county office of education shall provide to the State Department of Education an annual report on district expenditures and services within its respective county pursuant to the common reporting format developed by the State Department of Education.

(2) The county shall provide an annual report of the information required in paragraph (8) of subdivision (d).

(f) (1) For the 1991–92 fiscal year and fiscal years thereafter, the State Department of Education shall report to the Legislature on local district expenditures and services statewide.

(2) The department shall make the report required by paragraph (1) on or before January 1 of each year.

104455. (a) The State Department of Education shall monitor and ensure implementation of district and county offices of education

tobacco-free policies and tobacco-use prevention education programs in districts receiving funding from the Cigarette and Tobacco Products Surtax Fund through procedures in the Coordinated Compliance Review Manual provided to school districts by the Superintendent of Public Education.

(b) The department shall develop and adopt yearly quantifiable targets for the reduction of tobacco use in those programs funded on a competitive grant basis for secondary school implementation.

104460. (a) Each school district receiving funds from the Cigarette and Tobacco Products Surtax Fund shall make all of the following services available to every pregnant minor and minor parent enrolled in the school district:

(1) Referral to perinatal and related support services.

(2) Outreach services and assessment of smoking status.

(3) Individualized counseling and advocacy services.

(4) Motivational messages.

(5) Cessation services, if appropriate.

(6) Incentives to maintain a healthy lifestyle.

(7) Followup assessment.

(8) Maintenance and relapse prevention services.

(b) Where appropriate, those services listed in subdivision (a) shall be integrated with existing programs for pregnant minors and minor parents.

(c) Each district plan submitted in application for funds under this article shall include a description of the availability of the services required by this section.

104465. (a) The department shall annually set aside three million dollars ($3,000,000) appropriated for the purposes of the competitive grants program established pursuant to this article in order to support efforts to link the statewide media campaign to local communities and to provide regional public and community relations or media initiatives.

(b) Local community initiatives may include, but are not limited to, all of the following:

(1) Encouraging volunteer efforts.

(2) Local media programming.

(3) Provision of assistance in, and facilitation of, public and community events.

(c) The efforts described in subdivision (b) shall be directed principally to the target communities described in Section 24161.5.

(d) Regular application procedures for competitive grants under this article shall apply to applications for grants under this section.

(e) Funds awarded pursuant to this section shall be awarded in the same manner as other competitive grants under this article.

104470. The State Department of Education shall make periodic reports to the committee regarding the status and funding of tobacco education programs funded under this article as required by the

committee. The reports shall include an overview of program and grant expenditures funded under this article.

104475. There is hereby created under the authority of the Controller the Tobacco Education Fund.

104480. All guidelines, criteria, standards, and requirements specified in this article are exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and shall be implemented without being adopted as regulations.

104485. This article shall remain operative only until July 1, 1996, and shall remain in effect only until January 1, 1997, and as of that date is repealed, unless a later enacted statute, which is effective on or before January 1, 1997, deletes or extends that date.

Article 2. Cigarette and Tobacco Products Surtax Medical Research Program

104500. (a) (1) The Legislature finds that the efforts to reduce smoking in California have led to a drop in the consumption of tobacco. Although not on target to meet the goal of achieving a 75-percent reduction in tobacco consumption in California by the year 1999, the results are encouraging.

(2) The Legislature further finds that as a result of the success of the programs, the money received from the taxation of tobacco has been dropping. The Legislature declares this a sign of success, not a matter of concern.

(3) The Legislature further notes that programs, organizations, and individuals receiving money from the Cigarette and Tobacco Products Surtax Fund are receiving money from a declining revenue source. The Legislature finds that this success has led to an obvious concern and fear among recipients that ‘‘their money’’ is shrinking every year.

(4) The Legislature finds that, assuming the success of the antismoking efforts continue, there will be necessary reductions in spending in the years to come.

(5) The Legislature declares its intention to seek full analysis of all programs receiving money under Proposition 99 and declares its intention to critically evaluate how the money is being spent and whether the spending is achieving the results desired.

(6) The Legislature specifically rejects the notion that every dollar of expenditure made by every program, organization, or activity is of equal value. Instead, the Legislature declares its intention to choose between competing programs and to allocate moneys to those programs and activities that are most successful in meeting the goals of the initiative.

(b) It is the intent of the Legislature to provide for the continuation of the Cigarette and Tobacco Products Surtax Research

Program to support research into tobacco-related disease. It is the intent of the Legislature that this program be administered by the University of California and that this program be administered pursuant to the following principles:

(1) The research program established should adhere to the objectives stated in the provisions of the initiative act entitled Cigarette and Tobacco Products Surtax regarding research: ''The Research Account . . . shall only be available for tobacco-related disease research.''

(2) All research funds shall be awarded on the basis of scientific merit as determined by an open, competitive peer review process that assures objectivity, consistency, and high quality. All qualified investigators, regardless of institutional affiliation, shall have equal access and opportunity to compete for the funds in the Research Account.

(3) The peer review process for the selection of grants awarded under this program shall be modeled on that used by the National Institutes of Health in its grant-making process.

(4) Awardees shall be reimbursed for the full cost, both direct and indirect, of conducting the sponsored research consistent with federal guidelines governing all federal research grants and contracts.

104505. The Legislature hereby requests the University of California to continue to administer a comprehensive grant program to support research efforts related to the prevention, causes, and treatment of tobacco-related diseases. It is the intent of the Legislature that the program incorporate the principles and organizational elements specified in this article, including, but not limited to, a program office with a director and other necessary staff, a scientific advisory committee, and research review panels.

104510. For the purposes of this article:

(a) ''Grantee'' means any qualifying public, private, or nonprofit agency or individual including, but not limited to, colleges, universities, hospitals, laboratories, research institutions, local health departments, voluntary health agencies, health maintenance organizations, and individuals conducting research in California.

(b) ''Indirect costs'' includes such items as use allowance for research facilities, heating, lighting, library services, health and safety services, project administration, and building maintenance, as defined by federal cost accounting guidelines for federally sponsored research.

(c) ''Tobacco-related disease'' includes, but is not limited to, the following:

(1) Coronary heart disease.

(2) Cerebrovascular disease.

(3) Cancer, including cancers of the lung, larynx, esophagus, bladder, pancreas, and mouth. It is the intent of the Legislature that

the university further research the epidemiological link between smoking and breast cancer and prostate cancer.

(4) Chronic obstructive lung disease, including emphysema, chronic bronchitis, asthma, and related lung disorders.

(5) Other conditions or diseases that smoking or tobacco use has been established to be a risk factor for excess disability and illness.

(d) ''Tobacco-related disease research'' includes, but is not limited to, research in the fields of biomedical science, the social and behavioral sciences, public policy, epidemiology, and public health.

(e) ''Public policy research'' means research that investigates and evaluates various programs and strategies used by governmental, private, and nonprofit organizations to control tobacco use.

(f) ''University'' means the University of California.

104515. It is the intent of the Legislature that the university establish a scientific advisory committee to provide advice to the president of the university as to the direction, scope, and progress of the research program.

(a) Responsibilities of the committee may include, but are not limited to:

(1) Provision of advice on program priorities and emphasis.

(2) Provision of advice on overall program budget.

(3) Participation in periodic program evaluation.

(4) Assistance in developing guidelines to assure fairness, neutrality, and adherence to the principles of merit and quality in the conduct of the program.

(5) Assistance in developing appropriate linkages to nonacademic entities, including, but not limited to, voluntary organizations, health care delivery institutions, industry, government agencies, and public officials.

(b) Responsibilities of the committee may additionally include:

(1) Development of criteria and standards for grant awards.

(2) Development of administrative procedures relative to the solicitation, review, and award of grants to ensure an impartial, high quality peer review system.

(3) Development and supervision of research review panels.

(4) Review of research review panel reports and recommendations for grant awards.

(5) Development and oversight of mechanisms for the dissemination of research results.

(c) It is the intent of the Legislature that the committee consist of at least nine members representing a range of scientific expertise and experience appointed by the president of the university from nominations submitted by relevant organizations, as follows:

(1) Three members from voluntary health organizations dedicated to the reduction of tobacco use.

(2) One member with expertise in the field of biomedical research.

(3) One member with expertise in the field of behavioral or social research.

(4) One member from professional medical or health organizations.

(5) One member from an independent research university in California.

(6) One member drawn from other institutions engaged in research directed at tobacco-related diseases.

(7) One member representing tobacco control for the department.

(8) One member representing a community-based provider of health education and prevention services.

(d) Committee membership shall be drawn from the ranks of bona fide scientists and individuals fully conversant with the norms of scientific inquiry.

(e) Members shall serve at the pleasure of the President of the University of California. Membership may be staggered in such a way as to maintain a full committee while ensuring a reasonable degree of continuity of expertise and consistency of direction.

(f) Members shall serve without compensation, but may receive reimbursement for travel and other necessary expenses actually incurred in the performance of their official duties.

(g) The Legislature hereby declares that public policy research is an area of compelling interest because of its potential to determine the best methods for reducing tobacco use on a wide scale among Californians. The scientific advisory committee shall give a high priority to proposals for grant awards to fund public policy research.

104520. It is the intent of the Legislature that the university utilize peer review panels modeled upon the National Institutes of Health peer review process to review all research grants. The membership of these panels shall vary depending on the subject matter of proposals and review requirements, and shall draw on the most qualified individuals from appropriate institutions within and outside the State of California and from within and without the University of California system. The work of the peer review panels shall be administered pursuant to policies and procedures established by the scientific advisory committee. In order to avoid conflicts of interest and to ensure access to qualified reviewers, the university may utilize reviewers not only from California but also from outside the state. When serving on peer review panels, individuals who have submitted grant applications for funding by this program shall be governed by conflict-of-interest provisions consistent with the National Institutes of Health Manual, Chapter 4510 (item h).

104525. Research projects funded under this article may include, but are not limited to:

(a) Individual investigator-generated grants. These grants may be awarded to an institution on behalf of a principal investigator for a

discrete project related to the investigator's interests and competence.

(b) New investigator grants. These grants may be awarded to an institution to support the work of promising individuals in the initial stages of their research careers.

(c) Center grants. These grants may be awarded to institutions on behalf of a principal investigator and a group of collaborating investigators providing support for long-term multidisciplinary programs of research and development.

(d) Conference grants. These grants may be awarded for funding of conferences in California to coordinate, exchange, and disseminate information related to specific research efforts. These grants may fund honoraria and travel expenses for invited participants from outside California.

104530. It is the intent of the Legislature that the university, as lead agency, do all of the following:

(a) Provide overall direction and coordination of the program.

(b) Provide staff assistance to the advisory committee and review panels.

(c) Provide for periodic program evaluation, to assure that work funded is consistent with program goals.

(d) Maintain a system of financial reporting and accountability.

(e) Transmit programmatic as well as financial reports to the state, including an annual report on grants made, grants in progress, program accomplishments, and future program directions.

(f) Provide for the systematic dissemination of research results to the public and the health care community, and to provide for a mechanism to disseminate the most current research findings in the areas of smoking cessation and the prevention of tobacco use in order that these findings may be applied to the implementation of the Health Education Account.

(g) Develop policies and procedures to facilitate the translation of research results into commercial applications wherever appropriate.

(h) Undertake an outreach program to inform interested parties of the availability of grants for public policy research in the area of tobacco control.

104535. It is the intent of the Legislature that projects funded under this article be reimbursed for actual costs, including direct costs and indirect costs incurred by a research institution consistent with federal guidelines. Indirect cost rates shall not exceed those allowable by the federal government for federally sponsored research. With respect to those institutions that have not negotiated a federal indirect cost reimbursement rate, the university will request information to verify the indirect cost rates.

104540. It is the intent of the Legislature that no more than 5 percent of the Research Account be used for the purposes of the administration of this article.

104545. No provision of this article shall apply to the University of California unless the regents of the university, by resolution, make that provision so applicable.

104550. This article shall become inoperative on July 1, 1996, and, as of January 1, 1997, is repealed, unless a later enacted statute, which becomes effective on or before January 1, 1997, deletes or extends the dates on which it becomes inoperative and is repealed.

CHAPTER 2. NUTRITION

Article 1. California Nutrition Monitoring Development Act

104575. This article shall be known and may be cited as the ''California Nutrition Monitoring Development Act of 1986.''

104580. The Legislature declares that the purposes of this article are to determine the availability and types of nutrition monitoring information that is currently available in specified federal, state and local government programs and in selected private sector programs; to determine what additional information is needed to help legislators, state and local agencies and nongovernment users, to operate cost-effective services and to target funds where most needed; and to assess the feasibility of establishing a prototype state-local data system that will provide regular reports on the: nutritional status and nutrition related health problems of California's population, dietary intake and food consumption patterns, nutrition education information, including knowledge and attitude regarding nutrition, quality and healthfulness of the food supply, nutrition programs and service availability, including population served, service statistics, frequency and periodicals of data collection and types of reports, related socioeconomic factors, and on the state's ability to provide for food and nutrition services where needed.

104585. (a) The department shall assess the availability and adequacy of existing state and local food and nutrition data systems. All state departments and agencies that are required to provide data pursuant to this article are encouraged to participate to the fullest extent possible in all aspects of this program and to make their data available to counties upon request.

(b) The state departments from which existing data shall be provided for project purposes shall include the State Departments of Health Services, Aging, Education, and Social Services. Upon request of the department, these departments shall provide existing nutrition-related data collection forms, documentation, and reports, including, but not limited to, the following programs:

(1) In the Department of Aging: Congregate Nutrition Services, Home Delivered Nutrition Services, and the Brown Bag Network.

(2) In the State Department of Education: National School Lunch Program, the National School Breakfast Program, the Child Care Food Program, the Special Milk Program, the Nutrition Education and Training Program, and the various commodities programs.

(3) In the department: Special Supplemental Food Program for Women, Infants and Children (WIC), the Comprehensive Perinatal Care Program, the Genetics Disease Program, the Child Health and Disability Prevention Program, California Children's Services, County Health Services, Primary Health Services Development, Indian Health Program, Medical Care Services (Medi-Cal), Adult Health, and Vital Statistics.

(4) In the State Department of Social Services: the Food Stamp Program.

(c) The department may require any other state agency, department, board, or commission, with the exception of the University of California, to provide existing nutrition-related data, as described in this article. The department may request the University of California to provide this data in the case of the University of California Cooperative Extension Program, the Home Economics Program, and the Expanded Food and Nutrition Education Program. Additionally, other programs in local government and the private sector, such as local public health and social services departments, food banks, pantries, and meal programs, voluntary health organizations, and charitable social service agencies shall be encouraged to provide available nutrition monitoring information.

104590. (a) The department shall conduct a survey of state agencies and of counterpart local and private sector programs which now collect or use nutrition data or both. The department shall determine user needs for and applications of data, the adequacy of existing data systems, the costs compared to benefits of collecting this information, and recommendations about future data needs.

(b) The department shall assess the degree to which data is available to monitor the California Model Standards for Nutrition Services (guidelines for local health departments), the 1990 Nutrition Objectives for the Nation (national health priorities), the nutrition surveillance programs of the United States Centers for Disease Control (prenatal and pediatric surveillance and behavioral risk factors survey related to chronic diseases) and other similar public health objectives.

(c) The department shall outline a process for developing a prototype state-local nutrition monitoring system. The prototype system shall be scientifically sound and, insofar as is practicable, compatible with those employed by the United States Department of Agriculture, the United States Department of Health and Human Services, the National Public Health Reporting System, and recommendations by other recognized authorities. The department shall review existing or proposed systems such as the Statewide

Environmental and Evaluation Program System (SWEEPS) and the Nutrition Management Information and Surveillance System (Nutri-MISS) respectively for their applicability to this purpose.

104595. The department shall analyze the results of the California Nutrition Monitoring Development Act of 1986 in a report to the Governor and the Legislature. Where feasible and appropriate, other reports on nutritional status within the department shall be consolidated into one nutrition monitoring report. This report shall include all of the following components:

(a) The types of data to be collected and reported on shall include, but are not limited to, the data described in Section 104580 for purposes of carrying out this article.

(b) Based upon the findings of subdivision (a), the department shall identify those areas in which existing data is meeting user needs, areas in which users have identified deficiencies or inefficiencies, and areas in which data collection efforts are not occurring. The department shall recommend specifications for a suitable data system using microcomputer technology where feasible. The system shall involve state and local government agencies and the private sector.

(c) Using the data collected in subdivisions (a) and (b), the department shall identify options for providing data of the type and timeliness needed by local users.

(d) The department shall submit its report and recommendations to the Governor and the Legislature no later than January 1, 1988.

104600. The department, using applicable state procedures, may contract for any of the services required by this article, in which case the contractor or contractors shall have demonstrated expertise in the fields of nutrition monitoring and epidemiology, nutrition program operations, and community organization.

Article 2. ''5 A Day—For Better Health'' Program

104650. (a) The department shall establish and implement, to the extent funds are available pursuant to subdivision (d) which are other than state general funds, a ''5 A Day—For Better Health'' program for the purpose of promoting public awareness of the need to increase the consumption of fruits and vegetables as part of a low-fat, high-fiber diet in order to improve health and prevent major chronic diseases, including diet-related cancers.

(b) The department may promote the ''5 A Day—For Better Health'' program to the public through channels, including, but not limited to, print and electronic media, retail, grocers, schools, and other government programs. For purposes of this article, ''public'' includes, but is not limited to, the general adult population, adults with lower educational attainment, schoolage children and youth, and high-risk groups determined by the department.

(c) The department may, at its sole discretion, contract with qualified organizations for general or specialized services to implement this article, including personnel, marketing, public relations, research, evaluation, and administration.

(d) The department is encouraged to investigate all available funding sources, public and private, for the purposes of this article, including application for public and private grants.

104655. Notwithstanding any other provision of law, nothing shall operate to prohibit contributions to the program created pursuant to this article by organizations and commissions subject to Division 22 (commencing with Section 64001) of the Food and Agricultural Code.

CHAPTER 3. ORAL HEALTH

Article 1. General Provisions (Reserved)

Article 2. State Oral Health Program

104750. The department shall maintain a dental program including, but not limited to, the following:

(a) Development of comprehensive dental health plans within the framework of the State Plan for Health to maximize utilization of all resources.

(b) Provide the consultation necessary to coordinate federal, state, county, and city agency programs concerned with dental health.

(c) Encourage, support, and augment the efforts of city and county health departments in the implementation of a dental health component in their program plans.

(d) Provide evaluation of these programs in terms of preventive services.

(e) Provide consultation and program information to the health professions, health professional educational institutions, and volunteer agencies.

(f) For purposes of this article ''State Plan for Health'' means that comprehensive state plan for health being developed by the department pursuant to Public Law 89-749 (80 Stat. 1180).

104755. The director shall appoint a dentist licensed in the State of California to administer the dental program.

104760. Nothing in this article authorizes the department to compel dental examinations or services.

104765. The department shall have the power to receive for the dental program any financial aid granted by any private, federal, state, district, or local or other grant or source, and the division shall use such funds to carry out the provisions and purposes of this article.

Article 3. Dental Disease Prevention Programs

104770. The Legislature finds that 95 percent of all children in California have dental disease in the form of dental caries and periodontal disease. Dental disease in childhood can and does result in significant lifetime disability, dental pain, missing teeth, time lost from school and work, and the need for dentures. Poor nutrition in childhood is a major contributing factor in lifetime dental disability. The cost of treating the results of dental disease is close to two billion dollars ($2,000,000,000) per year in California, of which approximately one hundred million dollars ($100,000,000) is paid by the State of California for Denti-Cal treatment costs alone.

The Legislature also finds that dental disease in children and the resultant abnormalities in adults can be prevented by education and treatment programs for children. It is the intent of the Legislature in enacting this article to establish for children in preschool through sixth grade, and in classes for individuals with exceptional needs, preventive dental programs which shall be financed and have standards established at the state level and which shall be operated at the local level.

104775. A community dental disease prevention program may be offered to school children in preschool through sixth grade, and in classes for individuals with exceptional needs, by a local sponsor. A local sponsor may be a city or county health department, county office of education, superintendent of schools office, school district or other public or private nonprofit agency approved by the department. The program shall include, but not be limited to, the following:

(a) Educational programs, focused on development of personal practices by pupils, that promote dental health. Emphasis shall include, but not be limited to, causes and prevention of dental diseases, nutrition and dental health, and the need for regular dental examination with appropriate repair of existing defects.

(b) Preventive services including, but not limited to, ongoing plaque control and supervised application of topical prophylactic agents for caries prevention, in accordance with this article or other preventive agents approved by the department. Services shall not include dental restoration, orthodontics, or extraction of teeth. Any acts performed, or services provided, under this article constituting the practice of dentistry shall be performed or provided by, or be subject to the supervision of, a licensed dentist in accordance with Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code.

104780. An advisory board, including representatives from education, dental professions, and parent groups shall be designated by the local sponsor to advise on dental health programs funded under this article. The use of existing advisory bodies is encouraged.

The board shall hold public meetings at least twice a year after appropriate notification in order that interested parties may provide input regarding the dental health needs of the community.

104785. The minimal standards of the community dental disease prevention program shall be determined by the department in accordance with the purposes of this article, and may be revised periodically as deemed necessary by the department to further the purposes of this article.

104790. The local health officer of each local health department interested in participating in the community dental disease prevention program, or his or her designee, in cooperation with the appropriate education personnel and the local advisory board, shall submit a proposal for the program to the department annually. The proposal shall include the methods by which the program will be implemented in each jurisdiction and program results reported. However, this function shall be the responsibility of the department for all counties that contract with the state for health services under Section 101300. These contract counties, at the option of the board of supervisors, may provide services pursuant to this article in the same manner as other county programs, provided the option is exercised six months prior to the beginning of each fiscal year.

If the local health officer elects not to submit a program proposal, the department may solicit program proposals from other public or private nonprofit agencies and contract directly with the agencies. These proposals shall meet the same requirements as specified for local health officers in this section.

104795. The department shall review the program proposals and approve programs that meet criteria established pursuant to Section 104785. The department shall, through contractual arrangements, reimburse local sponsors with approved programs at an amount of four dollars and fifty cents ($4.50) in fiscal year 1986–87, and each fiscal year thereafter, per participating child per year for administration and services, pursuant to Section 104775.

104800. The local health officer or other sponsor may utilize or contract with, or both utilize and contract with, other local public and private nonprofit agencies, as well as school districts and county superintendents of schools, in conducting the program. The Legislature recognizes that these agencies, districts, and schools are currently engaged in a limited number of dental disease prevention projects and it is the intent of the Legislature that this participation be continued.

104805. The State Department of Education shall assist the department in developing and evaluating educational programs in dental health and dental disease prevention. These programs may include, but are not limited to, teacher and program coordinator in-service workshops, development and review of appropriate

educational materials, and evaluation of classroom dental health education presentations.

104810. It shall be the responsibility of the governing board of each school district participating in the program and the governing authority of each private school participating in the program to cooperate with the local sponsor administering the community dental disease prevention program in carrying out the program in any school under their jurisdiction. Each participating school shall maintain participation records for each child and the necessary educational materials and supplies for plaque control and other required dental disease prevention methods provided by the program. Nothing in this article shall require participation by a public or private school in a program established pursuant to this article.

104815. No child shall receive a preventive agent as part of a program established pursuant to this article unless the child's parent or guardian has given written notice to the governing body of the public or private school that the child may receive a preventive agent.

104820. It is the intent of the Legislature that the program established by this article shall, in fiscal years subsequent to the fiscal year in which this section is enacted, be funded according to customary budget procedures.

104825. It is the intent of the Legislature that the program established by this article shall be placed in effect in the areas of greatest identified need as determined by the department, in cooperation with the State Department of Education.

Article 4. Topical Dental Decay Inhibitors

104830. Pupils of public and private elementary and secondary schools, except pupils of community colleges, shall be provided the opportunity to receive within the school year the topical application of fluoride or other decay-inhibiting agent to the teeth in the manner approved by the department. The program of topical application shall be under the general direction of a dentist licensed in the state and may include self-application.

104835. Treatment as specified in this article shall be evidenced by a written record made on a form prescribed by the department. A copy of the record shall be given to the parent or guardian of the child, or if the person receiving the treatment is an adult, the copy shall be given to him or her.

104840. The county health officer of each county shall organize and operate a program so that treatment is made available to all persons specified in Section 104830. He shall also determine how the cost of such a program is to be recovered. To the extent that the cost to the county is in excess of that sum recovered from persons treated,

the cost shall be paid by the county in the same manner as other expenses of the county are paid.

104845. The governing board of each school district and the governing authority of each private school shall cooperate with the county health officer in carrying out the program in any school under its jurisdiction. The governing board of any school district may use any funds, property, and personnel of the district for that purpose.

104850. Treatment shall be provided for a person only if the parent or guardian or responsible relative or adult who has assumed responsibility for his or her care and custody (in the case of a minor), or the person (if an adult), files with the governing board of the school district or the governing authority of the private school, as the case may be, a letter provided by the district or authority pursuant to Section 104855, stating that such treatment is desired.

104855. The governing board of each school district and the governing authority of each private school shall distribute to each pupil's parent or guardian or responsible relative or adult who has assumed responsibility for his or her care and custody (in the case of a minor), or the pupil (if an adult), a letter which may be returned to such district or authority in which the person to receive the letter may indicate that the treatment is desired and the pupil is to receive the treatment or that the pupil is not to receive the treatment for one of the following reasons: (i) the pupil has received the treatment from a dentist, or (ii) the treatment is not desired.

104860. The department shall adopt and enforce all regulations necessary to carry out this article.

104865. In enacting this article, it is the intent of the Legislature to provide a means for the eventual achievement of the topical application of fluoride or other decay-inhibiting agent to the teeth of all school pupils in this state. However, it is understood that this treatment is not a substitute for regular professional dental care. This article is designed to provide for the keeping of adequate records of treatment so that appropriate public agencies and the persons treated will be able to ascertain that a person has been so treated.

CHAPTER 4. DIETHYLSTILBESTEROL (DES)

104875. For purposes of identifying persons who have been exposed to the potential hazards of diethylstilbestrol while pregnant or prenatally and of educating the public concerning the findings and early detection of associated malignancies and other abnormalities, the department shall establish, promote, and maintain a public and professional information campaign on diethylstilbestrol. The campaign shall be conducted throughout the state and shall include, but not be limited to, a concerted effort at reaching those persons or the offspring of persons who have been exposed to diethylstilbestrol while pregnant or prenatally in order to encourage them to seek

medical care for screening, early detection, or treatment and follow-up of any diethylstilbestrol-related condition.

104880. The department shall identify at least one program for screening and follow-up care for each health service area for purposes of referral of persons exposed to diethylstilbestrol while pregnant or prenatally. The department shall consider the provider's compliance with state- and federally-mandated standards, the location in relation to the geographical distribution of persons exposed to diethylstilbestrol, and the capacity of the provider to properly screen for breast cancer, vaginal cancer, cervical cancer, vaginal adenosis, and any other malignancy and abnormal conditions resulting from exposure to diethylstilbestrol. The department shall designate existing facilities presently serving the diethylstilbestrol-exposed population as screening programs pursuant to this section. However, if existing facilities are not available, training for screening and follow-up may be offered to the personnel in existing facilities and clinics.

104885. The department may request and shall receive from any department, division, board, bureau, commission, or agency of the state or of any political subdivision thereof such assistance and data as will enable it to properly carry out its activities and effectuate the purposes set forth in this chapter. The department may also enter into any contract for services as it deems necessary with a private agency or concern upon such terms and conditions as it deems appropriate.

104890. The department shall present to the Legislature, on or before December 1, 1982, information on the diethylstilbestrol program.

104895. It is the intention of the Legislature in enacting this chapter that funding for this program in subsequent fiscal years be through the normal budgetary process.

PART 4. OLDER ADULTS

CHAPTER 1. AGING

104900. (a) The department shall provide appropriate flu vaccine to local governmental or private, nonprofit agencies at no charge in order that the agencies may provide the vaccine, at a minimal cost, at accessible locations in the order of priority first, for all persons 60 years of age or older in this state and then to any other high-risk groups identified by the United States Public Health Service. The department and the State Department of Aging shall prepare, publish, and disseminate information regarding the availability of the vaccine and the effectiveness of the vaccine in protecting the health of older persons.

(b) The department may provide appropriate pneumonia vaccine to local governmental or private, nonprofit agencies at no charge in order that the agencies may provide the vaccine, at a minimal cost, at accessible locations for groups identified as high risk by the United States Public Health Service.

(c) The program shall be designed to utilize voluntary assistance from public or private sectors in administering the vaccines. However, local governmental or private, nonprofit agencies may charge and retain a fee not exceeding two dollars ($2) per person to offset administrative operating costs.

(d) Except when the department determines that it is not feasible to utilize federal funds due to excessive administrative costs, the department shall seek and utilize available federal funds to the maximum extent possible for the cost of the vaccine, the cost of administering the vaccine and the minimal fee charged under this section, including reimbursement under the Medi-Cal program for persons eligible therefor to the extent permitted by federal law.

(e) Administration of the vaccine shall be performed either by a physician, a registered nurse, or a licensed vocational nurse acting within the scope of their professional practice acts. The physician under whose direction the registered nurse or a licensed vocational nurse is acting shall require the nurse to satisfactorily demonstrate familiarity with (1) contraindication for the administration of such immunizing agents, (2) treatment of possible anaphylactic reactions, and (3) the administration of treatment, and reactions to such immunizing agents.

(f) No private, nonprofit volunteer agency whose involvement with an immunization program governed by this section is limited to the provision of a clinic site or promotional and logistical support pursuant to subdivision (c), or any employee or member thereof, shall be liable for any injury caused by an act or omission in the administration of the vaccine or other immunizing agent to a person 60 years of age or older or to members of high-risk groups identified by the United States Public Health Service, if the immunization is performed pursuant to this section in conformity with applicable federal, state, or local governmental standards and the act or omission does not constitute willful misconduct or gross negligence. As used in this subdivision, ''injury'' includes the residual effects of the vaccine or other immunizing agent. It is the intent of the Legislature in adding this subdivision to affect only the liability of private, nonprofit volunteer agencies and their members that are not health facilities as defined in Section 1250.

(g) Nothing in this section shall be construed to require physical presence of a directing or supervising physician, or the examination by a physician of persons to be tested or immunized.

104905. The department shall provide staff and budgetary support for planning, evaluation, education, research design,

funding, and medical leadership for health promotion and preventive health services for older adults.

For purposes of this section, ‘‘older adults’’ means persons 55 years of age or older.

104910. The California Commission on Aging shall allocate 5 percent of community grant funds pursuant to Title III of the Older Americans Act of 1965, as amended, (P.L. 89-73; 79 Stat. 218) or forty thousand dollars ($40,000), whichever is the lesser amount, to experiment with the use of available mobile medical services units to provide outpatient medical care for the aging.

104915. The department shall maintain a program to promote availability of medical and health care for the aging. The department may contract with public or private organizations for conducting pilot projects designed to determine the most effective and most efficient methods of providing medical and health care services for the aging.

For purposes of this chapter, the term ‘‘aging’’ means persons who are eligible for old age benefits under the Social Security Act. Such program may include, but is not limited to:

(a) Technical and financial assistance to local agencies for pilot projects developing or testing new or innovative systems for assuring the availability of medical and health care for the aging. Pilot projects may include, but are not limited to:

(1) Mobile health clinics.

(2) Mobile health teams.

(3) Patient transportation systems.

(4) Patient surveillance and referral systems.

(b) Studies of the health and medical care of the aging of the state.

(c) Coordination with similar programs of the federal government, other states, and public or private organizations.

(d) Development of recommendations for improved systems of medical and health care.

(e) Collection and summarization of statistics describing needs for and effectiveness of various methods of providing health and medical care.

104920. It is the intent of the Legislature that the California Commission on Aging be the coordinating agency of all programs for the aging in this state, except those programs designated elsewhere by the Governor or Legislature. It is further the intent of the Legislature that the commission cooperate with the department to evaluate and further coordinate programs for outpatient medical services for the aging.

CHAPTER 2. PREVENTIVE HEALTH CARE FOR THE AGING
(Reserved)

CHAPTER 3. GERIATRICS PROGRAMS

105100. (a) The Legislature finds that approximately 12.9 percent of all Californians will be over 65 years of age by the year 2000. As the number of elderly and the amount spent for their health care have increased, serious problems have arisen regarding the availability, quality, and appropriateness of the health services received by the elderly.

The Legislature also finds that there is a need to increase knowledge with respect to the major diseases and disabilities affecting older adults, and to improve the quality of long-term care available to chronically ill and functionally impaired persons.

The Legislature recognizes the vital role that physicians and registered nurses play in the delivery of health care to the elderly and chronically ill. The Legislature also recognizes the desirability of a multidisciplinary approach to meeting the needs of those persons.

(b) The Legislature further recognizes the leadership role taken by the University of California in addressing the needs of the elderly. It is the intent of the Legislature to further encourage the gerontological pursuits of the University of California.

105105. It is the purpose of the Legislature, in enacting this chapter, to establish academic geriatric resource programs at the University of California medical or other health science campuses. A multidisciplinary approach shall be utilized in the development of these programs. The programs shall include, but not be limited to, one or more of the following elements:

(a) Preclinical, clinical, or postgraduate educational programs in geriatrics for health science students to instruct and train them in recognizing and responding to the needs and dynamics of the geriatric care of elderly patients.

(b) Provision of continuing education in geriatrics for health care providers and the general public.

(c) A teaching nursing home program to research nursing home health care practices and to instruct and train health science students about geriatric care.

105110. For purposes of this chapter, the following definitions apply:

(a) ''Academic geriatric resource program'' means a program which includes one of the elements specified in Section 105105.

(b) ''Nursing home'' means a licensed skilled nursing or licensed intermediate care facility, as defined by Section 1250.

(c) ''Teaching nursing home'' means a licensed skilled nursing or licensed intermediate care facility, as defined by Section 1250, which is owned or operated by, or affiliated with, a University of California

or private university campus with a medical or health sciences center, for the purpose of providing training, patient care, research, and community service.

105115. The Regents of the University of California shall be the agency with the responsibility for making grants for the Academic Geriatric Resource Program.

105120. Commencing January 1, 1986, on January 1 of each year, the Regents of the University of California shall submit a progress report to the Legislature regarding the grant programs established pursuant to the provisions of this chapter. The report shall include, but not be limited to, all of the following elements:

(a) A description of the progress made in implementing the programs.

(b) The number of academic geriatric resource programs established.

(c) The characteristics of the programs.

(d) The costs of the programs.

105125. No provision of this chapter shall be applicable to the University of California unless the Regents of the University of California, by resolution, make that provision applicable.

105130. The department shall seek any Medicaid waivers necessary to implement this chapter.

105135. (a) It is the intent of the Legislature that the Division of Licensing of the Medical Board of California strongly urge those organizations responsible for the development of physician licensing examinations to include within those examinations increased emphasis on medical problems of the elderly.

(b) The Medical Board of California shall report to the Legislature its initial findings regarding the intent declared in subdivision (a) by January 1, 1986, and shall submit a subsequent report on or before January 1, 1987.

105140. (a) In addition to the other programs provided under this chapter, it is the intent of the Legislature to encourage the Regents of the University of California to monitor existing physician licensing requirements, and any additional requirements developed in response to Section 105135. It is also the intent of the Legislature that the regents review programs and offerings in the schools of medicine to ensure that graduates of those schools are adequately prepared to meet the licensing requirements in geriatric medicine and any other educational requirements in geriatric medicine deemed appropriate by the regents.

(b) It is the intent of the Legislature that the regents request the medical and other health science schools of the University of California to consider the need for additional emphasis on geriatrics in their curricula. The regents are hereby requested to provide a status report on this need to the Governor and the Legislature by January 1, 1987.

PART 5. ENVIRONMENTAL AND OCCUPATIONAL EPIDEMIOLOGY

CHAPTER 1. OCCUPATIONAL HEALTH AND DISEASE CONTROL

105150. (a) Local health departments, as defined in Section 101185, shall provide services in occupational health to promote the health of employed persons, including educational, consultative, statistical, investigative, and other activities appropriate thereto.

(b) This section shall become operative on July 1, 1994.

CHAPTER 2. OCCUPATIONAL HEALTH AND DISEASE PREVENTION

Article 1. Occupational Health and Disease Prevention Program

105175. (a) The department shall, by no later than January 1, 1987, establish and thereafter maintain a program on occupational health and occupational disease prevention, including, but not limited to, the following:

(1) Investigations into the causes of morbidity and mortality from work-induced diseases.

(2) Development of recommendations for improved control of work-induced diseases.

(3) Maintenance of a thorough knowledge of the effects of industrial chemicals and work practices on the health of California workers.

(4) Provision of technical assistance in matters of occupational disease prevention and control to the Department of Industrial Relations and other governmental and nongovernmental agencies, organizations, and private individuals.

(5) Collection and summarization of statistics describing the causes and prevalence of work-induced diseases in California.

(b) The functions provided for in subdivision (a) are intended to implement within the department a continuing research and development capability and a repository of hazardous substances capability which will reinforce and strengthen the administration of the California Occupational Safety and Health Act of 1973, Part 1 (commencing with Section 6300) of Division 5 of the Labor Code, including the capability to recommend occupational health standards to the California Occupational Safety and Health Standards Board. Whenever the repository identifies data gaps for any chemical regulated by the California Occupational Safety and Health Act of 1973, the department shall notify the Division of Occupational Safety and Health of the Department of Industrial Relations of its finding.

(c) The department shall submit a report to the Legislature by January 1, 1988, reviewing the activities of the program described in each paragraph of subdivision (a).

(d) Upon the request of the department, and in furtherance of the goals of the occupational disease prevention program, employers shall provide to the department the results of monitoring data, both exposure and medical, which has been collected pursuant to Cal-OSHA standards and regulations.

(e) The state department shall have access without delay to any place of employment during regular working hours and at other reasonable times to conduct investigations necessary to carry out the purposes of this article and Article 2 (commencing with Section 105185), including, but not limited to, research, health hazard evaluation, and epidemiological surveillance. In connection with the investigation, the department may question privately any employer, owner, operator, agent, or employee and review and copy records collected pursuant to Cal-OSHA standards and regulations, and other related records.

(f) The repository maintained pursuant to this section and Section 147.2 of the Labor Code shall contain the report issued pursuant to Sections 13124 and 13125 of the Food and Agricultural Code. Whenever a request for toxicity information is received concerning a chemical discussed in that report, the department shall notify the requestor of the nature and extent of any data gaps identified in the report with respect to that chemical. Whenever the repository receives a request about toxicity information on any other chemical, in addition to providing available information about the known toxic effects of exposure to the chemical, the repository shall also notify the requester of a determination by any state agency or federal agency that the chronic health effects testing data on the chemical is inadequate or incomplete. State agencies that maintain information on the toxic effects of chemicals shall provide the repository with access to that information.

105180. In any situation where these activities may duplicate or overlap the activities of another state department or agency such as the Department of Industrial Relations or Division of Industrial Safety, the department shall avoid duplication.

Article 2. Occupational Lead Poisoning Prevention

105185. (a) The department shall establish and maintain an occupational lead poisoning prevention program, including, but not limited to, the following:

(1) Developing a system for monitoring laboratory reports of cases of adult lead toxicity, to create an occupational lead poisoning registry.

(2) Following up reported cases of occupational lead poisoning to ascertain the source of lead exposure.

(3) Conducting investigations in cases where take-home exposure may be occurring, where there is a likelihood of identifying

additional cases, or where a previously unidentified risk factor may be present.

(4) Conducting training of employers, employees, and health professionals regarding prevention of occupational lead poisoning.

(5) Making recommendations for the prevention of lead poisoning.

(b) In any situation where the activities specified in subdivision (a) may duplicate or overlap the activities of any other state department or agency, including the Department of Industrial Relations, the department shall coordinate with the other departments or agency and take actions to avoid program and service duplication.

(c) The department may adopt regulations to implement this section and Sections 105190 and 105195. Any regulations adopted shall be considered and adopted as emergency regulations in accordance with Section 11346.1 of the Government Code.

105190. (a) A fee shall be paid annually to the State Board of Equalization by employers in industries identified by the four-digit Standard Industrial Classification (S.I.C., 1987 Edition) established by the United States Department of Commerce and for which the State Board of Equalization has received information from the department of documented evidence of potential occupational lead poisoning.

(b) The department shall provide to the State Board of Equalization on or before the first day of November of each year, all information for the prior three-year period obtained by the California Blood Lead Registry, regarding evidence of potential occupational lead poisoning by the Standard Industrial Classification. Based on this information, the State Board of Equalization shall determine whether an employer is within Category A of the Standard Industrial Classification or within Category B of the Standard Industrial Classification and shall implement the fee schedule set forth in subdivision (c). For the purpose of this subdivision and subdivision (c), a Category A Standard Industrial Classification code is a Standard Industrial Classification code listed in Section 105195 for which there have been less than 20 persons with elevated blood lead levels reported to the California Blood Lead Registry in the prior three-year period. A Category B Standard Industrial Classification code is a Standard Industrial Classification code listed in Section 105195 for which there have been 20 or more persons with elevated blood lead levels reported to the California Blood Lead Registry in the prior three-year period. An elevated blood lead level is a level greater than or equal to 25 micrograms of lead per deciliter of blood.

(c) For employers with 10 or more employees, but less than 100 employees, in a Category A Standard Industrial Classification code, the annual fee shall be one hundred seventy-five dollars ($175). For

employers with 100 or more employees, but less than 500 employees, in a Category A Standard Industrial Classification code, the annual fee shall be three hundred fifty dollars ($350). For employers with 500 or more employees in a Category A Standard Industrial Classification code, the annual fee shall be eight hundred seventy-five dollars ($875). For employers with 10 or more employees, but less than 100 employees, in a Category B Standard Industrial Classification code, the annual fee shall be two hundred fifty dollars ($250). For employers with 100 or more employees, but less than 500 employees, in a Category B Standard Industrial Classification code, the annual fee shall be seven hundred dollars ($700). For employers with 500 or more employees in a Category B Standard Industrial Classification code, the annual fee shall be two thousand dollars ($2,000). For the purpose of this subdivision, an employer is any person defined in Section 25118 of the Health and Safety Code. Employers with fewer than 10 employees are not subject to any fees pursuant to this section.

(d) The annual fee imposed in subdivision (b) shall be adjusted annually by the State Board of Equalization to reflect increases or decreases in the cost of living during the prior fiscal year as measured by the Consumer Price Index issued by the United States Department of Labor or a successor agency of the federal government. This adjustment of fees shall not be subject to the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(e) In no event shall the annual fee exceed the cost of the program described in Section 105185. The department may exempt from payment of fees those employers who demonstrate that lead is not present in their places of employment. The cost of the program described in Section 105185 shall not exceed the amount of revenue collected from the annual fee.

(f) The fee imposed pursuant to subdivision (b) shall be paid by each employer which is identified in the schedule in accordance with Part 22 (commencing with Section 43001) of Division 2 of the Revenue and Taxation Code and shall be deposited in the Occupational Lead Poisoning Prevention Account of the General Fund, which is hereby created, to be expended for the purposes of the Occupational Lead Poisoning Prevention Program, including the cost of administering the fees by the State Board of Equalization, upon appropriation by the Legislature.

105195. (a) Sections 105185 and 105190 shall apply to the following industries:

(1) 1622 Bridges, tunnels, and elevated highways.
(2) 1721 Painting, paper hanging, and decorating.
(3) 1791 Structural steel erection.
(4) 1795 Wrecking and demolition work.
(5) 2759 Commercial printing.

(6) 2816 Inorganic pigments manufacture.
(7) 2819 Industrial inorganic chemicals.
(8) 2821 Plastics materials and resins.
(9) 2892 Explosives manufacture.
(10) 2899 Chemical preparations.
(11) 3069 Fabricated rubber products.
(12) 3087 Custom compounding of purchased plastics resins.
(13) 3089 Plastic products.
(14) 3229 Pressed and blown glass.
(15) 3231 Products of purchased glass.
(16) 3253 Ceramic walls and floor tiles.
(17) 3262 Vitreous china food utensils.
(18) 3269 Pottery products.
(19) 3313 Electrometalurgical products.
(20) 3331 Primary copper.
(21) 3339 Primary nonferrous metals, except copper and aluminum.
(22) 3341 Secondary nonferrous metals.
(23) 3356 Nonferrous rolling, drawing, extruding.
(24) 3363 Aluminum die castings.
(25) 3364 Nonferrous die castings.
(26) 3365 Aluminum foundries.
(27) 3366 Copper foundries.
(28) 3369 Nonferrous foundries.
(29) 3399 Primary metal products.
(30) 3411 Metal cans manufacture.
(31) 3431 Metal sanitary ware.
(32) 3432 Plumbing fittings and brass goods.
(33) 3441 Fabricated structural metal.
(34) 3484 Small arms.
(35) 3491 Industrial valves.
(36) 3492 Fluid power valves and hose fittings.
(37) 3494 Valves and pipe fittings.
(38) 3496 Miscellaneous fabricated wire products.
(39) 3497 Metal foil and leaf.
(40) 3585 Refrigeration and heating equipment.
(41) 3599 Machinery, except electrical.
(42) 3624 Carbon and graphite products.
(43) 3661 Telephone and telegraph apparatus.
(44) 3662 Radio and television communication equipment.
(45) 3663 Radio and television equipment.
(46) 3669 Communications equipment.
(47) 3674 Semiconductors and related devices.
(48) 3691 Storage batteries.
(49) 3692 Primary batteries, dry and wet.
(50) 3699 Electrical equipment and supplies.
(51) 3711 Motor vehicles and car bodies.

(52) 3714 Motor vehicle parts and accessories.
(53) 3721 Aircraft.
(54) 3953 Marking devices.
(55) 3812 Search and navigation equipment.
(56) 3829 Measuring and controlling devices.
(57) 5064 Electrical appliances, television, and radios.
(58) 5093 Scrap and waste materials.
(59) 7538 General automotive repair shops.
(60) 7539 Automotive repair shops.
(61) 7997 Membership sports and recreation clubs.
(62) 7999 Amusement and recreation.

(b) (1) If the department determines that the potential for occupational lead poisoning exists in industries not covered by this section, based on new evidence, the department shall have the authority to add Standard Industrial Classification codes by regulation. Multiple case reports of occupational lead toxicity shall be a criterion for adding Standard Industrial Classification codes covered by this section for the purpose of fee assessment.

(2) If the department determines that lead use and lead exposure no longer exist in an industry covered by this section, based on new evidence, the department shall delete the Standard Industrial Classification code or individual industries within a Standard Industrial Classification code by regulation. If the department otherwise determines that the potential for occupational lead poisoning no longer exists in an industry covered by this section, based on new evidence, the department shall have the authority to delete Standard Industrial Classification codes or individual industries with a Standard Industrial Classification code by regulation. If the department determines that lead use and lead exposure no longer exist in the operations of an employer in an industry covered by this section, based on evidence submitted by the employer, the department may waive the fee of that employer.

105197. (a) A program is hereby established within the department to meet the requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. Sec. 4851 and following) and Title X of the Housing and Community Development Act of 1992 (P.L. 102-550).

(b) The department shall implement and administer the program. The department shall have powers and authority consistent with the intent of, and shall promulgate regulations to establish the program as an authorized state program pursuant to, Title IV, Section 402 to 404, inclusive, of the Toxic Substances Control Act (15 U.S.C. Sec. 2601 and following).

(c) Regulations regarding accreditation of training providers that are promulgated pursuant to subdivision (b) shall include, but not be limited to, provisions governing accreditation of providers of health and safety training to employees who engage in or supervise

lead-related construction work as defined in Section 6716 of the Labor Code, and certification of employees who have successfully completed that training. Regulations regarding accreditation of training providers shall, as a condition of accreditation, require providers to offer training that meets the requirements of Section 6717 of the Labor Code. The department shall, not later than August 1, 1994, adopt regulations establishing fees for the accreditation of training providers, the certification of individuals, and the licensing of entities engaged in lead-related occupations. The fees imposed under this subdivision shall be established at levels not exceeding an amount sufficient to cover the costs of administering and enforcing the standards and regulations promulgated under this section. The fees established pursuant to this subdivision shall not be imposed on any state or local government or nonprofit training program.

(d) All regulations affecting the training of employees shall be adopted in consultation with the Division of Occupational Safety and Health. The regulations shall include provisions for allocating to the division an appropriate portion of funds to be expended for the program for the division's cost of enforcing compliance with training and certification requirements. The department shall adopt regulations to establish the program on or before August 1, 1994.

(e) The department shall review and amend its training, certification, and accreditation regulations promulgated under this section as is necessary to ensure continued eligibility for federal and state funding of lead-hazard reduction activities in the state.

CHAPTER 3. PESTICIDE POISONING

105200. Any physician and surgeon who knows, or has reasonable cause to believe, that a patient is suffering from pesticide poisoning or any disease or condition caused by a pesticide shall promptly report that fact to the local health officer by telephone within 24 hours and by a copy of the report required pursuant to subdivision (a) of Section 6409 of the Labor Code within seven days, except that the information which is available to the physician and surgeon is all that is required to be reported as long as reasonable efforts are made to obtain the information.

Each local health officer shall immediately notify the county agricultural commissioner and, at his or her discretion, shall immediately notify the Director of Environmental Health Hazard Assessment of each report received and shall report to the Director of Pesticide Regulation, the Director of Environmental Health Hazard Assessment, and the Director of Industrial Relations, on a form prescribed by the Director of Environmental Health Hazard Assessment, each case reported to him or her pursuant to this section within seven days after receipt of the report.

The Office of Environmental Health Hazard Assessment shall designate a phone number or numbers for use by local health officers in the immediate notification of the office of a pesticide poisoning report. The office shall from time to time establish criteria for use by the local health officers in determining whether the circumstances of a pesticide poisoning warrants the immediate notification of the office.

In no case shall the treatment administered for pesticide poisoning or a condition suspected as pesticide poisoning be deemed to be first aid treatment.

Any physician and surgeon who fails to comply with the reporting requirements of this section or any regulations adopted pursuant to this section shall be liable for a civil penalty of two hundred fifty dollars ($250). For the purposes of this section, failure to report a case of pesticide poisoning involving one or more employees in the same incident shall constitute a single violation. The Division of Occupational Safety and Health of the Department of Industrial Relations shall enforce these provisions by issuance of a citation and notice of civil penalty in a manner consistent with Section 6317 of the Labor Code. Any physician and surgeon who receives a citation and notice of civil penalty may appeal to the Occupational Safety and Health Appeals Board in a manner consistent with Section 6319 of the Labor Code.

Each local health officer shall maintain the ability to receive and investigate reports of pesticide poisoning at all times pursuant to Section 12982 of the Food and Agricultural Code.

105205. The Office of Environmental Health Hazard Assessment shall develop and implement, in cooperation with local health officers and state and local medical associations, a program of medical education to alert physicians and other health care professionals to the symptoms, diagnosis, treatment, and reporting of pesticide poisoning.

105210. After consultation with the county agricultural commissioner or the Director of Agriculture, the local health officer may, upon his determination that pesticide poisoning is serious and that an outbreak in pesticide poisoning or any disease or condition caused by pesticide poisoning has occurred in his county, request assistance by the state department. Upon such request, the director shall provide the local health officer with the necessary staff and technical assistance to conduct an epidemiologic investigation of the outbreak, and where appropriate, shall make recommendation to control or prevent such poisoning outbreaks.

105215. Any public employee, as defined in Section 811.4 of the Government Code, whose responsibilities include matters relating to health and safety, protection of the environment, or the use or transportation of any pesticide and who knows, or has reasonable cause to believe, that a pesticide has been spilled or otherwise

accidentally released, shall promptly notify the local health officer or the notification point specified in the local hazardous materials response plan, where such a plan has been approved by the State Office of Emergency Services and is in operation. The operator of the notification point shall immediately notify the local health officer of the pesticide spill report.

The local health officer shall immediately notify the county agricultural commissioner and, at his or her discretion, shall immediately notify the Director of Environmental Health Hazard Assessment of each report received. Within seven days after receipt of any report, the local health officer shall notify the Director of Pesticide Regulation, the Director of Environmental Health Hazard Assessment, and the Director of Industrial Relations, on a form prescribed by the Director of Environmental Health Hazard Assessment, of each case reported to him or her pursuant to this section.

The Office of Environmental Health Hazard Assessment shall designate a phone number or numbers for use by local health officers in the immediate notification of the office of a pesticide spill report. The office of shall from time to time establish criteria for use by the local health officers in determining whether the circumstances of a pesticide spill warrants the immediate notification of the office.

105220. The Director of Environmental Health Hazard Assessment shall maintain a file of all the reporting forms received from local health officers pursuant to Section 105215 at the repository of current data on toxic materials established pursuant to Section 147.2 of the Labor Code. The file shall be open to the public and shall be indexed at least to the extent of the following:

(a) The county of the accidental release.

(b) The type of pesticide involved.

105225. Each public employer of a public employee subject to Section 105215 shall post in one or more prominent places frequented by such employee a notice informing such employee of the responsibility imposed by Section 105215.

CHAPTER 4. RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION

105250. (a) A program is hereby established within the department to meet the requirements of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. Sec. 4851 and following) and Title X of the Housing and Community Development Act of 1992 (P.L. 102-550).

(b) The department shall implement and administer the program. The department shall have powers and authority consistent with the intent of, and shall adopt regulations to establish the program as an authorized state program pursuant to, Title IV, Section

402 to 404, inclusive, of the Toxic Substances Control Act (15 U.S.C. Sec. 2601 and following).

(c) Regulations regarding accreditation of training providers that are promulgated pursuant to subdivision (b) shall include, but not be limited to, provisions governing accreditation of providers of health and safety training to employees who engage in or supervise lead-related construction work as defined in Section 6716 of the Labor Code, certification of employees who have successfully completed that training. Regulations regarding accreditation of training providers shall, as a condition of accreditation, require providers to offer training that meets the requirements of Section 6717 of the Labor Code. The department shall, not later than August 1, 1994, adopt regulations establishing fees for the accreditation of training providers, the certification of individuals, and the licensing of entities engaged in lead-related occupations. The fees imposed under this subdivision shall be established at levels not exceeding an amount sufficient to cover the costs of administering and enforcing the standards and regulations promulgated under this section. The fees established pursuant to this subdivision shall not be imposed on any state or local government or nonprofit training program.

(d) All regulations affecting the training of employees shall be adopted in consultation with the Division of Occupational Safety and Health. The regulations shall include provisions for allocating to the division an appropriate portion of funds to be expended for the program for the division's cost of enforcing compliance with training and certification requirements. The department shall adopt regulations to establish the program on or before August 1, 1994.

(e) The department shall review and amend its training, certification, and accreditation regulations promulgated under this section as is necessary to ensure continued eligibility for federal and state funding of lead-hazard reduction activities in the state.

CHAPTER 5. CHILDHOOD LEAD POISONING PREVENTION

105275. This chapter shall be known, and may be cited as, the Childhood Lead Poisoning Prevention Act of 1991.

105280. For purposes of this chapter, the following definitions apply:

(a) ''Appropriate case management'' means health care referrals, environmental assessments, and educational activities, performed by the appropriate person, professional, or entity, necessary to reduce a child's exposure to lead and the consequences of the exposure, as determined by the United States Centers for Disease Control, or as determined by the department pursuant to Section 105300.

(b) ''Lead poisoning'' means the disease present when the concentration of lead in whole venous blood reaches or exceeds levels constituting a health risk, as specified in the most recent United

States Centers for Disease Control guidelines for lead poisoning as determined by the department, or when the concentration of lead in whole venous blood reaches or exceeds levels constituting a heath risk as determined by the department pursuant to Section 105300.

(c) ''Department'' means the State Department of Health Services.

(d) ''Health assessment'' has the same meaning as prescribed in Section 6800 of Title 17 of the California Code of Regulations.

(e) ''Screen'' means the medical procedure by which the concentration of lead in whole venous blood is measured.

(f) ''Health care'' means the identification, through evaluation and screening, if indicated, of lead poisoning, as well as any followup medical treatment necessary to reduce the elevated blood lead levels.

(g) ''Environmental lead contamination'' means the persistent presence of lead in the environment, in quantifiable amounts, that results in ongoing and chronic exposure to children.

105285. (a) After July 1, 1992, but on or before July 1, 1993, the department shall adopt regulations establishing a standard of care, at least as stringent as the most recent United States Centers for Disease Control screening guidelines, whereby all children shall be evaluated for risk of lead poisoning by health care providers during each child's periodic health assessment. The regulations shall be developed in consultation with medical experts, environmental experts, appropriate professional organizations, and the public, as determined by the department.

(b) The standard of care shall provide that, upon evaluation, those children determined to be ''at risk'' for lead poisoning, according to the regulations adopted pursuant to subdivision (a), shall be screened.

(c) The standard of care shall provide that no child shall be screened pursuant to this article if the parent or guardian of the child refuses to consent to the screening.

(d) The standard of care shall provide that health care providers shall be responsible only for evaluation of all children, for screening of children determined to be at risk, and for medically necessary followup services.

(e) The standard of care established pursuant to this section shall not become operative before April 1, 1993.

105290. On or after April 1, 1993, in those instances in which a child is identified with lead poisoning, the department shall ensure appropriate case management. The department may contract with any public or private entity, including local agencies, to conduct the case management.

105295. The department shall collect and analyze all information necessary to effectively monitor appropriate case management efforts. The department shall prepare a biennial report describing

the effectiveness of appropriate case management efforts. This report shall be made available to local health departments and the general public.

105300. Notwithstanding Section 124130, the department shall have broad regulatory authority to fully implement and effectuate the purposes of this chapter. The authority shall include, but is not limited to, the following:

(a) The development of protocols to be utilized in screening and the procedures for changing those protocols when more accurate or efficient technologies become available.

(b) The designation of laboratories which are qualified to analyze whole blood specimens for concentrations of lead and the monitoring of those laboratories for accuracy.

(c) The development of reporting procedures by laboratories.

(d) Reimbursement for state-sponsored services related to screening and appropriate case management.

(e) Establishment of lower concentrations of lead in whole blood than those specified by the United States Centers for Disease Control for the purpose of determining the existence of lead poisoning.

(f) Establishment of lower acceptable levels of the concentration of lead in whole blood than those specified by the United States Centers for Disease Control for the purpose of determining the need to provide appropriate case management for lead poisoning.

(g) Development of appropriate case management protocols.

(h) Notification to the child's parent or guardian of the results of blood lead testing and environmental assessment.

(i) The establishment of a periodicity schedule for evaluation for childhood lead poisoning.

105305. The program implemented pursuant to this chapter shall be fully supported from the fees collected pursuant to Section 105310. Notwithstanding the scope of activity mandated by this chapter, in no event shall this chapter be interpreted to require services necessitating expenditures in any fiscal year in excess of the fees, and earnings therefrom, collected pursuant to Section 105310. This chapter shall be implemented only to the extent fee revenues pursuant to Section 105310 are available for expenditure for purposes of this chapter.

105310. (a) There is hereby imposed a fee on manufacturers and other persons formerly, presently, or both formerly and presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead, which have significantly contributed historically, currently contribute, or both have significantly contributed historically and contribute currently to environmental lead contamination.

(b) After July 1, 1992, but on or before January 1, 1993, the department shall, by regulation, establish specific fees to be assessed on manufacturers and other parties formerly, presently, or both

formerly and presently engaged in the stream of commerce of lead or products containing lead, or who are otherwise responsible for identifiable sources of lead which, as determined by the department, have significantly contributed historically, currently contribute, or both have significantly contributed historically and contribute currently to environmental lead contamination.

To the maximum extent practicable, the fees shall be assessed on the basis of the following criteria:

(1) A person's past and present responsibility for environmental lead contamination.

(2) A person's ''market share'' responsibility for environmental lead contamination.

This section shall not apply to, and no fee shall be assessed upon, any retailer of lead or products containing lead.

(c) The fee shall be assessed and collected annually by the State Board of Equalization. The first payment of these fees shall be due on or before April 1, 1993. The annual fee assessment in subdivision (a) shall be adjusted by the department to reflect both of the following:

(1) The increase in the annual average of the California Consumers Price Index, as recorded by the California Department of Industrial Relations, for the most recent year available.

(2) The increase or decrease in the number of children in California who are receiving services pursuant to this article.

This adjustment of fees shall not be subject to the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(d) (1) No fee shall be assessed upon a person if that person can demonstrate, as determined by the department, that his or her industry did not contribute in any manner, as described in this section, to environmental lead contamination.

(2) No fee shall be assessed upon a party if that party demonstrates, as determined by the department, that the lead, or the product containing lead, with which it is currently, or was historically, associated does not currently, or did not historically, result in quantifiably persistent environmental lead contamination.

(e) The fee imposed pursuant to this section shall be administered and collected by the board of Equalization in accordance with Part 22 (commencing with Section 43001) of Division 2 of the Revenue and Taxation Code. The fees shall be deposited in the Childhood Lead Poisoning Prevention Fund, which is hereby created in the State Treasury. Moneys in the fund shall be expended for the purposes of this chapter, including the State Board of Equalization's costs of collection and administration of fees, upon appropriation by the Legislature. All interest earned on the moneys which have been deposited into the Childhood Lead Poisoning Prevention Fund shall be retained in that fund.

(f) The fees collected pursuant to this section and the earnings therefrom shall be used solely for the purposes of implementing this chapter. The department shall not collect fees pursuant to this section in excess of the amount reasonably anticipated by the department to fully implement this chapter. The department shall not spend more than it collects from the fees and the earnings in implementing this chapter. In no fiscal year shall the department collect more than sixteen million dollars ($16,000,000) in fees, as adjusted for inflation pursuant to subdivision (b).

(g) It is the intent of the Legislature, in subsequent legislation, to appropriate and deposit into the Childhood Lead Poisoning Prevention Fund the sum of one hundred twenty-eight thousand dollars ($128,000) from the General Fund on July 1, 1992, to the Controller for allocation as loans as follows:

(1) Seventy-eight thousand dollars ($78,000) to the department, for the purposes of adopting regulations to establish the fee schedule authorized by this section. The State Board of Equalization shall repay the amount of this appropriation, on or before June 30, 1993, with interest at the pooled money investment rate, from fees collected pursuant to this section.

(2) Fifty thousand dollars ($50,000) to the State Board of Equalization, for the purposes of implementing this section. The State Board of Equalization shall repay the amount of this appropriation on or before June 30, 1993, with interest at the pooled money investment rate, from fees collected pursuant to this section.

(h) Regulations adopted for fee assessment and collection pursuant to this section shall be exempt from review by the Office of Administrative Law.

CHAPTER 6. SAFER MEDICAL DEVICES

105325. The Legislature hereby finds and declares all of the following:

(a) More than 700,000 California health care workers and professionals, such as nurses, physicians and surgeons and housekeeping staff, daily put their lives at risk of infection from deadly, bloodborne diseases in order to provide health care for all Californians.

(b) Nationally, more than 1,000 health care personnel a year are infected with Hepatitis B, and 250 die of this disease.

(c) Approximately 30 cases of occupational exposure to HIV have been conclusively documented by the federal Centers for Disease Control.

(d) Studies estimate that it is likely that several hundred health care workers nationwide have been infected with HIV on the job.

(e) Some bloodborne diseases, including infection with HIV, can be prevented only through avoiding exposure to the pathogen.

(f) In 1989, the federal Occupational Safety and Health Administration estimated that health care personnel suffer 889,000 exposures to bloodborne diseases annually nationwide and that 790,000 of these exposures results from injuries from sharp instruments, including needle sticks.

(g) During a six-month period, more than 200 exposures of health care personnel to blood and other bodily fluids were documented at a single hospital, the Medical Center at the University of California, San Francisco.

(h) While most health care employers have implemented rigorous, universal infection control procedures, requiring gloving and other protective equipment, exposure to bloodborne diseases continues to be a major risk for health care workers.

(i) As the federal Occupational Safety and Health Administration has noted, gloving and other protective devices cannot prevent puncture injuries from needles and other sharp instruments.

(j) Medical devices, such as needles and intravenous tubing, are reviewed by the federal Food and Drug Administration for patient safety and efficacy but are not reviewed by any state or federal agency for worker safety.

(k) It is estimated that improved product design of medical devices, such as needles, syringes, connectors for intravenous tubes, and vacuum tubes used to draw blood could reduce injuries involving exposure to blood by as much as 85 percent.

105330. It is the intent of the Legislature in enacting this chapter to reduce exposure of health care personnel to deadly, bloodborne diseases by encouraging the development and use of medical devices that are designed to assure worker safety as well as the safety of patients and the efficacy of the device.

105335. (a) The program on occupational health and occupational disease prevention of the department shall do all of the following:

(1) In coordination with the Division of Occupational Safety and Health, review and analyze existing studies, data, and other information on safety-enhanced product design of medical devices that place health care workers at risk of exposure to bloodborne diseases including, but not limited to, syringes and intravenous tubing that have sharp points.

(2) Collect and evaluate information from health facilities that are using medical devices that have been redesigned to enhance worker safety.

(3) To the extent that funding is available, conduct demonstration projects to test the use of safety enhanced medical devices at health facilities that volunteer to participate in these projects.

(4) Report to the Legislature and the Department of Industrial Relations its findings regarding the use of safety-enhanced product design for medical devices. These findings shall include analysis and

recommendations regarding projected cost savings to health facilities, actual improvement in worker safety, and continued patient safety and efficacy.

(b) The duties required by this section shall be performed to the extent that the department obtains funds from private sources and the federal government.

CHAPTER 7. INDOOR ENVIRONMENTAL QUALITY

105400. The Legislature finds and declares that:

(a) The people of the State of California have a primary interest in the quality of the indoor environment in which they live.

(b) As people spend greater portions of time each day indoors, the environmental quality of our buildings becomes increasingly important.

(c) Changes in building design, materials, construction, and operation have resulted in significant changes in indoor environmental quality.

(d) Activities and use of chemical products, appliances, power equipment, wear and tear of structural decorative materials, thermal factors, and mechanical ventilation are degrading the indoor environment, thereby creating mounting dangers to the public health, safety, and welfare.

105405. (a) The department through its Indoor Air Quality Program shall develop nonbinding guidelines for the reduction of exposure to volatile organic compounds (VOC) from construction materials in newly constructed or remodeled office buildings. At a minimum, the department shall consider all of the following:

(1) The type of building to which the guidelines shall apply.

(2) The methodology for identifying indoor sources of VOC.

(3) The bake-out procedures prior to occupancy for newly constructed buildings.

(4) The procedures for VOC reduction during and after major remodeling of occupied buildings.

(5) The need to establish mandatory regulations rather than nonbinding guidelines for the procedures to reduce VOC exposure in newly constructed buildings and during the remodeling of buildings and, in addition, the need for regulation regarding the occupancy of a newly constructed building or a building undergoing remodeling where VOC reduction is to be a consideration.

(6) The need to establish an ad hoc group of building construction material manufacturers, builders, building owners and managers, organized labor, sheetmetal contractors, plumbing contractors, mechanical engineers, architects, and building inspectors to advise the department on procedures and costs related to implementing the proposed guidelines.

(b) The department shall develop and submit the nonbinding guidelines to the Legislature, and file copies with the Department of General Services and the State Building Standards Commission, by January 1, 1992.

(c) The guidelines developed by the department pursuant to this section shall be nonbinding and voluntary, and shall therefore, be exempt from the procedures for adoption of regulations, including the review and approval by the Office of Administrative Law, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of the Government Code.

105410. The Legislature, in view of the findings and declarations specified in Section 105400, declares that the public interest shall be safeguarded by a coordinated, coherent state effort to protect and enhance the indoor environmental quality in residences, public buildings, and offices in the state.

105415. For the purpose of this chapter, ''indoor environmental quality'' means the environment inside a residential dwelling, including a house or apartment, or inside a school, office, public building, or other facility to which the general public has access. The term ''indoor environmental quality'' shall not include industrial working environments.

105420. The department shall coordinate efforts to assess, protect, and enhance indoor environmental quality.

105425. The department shall conduct and promote the coordination of research, investigations, experiments, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, and control of indoor pollution.

105430. (a) If model construction standards and techniques for controlling radon levels within new buildings are developed by the United States Environmental Protection Agency, the State Department of Health Services may adopt the standards and incorporate them into any radon assessment and mitigation plan which may be completed by the department and which becomes operative after January 1, 1990, unless the Department of Housing and Community Development adopts radon mitigation building standards, in which case the State Department of Health Services shall adopt no standards other than the standards adopted by the Department of Housing and Community Development.

Any radon assessment and mitigation plan shall include appropriate measures designed to detect, avoid, or dissipate dangerous levels of radon gas at potential building sites or during construction of new residential buildings in areas affected by radon. Any of those measures shall be appropriately delineated so as to apply only to certain at-risk buildings and geographic areas, and the plan shall specify construction projects, building characteristics, and geographical areas to which the measures apply, to assure ease of compliance and consistency with the findings and assessment of the

United States Environmental Protection Agency regarding radon risks. The plan may include reasonable provisions for testing and detection of radon at potential building sites as well as measures to provide for the appropriate radon-dissipating ventilation and insulation of new residential construction consistent with prevailing techniques.

(b) If regulations are adopted by the department to implement any radon assessment and mitigation plan completed by the department after January 1, 1990, no city, county, or other governmental agency may issue a permit to construct any building subject to state department regulation to any applicant who does not first comply with testing or building standards which may be implemented pursuant to this section.

(c) Any building standards which may be adopted pursuant to this section shall become effective as provided by Section 17958.

(d) In developing regulations pursuant to this section, the state department shall consider the methods and techniques which can provide an adequate level of safety at the lowest cost in order to reduce the impact on housing prices.

(e) Subdivisions (a) to (d), inclusive, shall only become operative if federal funds are available to the department for the purposes specified in this section, as determined by the department.

PART 6. DISASTER PREPAREDNESS (Reserved)

SEC. 6. Division 104 (commencing with Section 106500) is added to the Health and Safety Code, to read:

DIVISION 104. ENVIRONMENTAL HEALTH

PART 1. ENVIRONMENTAL HEALTH PERSONNEL

CHAPTER 1. LEGISLATIVE INTENT (Reserved)

CHAPTER 2. PERSONNEL (Reserved)

CHAPTER 3. ADMINISTRATIVE

106500. (a) The chief and those inspectors of the Food and Drug Section as he or she may designate, are peace officers for the purpose only of carrying out the duties of their employment. The authority of the peace officer shall extend to any place in the state as to any public offense committed, or which there is reasonable cause to believe has been committed, within this state that is a violation of any provision of Division 8.5 (commencing with Section 22950) of the Business and Professions Code, Part 5 (commencing with Section 109875), or the Miscellaneous Food, Food Facility, and Hazardous

Substances Act (Section 27), or Chapter 4 (commencing with Section 41301) of Division 16 of the Food and Agricultural Code. This authority shall further extend to violations of any penal provision of this code, the Business and Professions Code, or the Penal Code, that are discovered in the course of and arise in connection with the employment of these officers.

(b) Any inspector of the Food and Drug Section shall have the authority, as a public officer, to arrest, without a warrant, any person who, in his or her presence, has violated, or as to whom there is probable cause to believe has violated, any provision of Part 5 (commencing with Section 109875) or the Miscellaneous Food, Food Facility, and Hazardous Substances Act (Section 27), or Chapter 4 (commencing with Section 41301) of Division 16 of the Food and Agricultural Code.

In any case in which an arrest authorized by this subdivision is made for an offense declared to be a misdemeanor, and the person arrested does not demand to be taken before a magistrate, the arresting inspector may, instead of taking the person before a magistrate, follow the procedure prescribed by Chapter 5C (commencing with Section 853.5) of Title 3 of Part 2 of the Penal Code. That chapter shall thereafter apply with reference to any proceeding based upon the issuance of a citation pursuant to this authority.

(c) There shall be no civil liability on the part of and no cause of action shall arise against any person, acting pursuant to subdivision (b) and within the scope of his or her authority, for false arrest or false imprisonment arising out of any arrest that is lawful or that the arresting inspector, at the time of the arrest, had reasonable cause to believe was lawful. No inspector shall be deemed an aggressor or lose his or her right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

(d) The chief and inspectors of the Food and Drug Section may serve all processes and notices throughout the state.

CHAPTER 4. PROFESSIONAL CERTIFICATION

Article 1. Registered Environmental Health Specialists

106600. It is the intent of the Legislature in adopting this article to safeguard the health, safety, and general welfare of the public by the registration of those environmental health professionals practicing as environmental health specialists who have completed an approved environmental health or science curriculum and who are qualified to work, or are working, within the scope of the field of environmental health as defined by this article.

In adopting this article, it is recognized that the field of environmental health is a dynamic field that is continually evolving

into new and complex areas of concern. This article recognizes the existence of overlapping functions with other professions carrying out specific activities that may include some aspects of the field of environmental health. The title of a person registered under this article shall be environmental health specialist. Use of the term ''sanitarian'' or ''registered sanitarian'' in statutes and regulations shall mean ''registered environmental health specialists.'' A valid registered sanitarian registration shall on January 1, 1989, be a valid registration as an environmental health specialist. The department shall provide a new certificate of registration to that effect.

106605. This article does not require registration of individuals, such as industrial hygienists, health physicists, safety engineers, civil engineers, land surveyors, other registered professional engineers, or others with overlapping functions. This article does not require registration of individuals performing duties described in subdivision (e) of Section 106615, unless those individuals represent themselves as registered environmental health specialists. It is not the intent of this article to require local health departments to employ only registered environmental health specialists, environmental health specialist trainees, or those qualified for registration in jobs involving those overlapping functions. It is the sole purpose of this article to safeguard the health, safety, and general welfare of the public from adverse environmental factors, to register those environmental health professionals practicing as environmental health specialists who have completed an approved environmental health or science curriculum, and are qualified to work, or are working, in the public or private sector in the field of environmental health within the scope of practice as defined in this article, and to protect the public from individuals performing as environmental health specialists without proper qualifications.

106610. The department may, upon recommendation of the Environmental Health Specialist Registration Committee appointed pursuant to Section 106675, adopt any regulations necessary to accomplish the purposes of this article.

106615. The words and phrases defined in this section shall have the following meaning, unless the context clearly indicates otherwise:

(a) ''Department'' means the State Department of Health Services.

(b) ''Committee'' means the Environmental Health Specialist Registration Committee.

(c) ''Registered environmental health specialist'' means an environmental health professional educated and trained within the field of environmental health who is registered in accordance with the provisions of this article. A registered environmental health specialist registered under this article also meets the requirements for registration as an environmental assessor pursuant to Section 25570.

(d) ‘‘Environmental health specialist trainee’’ means a person who possesses (1) a minimum of a bachelor’s degree, including 30 semester units of basic sciences, from a department approved educational institution or an educational institution of collegiate grade listed in the directory of accredited institutions of postsecondary education compiled by the American Council on Education, but who has not completed the specific coursework and experience requirements in the field of environmental health as required by Section 106660 for registration, and (2) who is engaged in an approved environmental health training plan.

(e) ‘‘Scope of practice in environmental health’’ means the practice of environmental health by registered environmental health specialists in the public and private sector within the meaning of this article and includes, but is not limited to, organization, management, education, enforcement, consultation, and emergency response for the purpose of prevention of environmental health hazards and the promotion and protection of the public health and the environment in the following areas: food protection; housing; institutional environmental health; land use; community noise control; recreational swimming areas and waters; electromagnetic radiation control; solid, liquid, and hazardous materials management; underground storage tank control; onsite septic systems; vector control; drinking water quality; water sanitation; emergency preparedness; and milk and dairy sanitation pursuant to Section 33113 of the Food and Agricultural Code. Activities of registered environmental health specialists shall be regulated by the department upon the recommendation of the committee.

(f) ‘‘Certificate of registration’’ means a signed document issued by the department as evidence of registration and qualification to practice as a registered environmental health specialist under this article. The certificate shall bear the designation ‘‘registered environmental health specialist’’ and shall show the name of the person, date of issue, registration number, and seal.

(g) ‘‘Experience requirement’’ means on-the-job training and experience, as stated in this article, that all environmental health specialist trainees shall complete prior to obtaining eligibility for the environmental health specialist examination.

(h) ‘‘Approved environmental health training plan’’ means a training program in an organization that plans to utilize environmental health specialist trainees and has on file with the department a copy of its training plan that conforms with the requirements of Section 106665, and that has been approved by the committee.

(i) ‘‘Director’’ means the director.

106620. Except for the design of onsite septic systems, nothing in this article shall authorize registered environmental health

specialists to design any of the fixed works defined in Section 6731 of the Business and Professions Code.

106625. The governing body of a local health department may employ on a full-time basis one or more registered environmental health specialists, each of whom shall be a registered environmental health specialist as provided for in this article for the purpose of the enforcement of statutes related to public health, and the regulations of the department, and any local ordinances of a local health department that relate to activities under subdivision (e) of Section 106615. However, any person who is known as an environmental health specialist trainee may be employed to work under the supervision of a registered environmental health specialist, until he or she is qualified by examination as provided under Section 106670, for a period which shall not exceed three years. Prior to employment, the trainee shall have a current evaluation letter from the department stating that the education qualifications specified in Section 106660 have been met.

106630. Any person may make an application to the department to be registered as an environmental health specialist. The department shall accept complete applications if accompanied by the required fees.

(a) Application submission, completion and notification.

(1) Receipt of an application for a certificate of registration as an environmental health specialist shall be deemed to be the date the application is date stamped by the department.

(2) An application for a certificate of registration as an environmental health specialist is considered complete when a completed application form supplied by the department, proof of successful passage of the registered environmental health specialist examination, as specified in Section 106670, and the initial biennial registration fee are received by the department.

(3) Written notification by the department to applicants shall be deemed to occur on the date the notifications are postmarked.

(b) Application review period.

The department shall notify the applicant in writing within 15 working days of receipt of an application for a certificate of registration as an environmental health specialist that the application is completed and accepted for filing, or that the application is deficient and what specific information, documentation, or fee, is required to complete the application.

(c) Application decision period.

The department, within three calendar days of filing of a completed application, shall reach a decision regarding the application for a certificate of registration as an environmental health specialist.

(d) The department shall issue certificates of registration to qualified applicants.

(e) Duplicate certificate/card of registration shall be issued to individuals who hold valid registration as an environmental health specialist upon payment of ten dollars ($10) for a duplicate certificate and five dollars ($5) for a duplicate registration card.

106635. The requirements for registration of environmental health specialists shall be a minimum of a bachelor's degree from a department approved educational institution or an educational institution of collegiate grade listed in the directory of accredited institutions of postsecondary education compiled by the American Council on Education, with coursework prescribed as follows:

	Basic Requirements	Experience	Training
I.	30 semester or 45 quarter basic science units including each of the following: General Chemistry Lecture and Laboratory General Physics Lecture and Laboratory or Organic Chemistry Lecture and Laboratory General Microbiology Lecture and Laboratory General Biological Science Lecture and Laboratory Calculus or College Algebra	18 months	600 hrs.
II.	45 semester or 68 quarter basic science units including the following: Three of the required science courses shall include a laboratory: General Chemistry Organic Chemistry General Physics General Microbiology General Biological Science Calculus or College Algebra	one year	450 hrs.
III.	30 semester or 45 quarter basic science units including each of the following: General Chemistry Lecture and Laboratory General Physics Lecture and Laboratory or Organic Chemistry Lecture and Laboratory General Microbiology Lecture and Laboratory General Biological Science Lecture and Laboratory	9 months	300 hrs.

	Calculus or College Algebra plus Three semester or four quarter unit courses in each of the following: Epidemiology Statistics Public Administration or Environmental Health Administration and; 10 semester or 15 quarter units in environmental health science, including one or more of the following: water quality, waste management, food and consumer protection, housing and institution sanitation, vector control, recreational health, air quality, milk and dairy products, occupational health, electromagnetic radiation, noise control, toxicology, soil science, or land use development.		
IV.	45 semester or 68 quarter basic science units including the following: Three of the following required science courses shall include a laboratory: General Chemistry Organic Chemistry General Physics General Microbiology General Biological Science Calculus or College Algebra plus Three semester or four quarter unit courses in each of the following: Epidemiology Statistics Public Administration or Environmental Health Administration and; 10 semester or 15 quarter units in Environmental Health Science, including one or more of the following:	6 months	200 hrs.

	water quality, waste management, food and consumer protection, housing and institution sanitation, vector control, recreational health, air quality, milk and dairy products, occupational health, electromagnetic radiation, noise control, toxicology, soil science, or land use development.		
V.	Possess a minimum of a bachelor's degree in environmental health from an institution approved by the committee, which includes: One year of lecture and laboratory coursework in each of the following: General Chemistry General Physics General Biological Science, and One semester course in: Calculus or College Algebra Organic Chemistry General Microbiology with Laboratory Public Administration or Environmental Health Administration Epidemiology Statistics Field Orientation Course in Environmental Health Fifteen semester units of environmental health science courses selected from: water quality, waste management, food and consumer protection, housing and institution sanitation, vector control, recreational health, air quality, milk and dairy products, occupational health, electromagnetic radiation, noise control, toxicology, soil science, or land use development.	None required	None required

All basic science coursework including mathematics shall be equal to that acceptable in an approved environmental health degree program.

106640. Educational institutions requesting approval of their environmental health degree program shall first submit their program to the committee for review. If the program meets the prescribed curricula in Section 106635 it shall be submitted to the department for approval.

106645. Those persons who meet the educational, experience, and training requirements of Section 106635 shall be eligible for admission to the examination for registration as an environmental health specialist.

106650. Any person who has applied for environmental health specialist registration, or who is enrolled in an approved environmental health science curriculum, or who is certified by his or her employer as serving as an environmental health specialist trainee in an approved environmental health program on or before December 31, 1988, shall be admitted to the written examination on the basis of the requirements existing on December 31, 1988.

106655. A person who possesses a minimum of a bachelor's degree from a department-approved educational institution or an educational institution of collegiate grade listed in the directory of accredited institutions of postsecondary education compiled by the American Council on Education and has been employed as a certified dairy inspector in the State of California for at least 24 months immediately prior to applying for admission to the environmental health specialist registration examination, shall be eligible for admission to the examination for registration as an environmental health specialist.

106660. Any person meeting the educational qualifications pursuant to Section 106635, but who does not meet the experience requirement of that section, may make application to the department on a form prescribed by the department for acceptance as an environmental health specialist trainee. The department shall accept complete applications if accompanied by the required fees.

106665. An approved environmental health training plan shall include program elements in the training, duration of training, and types of training.

(a) Program elements, duration of training, and experience are as follows:

(1) All environmental health specialist trainees, shall complete a basic training period in an approved program. The training period shall include training in at least six elements, with three of the elements selected from the following basic elements:

(A) Food protection.

(B) Solid or liquid waste management, or both.

(C) Water supply.

(D) Housing and institutions.

(E) Bathing places.

(F) Vector control.

(G) Hazardous materials management or underground tank program, or both.

The remaining three elements may include any other basic element or any of the following elements: air sanitation, safety and accident prevention, land development and use, disaster sanitation,

electromagnetic radiation, milk and dairy products, noise control, occupational health, and rabies and animal disease control.

(2) Training in each of three basic elements shall be not less than 20 percent of the total required training hours. Time spent in the remaining three elements shall be not less than 40 percent of the total required training hours. The employer shall designate the methods, elements, and types of training or experience for the remaining part of the time required for entrance to the registered environmental health specialist examination as specified in Section 106670. The specified training may be cumulative and scheduled at the discretion of the employing agency over this period.

(3) The training may be accomplished by assignments chosen by the employing agency and under the supervision of a registered environmental health specialist.

(4) For those environmental health specialist trainees requiring more than one year of experience, the additional experience will be in one or more elements of environmental health listed in this section and may be outside of a local environmental health program.

(5) Training and experience gained working for governmental or a nonprofit entity, or both, may be counted toward the first-year training experience requirement if the training and experience is determined by the department to be equivalent to what would be gained in a local environmental health jurisdiction.

(b) Types of training:

The training program shall be integrated into the environmental health specialist trainee's job assignment and shall include items (1) and (2) and may include items (3), (4), and (5):

(1) A minimum of 20 hours per month of field instruction with direct supervision by a registered environmental health specialist for the first six months of employment. (The total minimum requirement in this area shall be 150 hours.)

(2) Independent time with adequate supervision and guidance.

(3) Office training with pretesting and posttesting.

(4) Lectures.

(5) Adequate office time to review and study.

(c) Requirements for certification of training:

(1) Environmental health specialist trainees shall receive their training from the department or agency that has a training plan approved by the committee.

(2) A daily log for the certification of the environmental health specialist trainee shall be maintained by the Director of Environmental Health.

(A) A daily log covering elements and hours spent of all training shall be kept by the environmental health specialist trainees, and verified by the trainer or supervisor on a weekly basis.

(B) Short narrative reports or copies of the monthly schedule of the environmental health specialist trainee's training and progress

shall be submitted by the training coordinator to the director every month throughout the traineeship.

(C) The Director of Environmental Health shall review the trainee's records on a monthly basis and shall certify on a quarterly basis that the records of training are accurate.

(D) The Director of Environmental Health shall notify the department within 30 days of the date an environmental health specialist trainee is hired or terminated.

(E) Copies of the environmental health specialist trainee's log, as well as the narrative reports or copies of monthly schedules shall be retained in the personnel file of the environmental health specialist trainee for at least one year after the environmental health specialist trainee successfully completes the registered environmental health specialist examination.

(3) When an environmental health specialist trainee completes the training program, the Director of Environmental Health shall forward certification to the department. This certification shall include the program areas, length of time, dates for the areas of training and a statement that the environmental health specialist trainee followed the approved training plan.

(d) Those jurisdictions that cannot provide the required training elements within their jurisdictions shall initiate a program of training exchange with another jurisdiction having an approved training program.

106670. (a) On and after January 1, 1989, only persons who meet the educational and experience requirements as established under Section 106635 shall be eligible for admission to examination for registration as an environmental health specialist.

(b) The professional examination shall be prescribed by the department with the concurrence of the committee, and a passing score on the examination shall be required prior to registration.

(c) An applicant who twice fails to pass the written examination shall not be eligible to be reexamined a third time until at least one year has elapsed from the date of the second examination. An applicant who fails the third examination shall not be eligible to take the examination a fourth time until two years have elapsed from the date of the third examination. Thereafter, the examination may not be taken more frequently than once in two years. Reapplication shall be made by submitting a new application with the required fee.

106675. (a) An Environmental Health Specialist Registration Committee shall be appointed to advise and to make recommendations to the department with respect to, and to take other actions as described in this article for the establishment of rules and regulations necessary to ensure, the proper administration and enforcement of the registration of environmental health specialists whose duties in public health and environmental health require knowledge and skills in the physical, biological, and environmental

health sciences and whose performance of professional duties is necessary for the promotion of life, health, and well being of the public.

The members of the former Sanitarian Registration Certification Committee shall serve as members of the new committee until the expiration of their terms.

(b) The committee shall consist of the Chief of the Environmental Planning and Local Health Services Branch, department, or the designee of the chief, who shall serve as executive officer but who shall not vote, and the following 10 members who are residents of the state:

(1) Two members appointed by the director from the California Conference of Directors of Environmental Health who shall be environmental health specialists with at least two years' experience as directors of environmental health in this state.

(2) Three members appointed by the director, each of whom shall be a qualified, practicing environmental health specialist registered in California for a period of five or more years. For purposes of this subdivision:

(A) One member shall be employed in the public sector at the time of appointment.

(B) One member shall be employed in the private sector at the time of appointment.

(C) One member shall be from the California Environmental Health Association.

(3) One member appointed by the director from the California Conference of Local Health Officers.

(4) Two members appointed by the director from the environmental health faculty of those California universities and colleges with approved curricula leading to a degree in environmental health.

(5) Two public members who have not been engaged at any time within five years immediately preceding their appointment in pursuits that lie within the field of environmental health or the profession regulated by the committee of which they are members. The Senate Rules Committee shall appoint one public member and the Speaker of the Assembly shall appoint one public member.

106680. The terms of the members of the committee first appointed shall be determined by lot and shall expire as follows: two members on January 1, 1985; two members on January 1, 1986; three members on January 1, 1987; and three members on January 1, 1988. Thereafter, appointments shall be for a four-year term. Committee members may serve no more than two successive terms. Each member shall serve on the committee until the appointment and qualification of his or her successor or until one year shall have elapsed since the expiration of the term for which he or she was appointed, whichever occurs first. Vacancies occurring prior to the

expiration of the terms shall be filled by appointment for the unexpired term. The director, upon the recommendation of the committee by a two-thirds vote, may remove an appointee member for misconduct in office, incompetency, neglect of duty, or other sufficient cause after due notice and hearing.

106685. (a) The members of the committee shall, annually, in the month of April, elect from their number a chairperson and a secretary.

(b) The committee shall meet at least twice annually and at other times as it may determine to evaluate applications for registration as environmental health specialists, to review and update examinations, to prepare and recommend reports relative to the administration of this article, and to transact all other business as may be necessary to carry out the provisions of this article.

(c) The committee may hold informal hearings for denial, suspension, refusal to renew, and revocation of registrations for environmental health specialists as provided in Section 106715.

(d) The committee may hold informal hearings for the purpose of administrative items, make the necessary determinations in conjunction therewith, and issue recommendations to the department consistent with the findings. The department may designate the committee to appoint one or more of its members to serve as a hearing agent. The agent or representatives shall conduct hearings in the manner provided by law.

(e) Six members of the committee shall constitute a quorum and special meetings of the committee shall be called by the executive officer upon written request by two members of the committee.

(f) The members of the committee shall serve without compensation, but shall receive their actual and necessary expenses incurred in the performance of their duties on the committee. However, no funds shall be disbursed for those purposes without the prior approval of the department.

106690. (a) The committee shall keep a record of its proceedings.

(b) The department shall maintain a register of all applications for registration and retain examination papers and records pertaining thereto for a length of time to be determined by the department.

(c) The department shall maintain a current registry of all registered environmental health specialists and all environmental health specialist trainees in the state.

(d) Individuals registered under of this article are responsible for assuring that the department has a current mailing address for them.

106695. A registered environmental health specialist may maintain registration under a retired biennial registration provided the following requirements are met:

(a) Has been a working registered environmental health specialist in California for at least 10 years in an area covered in subdivision (e)

of Section 106615, unless receiving an on-the-job disability before the 10 years of service as a registered environmental health specialist has elapsed.

(b) Is at least 50 years old or collecting retirement benefits, or both.

(c) Not working in a job requiring registration as an environmental health specialist. A person who pays a retired biennial fee shall be registered only as an inactive retired registered environmental health specialist.

106700. (a) A nonreturnable fee, shall be paid by a person for each application for registration, application for examination, and biennial renewal.

(b) Fees shall not exceed the actual administrative costs of the program. Fees, except retired and penalty fees, shall be subject to Section 100425. The actual dollar figure charged shall be rounded to the nearest whole dollar amount. The biennial renewal fee-retired shall be twenty-five dollars ($25).

(c) The nonreturnable biennial renewal fee, shall be paid by each registered environmental health specialist on or before the first day of January of every second year, or on any other date that is determined by the department. Each registered environmental health specialist registered pursuant to this article, shall first pay the biennial fee at the time of initial registration to cover the calendar year in which registration is acquired and the following calendar year. Registrations not maintained as required by this subdivision are suspended and remain invalid during the period of suspension. Suspended registrations become revoked three years after the date of suspension. Notwithstanding the provisions of the Government Code, the executive officer shall revoke suspended registrations after three years from the date of suspension for nonpayment of fees.

(d) An additional penalty fee equal to 50 percent of the biennial renewal fee for each year of delinquency or portion thereof shall be paid by each person who fails to pay the fee required by subdivision (c) within 30 days of the established due date. All accumulated penalty fees shall be paid prior to any revalidation of registration.

(e) The department shall receive and account for all money received pursuant to this article and shall deposit it with the Treasurer who shall keep the money in a separate fund to be known as the ‘‘Registered Environmental Health Specialist Fund,’’ that fund is hereby created.

(f) Notwithstanding Section 13340 of the Government Code, funds collected pursuant to the provisions of this article are continuously appropriated without regard to fiscal year to pay expenses of the department to administer the provisions of this article.

(g) The following fees are hereby established and shall be annually adjusted as required by subdivision (b):

(1) Application fee — sixty-nine dollars ($69).
(2) Examination fee — sixty dollars ($60).
(3) Biennial renewal fee — active eighty-seven dollars ($87).

106705. The department upon recommendation of the committee, may, by regulation, establish the requirement and standards for continuing education for registered environmental health specialists. The standards shall be established in a manner to assure that a variety of forms of continuing education are available to registered environmental health specialists.

106710. A valid registration as an environmental health specialist under this article shall only be issued to a person who has:

(a) Met the applicable education and experience requirements.
(b) Successfully passed the examination for registration.
(c) Submitted a complete application in accordance with Section 106630.
(d) Paid the fees required in Section 106700.
(e) Not committed acts specified in subdivision (a) of Section 106715.

106715. (a) Notwithstanding any other provisions of this article, the department upon the recommendation of the committee may suspend, deny, refuse to renew, or revoke a registration certificate issued under the provisions of this article after sufficient notice and an opportunity for a hearing and upon findings that the registered environmental health specialist has:

(1) Knowingly made a false statement of fact required to be revealed in the application for registration.
(2) Been convicted of a crime, if the crime is related to the qualifications, functions, and duties of an environmental health specialist.
(3) Knowingly made a false statement of fact required to be revealed in an application for, or renewal of, registration.
(4) Committed an act of deceit, misrepresentation, violation of contract, fraud, negligence, professional incompetence, or unethical practice.

(b) The procedure to deny, suspend, refuse to renew, or revoke an environmental health specialist registration certificate pursuant to this section shall be as follows:

(1) All cases, complaints, or allegations charging a violation of this subdivision shall be made in writing and submitted to the department.
(2) The department shall make a preliminary investigation by:
(A) Obtaining copies of all pertinent written documents (laws, reports, contacts, and correspondence).
(B) Interviewing, in person or by telephone, of all individuals involved with the issue.
(3) The department shall compile the information into a confidential case document that includes:

(A) A description of the complaint.
(B) A chronology of events.
(C) Results of the interviews.
(D) Copies of the written documents.

(4) The case document shall be submitted to each member of the committee requesting their recommendation whether or not the information warrants further investigation and an informal hearing.

(5) The department shall review committee recommendations and the preliminary investigation findings and then decide whether to dismiss the complaint or proceed to an informal committee hearing. Dismissal of the charges shall be followed by a letter to both complainant and the registered environmental health specialist involved explaining the department's action.

(6) If the decision is made to proceed with an informal hearing, the department shall request the committee to appoint one or more hearing officers to hear the case.

(A) All parties shall be notified of the time and place of the hearing.

(B) An investigation of the issue may be made by an independent professional investigator if it is felt warranted by the department and the committee. The investigation results shall be submitted to the department, committee hearing officers, complainant, and respondent prior to the hearing.

(C) The informal hearing shall permit the right to be heard (with an attorney, if desired) and the proceedings recorded.

(D) Upon the finding that a violation of this section occurred, the following disciplinary ranges may be recommended to the department by committee:

(i) Knowingly made a false statement of fact required to be revealed in the application for registration.

(I) Maximum: Revocation.

(II) Minimum: Fifteen-day suspension. Range depends on whether or not the registration was falsely approved.

(ii) Been convicted of a crime, if the crime is related to the qualifications, functions, and duties of a registered environmental health specialist.

(I) Maximum: Deny, refuse to renew, or revocation of registration.

(II) Minimum: Ninety days actual suspension.

(iii) Knowingly made a false statement of fact required to be revealed in an application for, or renewal of registration.

(I) Maximum: Revocation.

(II) Minimum: Seven day actual suspension.

(iv) Committed an act of deceit, misrepresentation, violation of contract, fraud, negligence, professional incompetence, or unethical practice.

(I) Maximum: Revocation.

(II) Minimum: Ninety days suspension stayed for three years on the following conditions of probation.

—Forty-five days actual suspension.

—The respondent shall obey all laws and regulations related to the practice of environmental health.

(c) Department action to implement denial, suspension, refusal to renew, or revocation of registration under this chapter shall be in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted by that chapter. In the event of conflict between that chapter and this article, Chapter 5 shall prevail.

106720. The department and the committee may use the following criteria to evaluate the potential for rehabilitation or actual rehabilitation of a person prior to denying, suspending, or revoking registration.

(a) The nature and severity of the act, crime, or violation under consideration as grounds for denial, suspension, or revocation.

(b) The time that has elapsed since commission of the act, crime, or violation.

(c) The extent to which the applicant has complied with any terms of parole, probation, restitution, or other sanctions imposed upon the applicant.

(d) Evidence of rehabilitation or lack of rehabilitation of the applicant.

106725. The department shall, upon application therefor and upon payment of the current application and biennial renewal fees, as determined by the department upon the recommendation of the committee by a two-thirds vote, not to exceed one hundred dollars ($100), issue a certificate of registration as an environmental health specialist to any person who holds a certificate of registration as a sanitarian or an environmental health specialist issued by the proper authority of any state or territory, or possession of the United States, if the requirements for the registration of sanitarians or environmental health specialists under which the certificate was issued are consistent with the provisions of this article and at the time the certificate was granted were at least as stringent as those specified in Section 106635.

106730. This article does not affect or replace any other requirements or qualifications imposed pursuant to state or federal law on persons involved in activities under subdivision (e) of Section 106615.

106735. Only a person who has qualified as a registered environmental health specialist and who holds a valid registration certificate issued in conformance with Section 106710 for use in this state shall have the right and privilege of using the title ‘‘registered environmental health specialist’’ and to use the abbreviation

‘‘R.E.H.S.’’ after the person’s name. Only a person who has qualified as a registered environmental health specialist trainee and has a letter of acceptance issued by the department shall have the right and privilege of using the title ‘‘registered environmental health specialist trainee.’’

Except as permitted in Section 106600 any use of the words ‘‘registered sanitarian’’ or other use of the words ‘‘registered environmental health specialist’’ to denote a working title is prohibited.

A person who violates any provision of this section is guilty of a misdemeanor and may be fined a sum not to exceed one thousand dollars ($1,000) or imprisoned for not more than 180 days, or both.

Article 2. Radon Specialists and Laboratories

106750. This article establishes requirements for the certification of radon measurement laboratories, radon testing and consulting specialists, and radon mitigation contractors.

106755. ‘‘Radon measurement laboratory’’ means a commercial laboratory that analyzes radon detectors or tests for radon or radon decay products. A radon measurement laboratory shall meet the provisions for certification of this article.

106760. ‘‘Radon testing and consulting specialist’’ means an individual person who performs radon or radon progeny measurements in buildings; who provides professional or expert advice on radon and radon progeny measurements, radon entry routes, and other radon related activities; and who is knowledgeable in the health risk associated from exposure to radon. A radon testing and consulting specialist shall meet the provisions for certification of this article.

106765. ‘‘Radon mitigation contractor’’ means an individual person, corporation, company, or other association that repairs or alters a building or design for the purpose, in whole or in part, of reducing the concentration of radon in the indoor atmosphere. A radon mitigation contractor or the operating supervisor of the radon mitigation contractor shall meet the provisions for certification of this article.

106770. ‘‘Department’’ means the State Department of Health Services.

106775. Except as provided in Section 106850, no person may test for, analyze, or mitigate against, the presence of radon in any building or on any building lot, design a radon mitigation system, purvey radon testing equipment or radon mitigation equipment to the general public, or represent or advertise that he or she may so test, mitigate, or purvey, unless that person has first applied for and obtained certification for the activity from the department pursuant

to this article, that certification has not expired or been revoked or suspended.

106780. A certification issued under this article is valid for not more than two years and shall expire on December 31 of the second calendar year after it is issued. The certification shall be issued in the form and manner determined by the department.

106785. An application for renewal of a radon certificate shall be filed not later than 90 days before the expiration of an existing certification.

106790. The application for certification, or renewal of certification, shall be submitted in writing on forms provided by the department.

106795. The application shall be accompanied with the following:

(a) A nonrefundable application fee in the amount provided in Section 106805.

(b) Written evidence that the applicant has the minimum qualifications as required by Sections 106815 to 106855, inclusive, to perform the activity for which certification is sought.

106800. Applications for more than one type of certification may be combined and submitted as one application, if all of the requirements for each type of certification provided in this article are met.

106805. The application fees for certification are nonrefundable and shall be in the following amounts:

(a) Radon Measurement Laboratory	$300
(b) Radon Testing and Consulting Specialist	$100
(c) Radon Mitigation Contractor	$200

These fees shall be deposited into the Radon Contractor Certification Fund, that is hereby created. The moneys in this fund are available, upon appropriation by the Legislature, to the department for the purposes of this article.

106810. The state may enter into a reciprocal agreement with any other state under which each state recognizes the other's radon certification program, if that other reciprocal state's program meets this state's basic requirements. Each reciprocal agreement shall be published in the quarterly bulletin published pursuant to Section 106840.

106815. An applicant for certification under this article shall meet the minimum qualifications in Sections 106815 to 106855, inclusive.

106820. A person shall not be certified or recertified as a radon testing and consulting specialist unless the applicant meets all of the following qualifications:

(a) The applicant submits written evidence of successful completion of a minimum of 16 hours of a classroom course of study

in radon measurement meeting the standards adopted by the department. The department shall adopt the guidelines for the classroom training course of the National Radon Measurement Proficiency Program of the federal Environmental Protection Agency as the standards for the classroom course of study pursuant to Section 106855.

(b) The applicant provides a quality assurance and quality control program meeting the standards adopted by the department. The department shall adopt the guidelines for the quality assurance and quality control program provided in the National Radon Measurement Proficiency Program of the federal Environmental Protection Agency as the standards for the quality assurance and quality control program pursuant to Section 106855.

(c) For renewal of certification, the applicant submits written evidence of successful participation in each radon proficiency program applicable to radon testing and consulting specialists offered by the federal Environmental Protection Agency since the date of the prior application for certification, or shows good cause for not participating in each of those programs in which the applicant did not participate.

106825. (a) A laboratory shall not be certified or recertified as a radon measurement laboratory unless the laboratory complies with the applicable requirements in Sections 106775 to 106805, inclusive.

(b) A radon measurement laboratory certification authorizes the laboratory to perform radon analysis utilizing only those types of devices for which it is certified.

(c) A laboratory shall not be certified or recertified as a radon measurement laboratory unless the applicant meets all of the following qualifications:

(1) The applicant submits written evidence of successful completion by an operating supervisor of the laboratory of a classroom course of study in radon measurement meeting the standards adopted by the department. The department shall adopt the guidelines for the classroom training course of the National Radon Measurement Proficiency Program of the federal Environmental Protection Agency as the standards for the classroom course of study pursuant to Section 106855.

(2) The laboratory provides (a) quality assurance and quality control program meeting the standards adopted by the department. The department shall adopt the guidelines for the quality assurance and quality control program provided in the National Radon Measurement Proficiency Program of the federal Environmental Protection Agency as the standards for the quality assurance and quality control program pursuant to Section 106855.

(3) For renewal of certification, the applicant submits written evidence of successful participation by the operating supervisor of the laboratory in each radon proficiency program applicable to

radiation measurement laboratories offered by the federal Environmental Protection Agency since the date of the prior application for certification, or shows good cause for not participating in each of those programs in which the applicant's operating supervisor did not participate.

106830. (a) A contractor shall not be certified as a radon mitigation contractor unless the applicant complies with the applicable requirements in Sections 106775 to 106805, inclusive.

(b) A contractor shall not be certified or recertified as a radon mitigation contractor unless the applicant meets all of the following qualifications:

(1) The applicant submits written evidence of successful completion of a radon contractors proficiency program meeting the standards adopted by the department. The department shall adopt the guidelines for the National Radon Contractors Proficiency Program of the federal Environmental Protection Agency as the standards for the radon contractors proficiency program pursuant to Section 106855.

(2) For renewal of certification, the applicant submits written evidence of successful participation in each radon proficiency program applicable to radon contractors offered by the federal Environmental Protection Agency offered since the date of prior application, or shows good cause for not participating in each of those programs in which the applicant's operating supervisor did not participate.

106835. An employee of the State of California or any employee of an agency of the United States working in the radon program, and who meets the experience and educational requirement for certification in any of the categories set forth in this article, shall be certified in that category. A certification under this section is valid only for purposes of that person's employment and shall not authorize the employee to perform any private consulting within the State of California.

106840. The department shall, on or before March 1, 1992, and quarterly thereafter publish, and work with associations representing certified radon testers and mitigators to widely disseminate, a list of persons and entities certified under this article, and, to the extent the information is available, the list of persons and entities of reciprocal states that are known to operate in this state.

106845. This article does not apply to a person in any of the following circumstances:

(a) The person is testing for, or mitigating radon in a building that the person owns or occupies.

(b) The person is designing or constructing mitigation measures to prevent against radon infiltration or accumulation in new construction.

(c) The person is performing scientific research regarding testing or mitigation of radon, but only if the person informs the owner and the occupant of the building of all of the following:

(1) That the person is not certified by the department to test for, or to mitigate against, radon.

(2) Any test results are neither certified or valid for legal purposes.

(3) Any mitigation methods suggested or used are experimental.

(d) The person or entity is purveying radon equipment that is approved by the department for sale to the general public that is manufactured or designed by a person or entity that is certified under this article, or the person or entity is purveying radon equipment to a person or entity that is certified under this article.

106850. A person or entity that is certified in another state, that has a reciprocal agreement with this state pursuant to Section 106810, may conduct those activities in this state for which the person or entity is certified in that other state.

106855. (a) The federal guidelines prescribed in this article shall become state standards unless the department finds the federal guidelines do not promote the intent and purposes of this article. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and except as provided in subdivision (b), a federal guideline that becomes a state standard pursuant to this article shall take effect in this state 30 days after it becomes effective as a federal guideline.

(b) Any person who will be adversely affected by adoption of the federal guideline in this state may, within the 30 days prior to its becoming effective as a standard in this state, file with the department, in writing, objections and a request for a hearing. The timely filing of substantial objections to the adoption of a federal guideline that has become effective as a state standard, stays the adoption of the federal guideline as a state standard in this state until the department conducts a hearing and decides the issue.

106860. The department may revoke or suspend a certification for any of the following reasons:

(a) Any misstatement in the application or in any supplementary statement.

(b) Any condition revealed by the application, supplementary statement, report, record, or other evidence, that would warrant the department's refusal to grant a registration on an original application.

(c) A violation of any law relating to, or failure to observe any of the applicable terms or provisions of, registration, or any other applicable rule, regulation, code, or order adopted pursuant to this section.

(d) Being discontinued or removed, or having the operating supervisor discontinued or removed, from the federal Environmental Protection Agency's Radon and Radon Progeny

Measurement Proficiency Program or its Radon Contractors Program during the term of the certification.

Article 3. Water Treatment Plant Operators

106875. The department shall, upon recommendation of the advisory committee established by Section 116925, certify persons as to their qualifications to supervise or operate water treatment plants, as defined by Section 116920. The certification shall indicate the classification of water treatment plant that the person is qualified to operate.

106880. After consulting with the advisory committee as to time and place, the state department shall hold at least one examination each year for the purpose of examining candidates for certification.

106885. All persons responsible for the operation of water treatment plants shall possess a certificate, as defined by Section 116910, of appropriate grade in accordance with the regulations referred to in Section 116950.

106890. It is the intent of the Legislature that the program authorized pursuant to this article and Chapter 6 (commencing with Section 116900) of Part 12 be entirely self-supporting, and for this purpose the board is authorized to establish fee schedules for the issuance and renewal of certificates that shall provide revenues that shall not exceed the amount necessary, but shall be sufficient, to recover all costs incurred in the administration of this article and Chapter 6 (commencing with Section 116900) of Part 12.

106895. A person employed as a water treatment plant operator, as defined by Section 116915, on the effective date of this article and Chapter 6 (commencing with Section 116900) of Part 12 shall be issued an appropriate certificate provided that he or she gives evidence of competence, training, education, experience, or a combination of the qualifications acceptable to the director as prescribed by the regulations referred to in Section 116950.

106900. The director, with the approval of the advisory committee, shall establish the criteria and standards for education and training of existing and prospective water treatment plant operators and shall provide the criteria and standards for use in statewide technical education and training programs.

106905. All preentry and postentry educational programs shall be tailored to the needs of all segments of the population without respect to race, color, or creed.

106910. The department, with the approval of the advisory committee, shall establish and publish criteria to classify the type of water treatment plants with regard to plant size, character of water and required degree of treatment, and other physical conditions affecting treatment plants. The department, with the approval of the advisory committee, shall establish the level of skill, knowledge, and

experience necessary to supervise or operate successfully water treatment facilities to protect the public health.

Article 4. Vector Control Technicians

106925. (a) Except as otherwise provided in subdivision (b) or (h), every government agency employee who handles, applies, or supervises the use of any pesticide for public health purposes, shall be certified by the department as a vector control technician in at least one of the following categories commensurate with assigned duties, as follows:

(1) Mosquito control.

(2) Terrestrial invertebrate vector control.

(3) Vertebrate vector control.

(b) The department may establish, by regulation, exemptions from the requirements of this section that are deemed reasonably necessary to further the purposes of this section.

(c) The department shall establish by regulation minimum standards for continuing education for any government agency employee certified under Section 116110 and regulations adopted pursuant thereto, who handles, applies, or supervises the use of any pesticide for public health purposes.

(d) An official record of the completed continuing education units shall be maintained by the department. If a certified technician fails to meet the requirements set forth under subdivision (c), the department shall suspend the technician's certificate or certificates and immediately notify the technician and the employing agency. The department shall establish by regulation procedures for reinstating a suspended certificate.

(e) The department shall charge and collect a nonreturnable renewal fee of twenty-five dollars ($25) to be paid by each continuing education certificant on or before the first day of July, or on any other date that is determined by the department. Each person employed in a position on September 20, 1988, that requires certification shall first pay the annual fee the first day of the first July following that date. All new certificants shall first pay the annual fee the first day of the first July following their certification.

(f) The department shall collect and account for all money received pursuant to this section and shall deposit it in the Mosquitoborne Disease Surveillance Account provided for in Section 25852 of the Government Code. Notwithstanding Section 25852 of the Government Code, fees deposited in the Mosquitoborne Disease Surveillance Account pursuant to this section shall be available for expenditure upon appropriation by the Legislature to implement this section.

(g) Fees collected pursuant to this section shall be subject to the annual fee increase provisions of Section 100425.

(h) Employees of the Department of Food and Agriculture and county agriculture departments holding, or working under the supervision of an employee holding, a valid Qualified Applicator Certificate in Health Related Pest Control issued by the licensing and certification program of the Department of Food and Agriculture shall be exempt from this section.

Article 5. Radiological Technologists

106950. Every person charged with the performance of any duty under the laws of this State relating to the preservation of the public health, who wilfully neglects or refuses to perform the same, is guilty of a misdemeanor.

106955. No person shall operate or maintain any X-ray fluoroscope, or other equipment or apparatus employing roentgen rays, in the fitting of shoes or other footwear or in the viewing of bones in the feet. This section shall not apply to any licensed physician and surgeon, podiatrist, chiropractor, or any person practicing a licensed healing art, or any technician working under the direct and immediate supervision of those persons. Any person violating this section shall be guilty of a misdemeanor.

106960. It shall be unlawful for any person to implant foreign materials within the scalp of any other person for the purpose of preventing or alleviating baldness. ''Foreign materials'' shall include, but shall not be limited to, synthetic fibers and strands of human hair from another person. A violation of this section shall be a misdemeanor.

This section shall not be applicable to procedures for the transplantation of a person's own hair or to procedures for the fixation of hairpieces, toupees, or wigs.

106965. (a) It shall be unlawful for any person to administer or use diagnostic or therapeutic X-ray on human beings in this state after July 1, 1971, unless that person has been certified or granted a permit pursuant to subdivision (b) or (c) of Section 114870 or pursuant to Section 114885, is acting within the scope of that certification or permit, and is acting under the supervision of a licentiate of the healing arts.

(b) On and after July 15, 1993, it shall be unlawful for any person to perform mammography in this state unless that person has a current and valid certificate in mammographic radiologic technology issued pursuant to subdivision (b) of Section 114870, is acting within the scope of that certificate, and is acting under the supervision of a licentiate of the healing arts. Nothing in this article shall be construed as authorizing a person licensed under the Chiropractic Initiative Act to administer, use, or supervise the use of mammographic X-ray equipment.

106970. It shall be unlawful for any person to direct, order, assist, or abet a violation of Section 106965.

106975. Section 106965 shall not apply to any of the following persons:

(a) Licentiates of the healing arts.

(b) Students in an approved school for radiologic technologists and in schools of medicine, podiatry or chiropractic when the students are operating X-ray machines under the supervision of an instructor who is a certified radiologic technologist or a certified supervisor or operator; and students of dentistry, dental hygiene and dental assisting when the students are operating X-ray machines under the supervision of an instructor who is a licensed dentist.

(c) Any person employed by an agency of the government of the United States while performing the duties of employment.

(d) Persons temporarily exempted pursuant to Section 107020.

(e) A licensed dentist; or person who, under the supervision of a licensed dentist, operates only dental radiographic equipment for the sole purpose of oral radiography. This exemption applies only to those persons who have complied with the requirements of Section 1656 of the Business and Professions Code.

(f) A person who has been certified or granted a limited permit pursuant to subdivision (b) or (c) of Section 114870 and who performs dental radiography in a dental X-ray laboratory upon the written order of a licensed dentist.

106980. Certification in radiologic technology pursuant to subdivision (b) or (c) of Section 114870 shall not authorize any of the following:

(a) The use of diagnostic, mammographic, or therapeutic X-ray equipment except under the supervision of a certified supervisor or operator.

(b) The interpretation of any radiograph or a diagnosis based upon it.

(c) The reporting of any diagnosis to a patient except as ordered by a licentiate of the healing arts.

(d) The use of any title or designation indicating or implying the right to practice any of the healing arts.

106985. (a) Notwithstanding Section 2052 of the Business and Professions Code or any other provision of law, a radiologic technologist certified pursuant to the Radiologic Tecnology Act (Section 27) may, under the direct supervision of a licensed physician and surgeon, assist a licensed physician and surgeon in completing an injection to administer contrast materials, manually or by utilizing a mechanical injector, after the performance of venipuncture or arterial puncture by a person authorized to perform those tasks.

(b) Nothing in this section shall be construed to grant radiologic technologists the authority to perform venipuncture or arterial puncture, or to administer contrast materials.

(c) ‘‘Direct supervision,’’ for purposes of this section, means the direction of procedures authorized by this section by a licensed physician and surgeon who shall be physically present in the room during the performance of the procedures and actually observing the procedures.

106990. A radiologic technologist certified pursuant to subdivision (b) of Section 114870 may use the title, certified radiologic technologist (CRT). No other person shall use the designation. The department may prescribe appropriate titles for use by categories of persons granted permits pursuant to subdivision (c) of Section 114870 and may limit the use of the titles.

106995. The department shall prescribe minimum qualifications for granting of permits and certificates in radiologic technology in any classification, as well as continuing education requirements for holders of these permits and certificates in order to protect the public health and safety.

107000. Except as provided in Sections 107035, 107040, or 25685, and in addition to the requirements as may be prescribed pursuant to Section 106995, each applicant for certification as a radiologic technologist pursuant to subdivision (b) of Section 114870 shall submit evidence satisfactory to the department that he or she has satisfactorily completed a course in an approved school for radiologic technologists, or has completed a course of study and training in radiologic technology that in the opinion of the department is equivalent to the minimum requirements of a course in an approved school for radiologic technologists.

107005. Except as provided in Section 107035, in order to be certified as a radiologic technologist pursuant to subdivision (b) of Section 114870, an applicant shall pass a written examination approved by the department and administered by the department or by the other agency or organization designated by the department.

107010. The department may accept in lieu of its own examination a certificate of another agency or organization that certifies radiologic technologists, provided the certificate was issued on the basis of qualifications and an examination deemed by the department to be reasonably equivalent to the standards established by the department.

107015. The department shall certify as a radiologic technologist any applicant who meets the requirements of the Radiologic Technology Act (Section 27).

107020. The department may issue a permit authorizing the temporary practice of radiologic technology to any applicant for certification who has complied with the experience and education requirements of Section 107000, 107035, 107040, or 25685, and is awaiting examination. A permit shall convey the same rights as a certificate for the period for which it is issued in the classification for

the applicant is eligible, and shall be valid until 90 days after the date of the next examination held pursuant to Section 107025, except that if the applicant does not take the examination the permit shall expire on the date of the examination.

107025. The department shall hold at least one examination each year, for applicants for certification, at the times and places as the department may determine.

107030. Not less than two months prior to the date of each examination, the department shall cause a notice thereof to be published in two or more newspapers of general circulation, and at least one radiologic technologist magazine, all of which are published within the state.

107035. Any officer, employee, or designated agent of the department may enter at all reasonable times upon any private or public property for the purpose of inspecting and determining whether or not there is compliance with or violation of the Radiologic Technology Act (Section 27), or of the regulations adopted pursuant thereto, and the owner, occupant, or person in charge of the property shall permit the entry and inspection.

107040. Whenever, in the judgment of the department, any person has engaged in or is about to engage in any acts or practices that constitute or will constitute a violation of any provision of the Radiologic Technology Act (Section 27), or any rule, regulation, or order issued thereunder, and at the request of the department, the Attorney General may make application to the superior court for an order enjoining this acts or practices, or for an order directing compliance, and upon a showing by the department that the person has engaged in or is about to engage in any acts or practices, a temporary or permanent injunction, restraining order, or other order may be granted.

107045. (a) The department shall approve schools for radiologic technologists that, in the judgment of the department, will provide instruction adequate to prepare individuals to meet requirements for certification as radiologic technologists under the Radiologic Technology Act (Section 27).

(b) The department shall provide for reasonable standards for approved schools, for procedures for obtaining and maintaining approval, and for revocation of approval where standards are not maintained.

107050. When approving a school for radiologic technologists, the department may take into consideration accreditation, approval, or certification of the school by other agencies or organizations if the department finds that accreditation, approval, or certification was granted on the basis of standards that will afford the same protection to the public as the standards provided by the Radiologic Technology Act (Section 27) or the regulations adopted pursuant thereto.

107055. The department may inspect schools for radiologic technologists prior to approval and at other times as it deems necessary to determine that the purposes of the Radiologic Technology Act (Section 27) are being met, and may require any reports from schools as it deems necessary to carry out the purposes of the Radiologic Technology Act (Section 27).

107060. The department may enter into an agreement with another state agency to perform all or part of the functions necessary in order to approve and maintain approval of schools for radiologic technologists.

107065. Every holder of a certificate or a permit issued pursuant to the Radiologic Tecnology Act (Section 27) may be disciplined as provided in Sections 107065 and 107670. The proceedings under Sections 107065 and 107670 shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all of the powers granted therein.

107070. Certificates and permits may be denied, revoked, or suspended by the department, for any of the following reasons:

(a) Habitual intemperance in the use of any alcoholic beverages, narcotics, or stimulants to the extent as to incapacitate for the performance of professional duties.

(b) Incompetence or gross negligence in performing radiologic technology functions.

(c) Conviction of practicing one of the healing arts without a license in violation of Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

(d) Procuring a certificate or permit by fraud, or misrepresentation, or because of mistake.

(e) Use of a designation implying certification as a radiologic technologist by one not so certified.

(f) Nonpayment of fees prescribed in accordance with Section 107080.

(g) Violation of Section 106965 or 106980 or any other provision of the Radiologic Technology Act (Section 27) or regulation of the department.

(h) Conviction, either within or outside of this state, of a felony or misdemeanor involving moral turpitude, that was committed during the performance of radiologic technology duties. A plea or verdict of guilty or a conviction following a plea of nolo contendere made to a charge of a felony or misdemeanor involving moral turpitude, that was committed during the performance of radiologic technology duties, is deemed to be a conviction within the meaning of this section. However, upon recommendation of either the court that imposed or suspended sentence of the parole or probation authority having a person under surveillance or having discharged him or her from surveillance that the person has responded to correctional and

rehabilitative processes to a degree that might warrant waiver of the provisions of this section, the department may, at its discretion, take no action pursuant to this subdivision.

107075. Any person who violates or aids or abets the violation of any of the provisions of the Radiologic Technology Act (Section 27) or regulation of the department adopted pursuant to that act is guilty of a misdemeanor.

107080. (a) The application fee for any certificate or permit issued pursuant to the Radiologic Tecnology Act (Section 27) shall be established by the department in an amount as it deems reasonably necessary to carry out the purpose of that act.

(b) The fee for any examination conducted pursuant to the Radiologic Tecnology Act (Section 27) after failure of that examination within the previous 12 months shall be fixed by the department in an amount it deems reasonably necessary to carry out that act.

(c) The annual renewal fee for each certificate or permit shall be fixed by the department in an amount it deems reasonably necessary to carry out the Radiologic Tecnology Act (Section 27) .

(d) The penalty fee for renewal of any certificate or permit if application is made after its date of expiration shall be five dollars ($5) and shall be in addition to the fee for renewal prescribed by subdivision (c).

(e) The fee for a duplicate certificate or permit shall be one dollar ($1).

(f) No fee shall be required for a certificate or permit or a renewal thereof except as prescribed in the Radiologic Technology Act (Section 27).

107085. Failure to pay the annual fee for renewal on or before the expiration date of the certificate or permit shall automatically suspend the certificate or permit. If the prescribed fee is not paid within six months following the date, the certificate or permit shall be revoked. A certificate or permit revoked for nonpayment of the renewal fee may be reinstated within five years from the time of revocation upon payment of the penalty fee plus twice the annual renewal fee. If the application for reinstatement is not made within five years from the date of suspension of the certificate or permit, the certificate or permit shall be canceled and shall not be subject to reinstatement.

107090. The department may establish a schedule of fees for permits issued pursuant to subdivisions (c) and (e) of Section 114870, and Sections 114885 and 107115, if the revenue from the fees is related to the costs of administering the Radiologic Technology Act (Section 27).

107095. The department may establish a schedule of fees to be paid by schools applying for approval as approved schools for radiologic technologists and, on an annual basis, by schools that are

included on the department's list of approved schools for radiologic technologists.

107100. (a) All fees payable under the Radiologic Technology Act (Section 27) shall be collected by and paid to the department for deposit into the Radiation Control Fund established pursuant to Section 114980.

(b) This section shall become operative on July 1, 1993.

107110. It shall be unlawful for any licentiate of the healing arts to administer or use diagnostic, mammographic, or therapeutic X-ray on human beings in this state after January 1, 1972, unless that person is certified pursuant to subdivision (e) of Section 114870 or Section 114885, and is acting within the scope of that certification.

Article 6. Nuclear Medicine Technology

107115. A licentiate of the healing arts who is certified by an examining board in radiology recognized by the department shall be granted a certificate to supervise the operation of X-ray machines and to operate X-ray machines without restrictions.

107120. The department shall keep certificate and permit holders apprised of significant changes in the practice of radiologic technology and changes in regulation of the practice of radiologic technology through a biannual report. The report shall be furnished to certified radiological technologists and limited permit holders and may be furnished to appropriate licentiates of the healing arts.

107150. ''Nuclear medicine technology'' means that technology applied under the supervision of a physician and surgeon or a licensed clinical bioanalyst, when performing in vitro procedures, that pertains to the utilization of radiopharmaceuticals for the diagnosis and treatment of disease in humans and includes: (1) the standardization of radiopharmaceutical dosages prior to administering the preparation of radiopharmaceutical agents in accordance with department regulations, (2) the administration of radiopharmaceuticals in accordance with statute or regulation, and (3) the calibration and use of radiation detection instruments and equipment to obtain clinical information. Nuclear medicine technology includes in vitro tests performed in a licensed clinical laboratory that use a radioactive marker substance not administered to human subjects and in vivo nuclear medicine procedures that involve administration of a radioactive marker substance to humans.

107155. (a) Any person not currently licensed as a physician and surgeon pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or as a clinical laboratory technologist, bioanalyst, or clinical chemist pursuant to Chapter 3 (commencing with Section 1200) of Division 2 of the Business and Professions Code, who performs nuclear medicine

technology shall be subject to the standards of competence established by the department pursuant to this article.

(b) Nothing in this article shall be construed to limit the existing authority of, or scope of practice of, a physician and surgeon, clinical laboratory technologist, bioanalyst, or clinical chemist granted pursuant to their licenses, or to further require persons to establish competence to perform in vitro tests.

(c) In vitro procedures using radioactive materials shall be performed in a licensed clinical laboratory.

(d) This article shall not apply to any of the following persons:

(1) Any person employed by an agency of the United States government, while performing the duties of the employment.

(2) A licensed clinical laboratory technologist who administers a radioactive marker test substance to a human subject to perform a measurement on a sample containing the radioactive marker test substance that has been removed from the subject.

(3) A registered pharmacist who handles radioactive drugs in accordance with the California State Board of Pharmacy regulations contained in the most recent version of Sections 1708.3 to 1708.8, inclusive, of Article 2 of Chapter 17 of Title 16 of the California Code of Regulations.

107160. (a) The department shall provide by regulation a schedule of fees that shall be paid by persons applying to establish their competence to perform nuclear medicine technology. The revenue derived from the fees shall be sufficient to cover all costs incurred in the administration of this article.

(b) The fees paid by applicants shall be adjusted annually, pursuant to Section 100425, and the adjusted fee amounts shall be rounded off to the nearest whole dollar.

107165. The establishment of a person as competent to perform nuclear medicine technology may be denied, revoked, or suspended by the department, for any of the following reasons:

(a) Habitual intemperance in the use of any alcoholic beverages, narcotics, or stimulants to an extent as to incapacitate for the performance of professional duties.

(b) Incompetence or negligence in performing nuclear medicine technology functions.

(c) Establishment of competence to perform nuclear medicine technology by fraud, or misrepresentation, or because of mistake.

(d) Use of a designation indicating that a person is established by the department as competent to perform nuclear medicine technology by a person who has not been established by the department as competent to perform nuclear medicine technology.

(e) Violation of the provisions of this article or regulations adopted pursuant thereto.

The proceedings for denial, revocation, or suspension pursuant to this section shall be conducted in accordance with Chapter 5

(commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all of the powers granted therein.

107170. Any person who violates this article or any regulation adopted pursuant thereto shall be guilty of a misdemeanor.

107175. The department shall enforce this article.

Article 7. Low-Acid Cannery Retort Operators (Reserved)

Article 8. Revocation Procedures (Reserved)

PART 2. ENVIRONMENTAL PLANNING

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. ENVIRONMENTAL EPIDEMIOLOGY (Reserved)

PART 3. PRODUCT SAFETY

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. CALIFORNIA HAZARDOUS SUBSTANCES ACT

Article 1. General Provisions and Definitions

108100. This chapter shall be known as the California Hazardous Substances Act.

108105. Unless the provisions or the context otherwise requires, these definitions, rules of construction, and general provisions shall govern the construction of this chapter.

108110. The term ‘‘art or craft material’’ means any raw or processed material or manufactured product marketed or being represented by the manufacturer, repackager or retailer as being suitable for use in any phase of the creation of any work of visual or graphic art of any medium. These mediums may include, but shall not be limited to, paintings, drawings, prints, sculpture, ceramics, enamels, jewelry, stained glass, plastic sculpture, photographs, and leather and textile goods. The term shall not include economic poisons subject to the Federal Insecticide, Fungicide, and

Rodenticide Act (61 Stats. 163) or Chapter 2 (commencing with Section 12751) of Division 7 of the Food and Agricultural Code; or to drugs, devices, or cosmetics, that are subject to the Federal Food, Drug and Cosmetics Act (52 Stats. 1040) or Part 5 (commencing with Section 109875).

108115. ''Department'' means the State Department of Health Services.

108120. As used in this chapter, ''federal act'' means the Federal Hazardous Substances Act (74 Stats. 372; 15 U.S.C., Sec. 1261, et seq.).

108125. The term ''hazardous substance'' means:

(a) Any substance or mixture of substances that (1) is toxic, (2) is corrosive, (3) is an irritant, (4) is a strong sensitizer, (5) is flammable or combustible, or (6) generates pressure through decomposition, heat, or other means; if the substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

(b) Any substances that the department by regulation finds pursuant to the provisions of Section 108320 meet the requirements of subdivision (a) of this section.

(c) Any radioactive substance, if, with respect to the substance as used in a particular class of article or as packaged, the department determines by regulation that the substance is sufficiently hazardous to require labeling in accordance with this chapter in order to protect the public health.

(d) Any toy or other article intended for use by children that the department determines, by regulation, pursuant to the provisions of Section 108320, presents an electrical, mechanical, or thermal hazard.

108130. The term ''hazardous substance'' shall not apply to any of the following:

(a) Foods, drugs, or cosmetics subject to the Federal Food, Drug, and Cosmetic Act (52 Stat. 1040) or Part 5 (commencing with Section 109875).

(b) Substances intended for use as fuels when stored in containers and used in the heating, cooking, or refrigeration system of a house.

(c) Source material, special nuclear material, or byproduct material, as defined in the Atomic Energy Act of 1954 (68 Stat. 919), as amended, and regulations issued pursuant thereto by the Atomic Energy Commission.

(d) Fertilizing materials regulated by Chapter 5 (commencing with Section 14501) of Division 7 of the Food and Agricultural Code.

(e) Livestock remedies regulated by Chapter 4 (commencing with Section 14200) of Division 7 of the Food and Agricultural Code.

(f) Economic poisons regulated by Chapter 2 (commencing with Section 12751) of Division 7 of the Food and Agricultural Code, except as provided in Section 108135.

(g) Economic poisons subject to the Federal Insecticide, Fungicide, and Rodenticide Act (61 Stat. 163), except as provided in Section 108135.

(h) Injurious substances as defined and regulated by Article 112 (commencing with Section 5225) of Group 16 of Subchapter 7 of Chapter 4 of Title 8 of the California Code of Regulations.

108135. The term ''hazardous substance'' shall apply to any article that is not itself an economic poison within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act or Chapter 2 (commencing with Section 12751) of Division 7, of the Food and Agricultural Code, but that is a hazardous substance within the meaning of Section 108125 by reason of bearing or containing an economic poison.

108140. The term ''human carcinogen'' means any substance listed as a human carcinogen by the International Agency for Research on Cancer.

The term ''potential human carcinogen'' means one of the following:

(1) Any substance that does not meet the definition of human carcinogen, but for which there exists sufficient evidence of carcinogenicity in animals, as determined by the International Agency for Research on Cancer.

(2) Any chemical shown to be changed by the human body into a human carcinogen.

108145. The term ''toxic'' shall apply to any substance, other than a radioactive substance, that has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.

108150. The term ''toxic substance causing chronic illness'' means any of the following:

(1) Human carcinogens.

(2) Potential human carcinogens.

(3) Any substance included in the list of hazardous substances prepared by the Director of Industrial Relations, pursuant to Section 6382 of the Labor Code, notwithstanding exemptions made for substances on the list that are used in particular forms, circumstances, or concentrations, if the health hazard presented by the substance is not the subject of label statements required by federal law.

108155. ''Highly toxic'' means any substance that falls within any of the following categories:

(a) Produces death within 14 days in half or more than half of a group of 10 or more laboratory white rats each weighing between 200 and 300 grams, at a single dose of 50 milligrams or less per kilogram of body weight, when orally administered.

(b) Produces death within 14 days in half or more than half of a group of 10 or more laboratory white rats each weighing between 200 and 300 grams, when inhaled continuously for a period of one hour

or less at an atmospheric concentration of 200 parts per million by volume or less of gas or vapor or two milligrams per liter by volume or less of mist or dust, provided the concentration is likely to be encountered by man when the substance is used in any reasonably foreseeable manner.

(c) Produces death within 14 days in half or more than half of a group of 10 or more rabbits tested in a dosage of 200 milligrams or less per kilogram of body weight, when administered by continuous contact with the bare skin for 24 hours or less.

108160. If the department finds that available data on human experience with any substance indicate results different from those obtained on animals with the dosages or concentrations stated in Section 108155, the human data shall take precedence.

108165. ''Corrosive'' means any substance which in contact with living tissue will cause destruction of tissue by chemical action; but shall not refer to action on inanimate surfaces.

108170. ''Irritant'' means any substance not corrosive within the meaning of Section 108165 that on immediate, prolonged, or repeated contact with normal living tissue will induce a local inflammatory reaction.

108175. ''Strong sensitizer'' means a substance that will cause on normal living tissue through an allergic or photodynamic process a hypersensitivity that becomes evident on reapplication of the same substance and that is designated by the department. Before designating any substance as a strong sensitizer, the department, upon consideration of the frequency of occurrence and severity of the reaction, shall find that the substance has a significant potential for causing hypersensitivity.

108180. The term ''extremely flammable'' shall apply to any substance that has a flashpoint at or below 20 degrees Fahrenheit, as determined by the Tagliabue open-cup tester, the term ''flammable'' or ''combustible'' shall apply to any substance that has a flashpoint of above 20 degrees to and including 80 degrees Fahrenheit, as determined by the Tagliabue open-cup tester, and the term ''combustible'' shall apply to any substance that has a flashpoint above 80 degrees Fahrenheit to and including 150 degrees, as determined by the Tagliabue open-cup tester; except that the flammability or combustibility of solids and of the contents of self-pressurized containers shall be determined by methods found by the department to be generally applicable to the materials or containers, respectively, and established by regulations issued by it, which regulations shall also define the terms ''flammable'' and ''combustible'' and ''extremely flammable'' in accord with those methods.

108185. ''Radioactive substance'' means a substance that emits ionizing radiation.

108190. ‘‘Label’’ means a display of written, printed, or graphic matter upon the immediate container of any substance or, in the case of an article that is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of the matter directly upon the article involved, or upon a tag or other suitable material affixed thereto, and a requirement made by, or pursuant to, this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless the word, statement, or other information also appears (a) on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and (b) on all accompanying literature where there are directions for use, written or otherwise.

108195. The term ‘‘immediate container’’ does not include package liners.

108200. The term ‘‘misbranded hazardous substance’’ means a hazardous substance (including a toy or other article intended for use by children, that is a hazardous substance, or that bears or contains a hazardous substance in the manner as to be susceptible of access by a child to whom the toy or other article is entrusted) intended, or packaged in a form suitable for use in the household or by children if the packaging or labeling of the substance is in violation of an applicable regulation issued pursuant to Section 108685 or 108700, or if the substance, except as otherwise provided by, or pursuant to, Section 108320, 108355, or 108360, fails to bear a label that states conspicuously, as prescribed in Chapter 8 (commencing with Section 108800): (1) the name and place of business of the manufacturer, packer, distributor, or seller; (2) the common or usual name or the chemical name, if there be no common or usual name, of the hazardous substance or of each component that contributes substantially to its hazard, unless the department by regulation permits or requires the use of a recognized generic name; (3) the signal word ‘‘DANGER’’ on substances that are extremely flammable, corrosive, or highly toxic; (4) the signal word ‘‘WARNING’’ or ‘‘CAUTION’’ on all other hazardous substances; (5) an affirmative statement of the principal hazard or hazards, such as ‘‘Flammable,’’ ‘‘Combustible,’’ ‘‘Vapor harmful,’’ ‘‘Causes burns,’’ ‘‘Absorbed through skin,’’ or similar wording descriptive of the hazard; (6) precautionary measures describing the action to be followed or avoided, except when modified by the department pursuant to Section 108320, 108325, 108330, 108355, or 108360; (7) instructions, when necessary or appropriate, for first aid treatment; (8) the word ‘‘Poison’’ for any hazardous substance that is defined as ‘‘highly toxic’’ by Section 108155; (9) instructions for handling and storage of packages that require special care in handling or storage; and (10) the statement ‘‘Keep out of the reach of children,’’ or its practical equivalent, or if the article is intended for use by children

and is not a banned hazardous substance, adequate direction for the protection of children from the hazard. The term ‘‘misbranded hazardous substance’’ also includes a household substance as defined in subdivision (b) of Section 108680 if it is a substance described in Section 108125 and its packaging or labeling is in violation of an applicable regulation issued pursuant to Section 108685 or 108700.

108205. The term ‘‘banned hazardous substance’’ means either:

(a) Any toy, or other article intended for use by children, that is a hazardous substance, or that bears or contains a hazardous substance in the manner as to be susceptible of access by a child to whom the toy or other article is entrusted.

(b) Any hazardous substance intended or packaged in a form suitable, for use in the household, that the department by regulation classifies as a ‘‘banned hazardous substance’’ on the basis of a finding that, notwithstanding the cautionary labeling as is or may be required under this chapter for that substance, the degree or nature of the hazard involved in the presence or use of that substance in households is that the objective of the protection of the public health and safety can be adequately served only by keeping that substance, when so intended or packaged, out of the channels of intrastate commerce.

108210. (a) An article may be determined to present an electrical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture may cause personal injury or illness by electric shock.

(b) An article may be determined to present a mechanical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness from any of the following:

(1) Fracture, fragmentation, or disassembly of the article.

(2) Propulsion of the article or any part or accessory thereof.

(3) Points or other protrusions, surfaces, edges, openings, or closures.

(4) Moving parts.

(5) Lack or insufficiency of controls to reduce or stop motion.

(6) As a result of self-adhering characteristics of the article.

(7) Because the article, or any part or accessory thereof, may be aspirated or ingested.

(8) Because of instability.

(9) Because of any other aspect of the article’s design or manufacture.

(c) An article may be determined to present a thermal hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness because of heat as from heated parts, substances, or surfaces.

108215. The department, by regulation, shall exempt from subdivision (a) of Section 108205 (1) articles such as chemical sets, that by reason of their functional purpose require the inclusion of the hazardous substance involved or necessarily present an electrical, mechanical, or thermal hazard and that bear labeling giving adequate directions and warnings for safe use and are intended for use by children who have attained sufficient maturity, and may reasonably be expected to read and heed the directions and warnings and (2) fireworks subject to control under Part 2 (commencing with Section 12500) of Division 11.

108220. Proceedings for the issuance, amendment, or repeal of regulations pursuant to subdivision (b) of Section 108205 and Section 108215 shall be in the manner prescribed in Section 108335. If the department, however, finds that the distribution for household use of the hazardous substance involved presents an imminent hazard to the public health, it may by order publish a notice of the findings, and thereupon the substance when intended or offered for household use or when so packaged as to be suitable for that use shall be deemed to be a ''banned hazardous substance'' pending the completion of proceedings relating to the issuance of the regulations.

108225. Notwithstanding any other provision of this chapter, no substance or article shall be deemed to violate any provision of this chapter except Article 6 (commencing with Section 108500), if the substance or article complies with federal law.

Article 2. Articles For Children

108230. A determination by the department that a toy or other article intended for use by children presents an electrical, mechanical, or thermal hazard shall be made by regulation.

108235. If, before or during the making of a determination pursuant to Section 108230, the department finds that, because of an electrical, mechanical, or thermal hazard, distribution of the toy or other article involved presents an imminent hazard to the public health and the department by regulation gives notice of the finding, the toy or other article shall be deemed to be a banned hazardous substance for purposes of this chapter until the proceeding has been completed. If not yet initiated when the regulation is adopted, a proceeding shall be initiated as promptly as possible.

Article 3. Prohibitions

108240. The manufacture, production, preparation, compounding, packing, selling, offering for sale, or keeping for sale within the State of California, or the introduction into this state from any other state, territory, or the District of Columbia, or from any

foreign country, of any package of a misbranded hazardous substance or banned hazardous substance is prohibited.

108245. Any person who imports or receives from any other state or territory or the District of Columbia or from any foreign country, or who having so received delivers for pay or otherwise or offers to deliver to any other person, any misbranded hazardous substance or banned hazardous substance or any person who shall manufacture or produce, prepare or compound, or pack or sell, or offer for sale, or keep for sale in the State of California any misbranded hazardous substance or banned hazardous substance, shall be guilty of a misdemeanor punishable as provided in Section 108295.

108250. The packing, selling, offering for sale, or keeping for sale of a hazardous substance in a reused food, drug, or cosmetic container or in a container that, though not a reused container, is identifiable as a food, drug, or cosmetic container by its labeling or by other identification, is unlawful. Such an act shall result in the hazardous substance being in a misbranded package. As used in this section, the terms ''cosmetic,'' ''drug'' and ''food'' shall have the same meaning as in Chapter 1 (commencing with Section 109875) of Part 5.

108255. The department may by regulation prohibit the use of any other container for hazardous substances if it determines that the container may be mistaken for a food, drug, or cosmetic container and has a closure that presents a health hazard due to ease of opening.

108260. The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to a hazardous substance is unlawful if the act results in the article being a misbranded hazardous substance or banned hazardous substance.

108265. It shall be unlawful to refuse to permit entry or inspection authorized by Section 108370 or to permit access to and copying of any record as authorized by Section 108300.

108270. No person shall be prosecuted under this chapter if, after receipt of a hazardous substance, he or she can establish a guarantee or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he or she received in good faith the hazardous substance, to the effect that the hazardous substance is not a misbranded hazardous substance or a banned hazardous substance within the meaning of these terms, as defined by this chapter.

108275. If the guarantee is to the effect that the article is not misbranded or banned within the meaning of the Federal Hazardous Substances Act (Public Law 86-813, 74 Stat. 372), it shall be sufficient for all the purposes of this chapter and have the same force and effect as though it referred to this chapter whether given by a person residing in the United States or elsewhere.

108280. The giving of a guarantee referred to in Section 108270 that is false, is prohibited, except by a person who relied upon a

guarantee to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he or she received in good faith the hazardous substance.

108285. No person shall be prosecuted under this chapter if the hazardous substance is shipped or delivered for shipment for export to any foreign country, in a package marked for export on the outside of the shipping container and labeled in accordance with the specifications of the foreign purchaser and in accordance with the laws of the foreign country, but if the hazardous substance is sold or offered for sale in domestic commerce, this section shall not apply.

108290. The use by any person to his or her own advantage, or revealing other than to the department or any agent of the department or to the courts when relevant in any judicial proceeding under this chapter, of any information acquired under authority of this chapter concerning any method of process that as a trade secret is entitled to protection is prohibited.

108295. Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars ($50) or more than one thousand dollars ($1,000), or by imprisonment in the county jail for a term not exceeding six months, or by both fine and imprisonment.

If the violation is committed with intent to defraud or mislead, or after a conviction of the person under this section has become final, the person shall be subject to imprisonment for not more than one year in the county jail, or a fine of not more than two thousand dollars ($2,000), or both the imprisonment and fine.

108300. For the purpose of enforcing this chapter, carriers engaged in commerce, and persons receiving or holding hazardous substances shall upon the request of an agent of the department, permit the agent, at reasonable times, to have access to and to copy all records showing the movement of any hazardous substance, or the holding thereof during or after the movement, and the quantity, shipper, and consignee thereof, provided, that evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained, provided, further, that carriers shall not be subject to this chapter by reason of their receipt, carriage, holding, or delivery of hazardous substances in the usual course of business as carriers.

As used in this section, ‘‘carrier’’ means a person engaged in transporting property from one place to another and who has no other interest in the ownership of the property.

108305. Before any violation of this chapter is reported to the district attorney of the county, or the prosecuting officer of the city, for institution of a criminal proceeding the person against whom the proceeding is contemplated may be given appropriate notice and an opportunity to present his or her view, either orally or in writing, with regard to each contemplated proceeding.

Article 4. Repurchase

108310. As under this article:

(a) ‘‘Manufacturer’’ includes an importer for resale.

(b) A dealer who sells at wholesale an article or substance shall, with respect to that sale, be considered the distributor of that article or substance.

108315. In the case of any article or substance sold on or after the effective date of this section by its manufacturer, distributor, or dealer that is a banned hazardous substance, whether or not it was at the time of its sale, the article or substance shall, in accordance with regulations of the department, be repurchased as follows:

(a) The manufacturer of any such article or substance shall repurchase it from the person to whom he or she sold it, and shall do the following:

(1) Refund that person the purchase price paid for the article or substance.

(2) If that person has repurchased the article or substance pursuant to subdivision (b) or (c) reimburse him or her for any amounts paid in accordance with subdivision (b) or (c) for the return of the article or substance in connection with its repurchase.

(3) If the manufacturer requires the return of the article or substance in connection with his or her repurchase of it in accordance with this subdivision, reimburse that person for any reasonable and necessary expenses incurred in returning it to the manufacturer.

(b) The distributor of any article or substance shall repurchase it from the person to whom he or she sold it, and shall do the following:

(1) Refund that person the purchase price paid for the article or substance.

(2) If that person has repurchased the article or substance pursuant to subdivision (c), reimburse him or her for any amounts paid in accordance with that subdivision for the return of the article or substance in connection with its repurchase.

(3) If the distributor requires the return of the article or substance in connection with his or her repurchase of it in accordance with this subdivision, reimburse that person for any reasonable and necessary expenses incurred in returning it to the distributor.

(c) In the case of any article or substance sold at retail by a dealer, if the person who purchased it from the dealer returns it to him or her, the dealer shall refund the purchaser the purchase price paid for it and reimburse him or her for any reasonable and necessary transportation charges incurred in its return.

Article 5. Administration

108320. The department may adopt regulations regarding hazardous substances as it determines are necessary to adequately

enforce and administer this chapter. Any violation of the regulations shall be deemed to be a violation of this chapter.

108325. Whenever in the judgment of the department the action will promote the objectives of this chapter by avoiding or resolving uncertainty as to its application, the department may by regulation declare to be a hazardous substance, for the purpose of this chapter, any substance or mixture of substances that it finds meet the requirements of Section 108125.

108330. If the department finds that the requirements of Section 108200 are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, it may by regulation establish reasonable variations or additional label requirements as it finds necessary for the protection of the public health and safety; and any hazardous substance intended, or packaged in a form suitable, for use in the household or by children, that fails to bear a label in accordance with regulations shall be deemed to be a misbranded hazardous substance.

108335. The regulations shall be adopted by the department in the manner prescribed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The regulations shall conform as nearly as practicable with regulations promulgated by the United States Department of Health, Education, and Welfare, Food and Drug Administration.

108340. To the extent that the requirements of this chapter are identical with the federal act, all regulations and any amendments to regulations adopted pursuant to the federal act that are in effect on the effective date of this section or that are adopted on or after the date are the hazardous substances regulations of this state.

108345. A federal regulation adopted pursuant to this chapter takes effect in this state 30 days after it becomes effective as a federal regulation. Any person who will be adversely affected by adoption of a federal regulation in this state may, within the 30 days prior to its becoming effective in this state, file with the state department, in writing, objections and a request for a hearing. The timely filing of substantial objections to a regulation that has become effective under the federal act, stays the adoption of the regulation in this state.

108350. If substantial objections are made to a federal regulation within 30 days prior to its becoming effective in this state or to a proposed regulation within 30 days after it is published, the state department, after notice, shall conduct a public hearing to receive evidence on issues raised by the objections. Any interested person or his or her representatives shall be heard. The state department shall act upon objections by order and shall mail the order to objectors by certified mail as soon after the hearing as practicable. The order shall be based on evidence contained in the record of the hearing. If the order concerns a federal regulation, the state department may adopt, rescind, or modify it. If the order concerns a proposed regulation, the

state department may withdraw it or set an effective date for the regulation as published or as modified by the order. The effective date shall be at least 60 days after publication of the order.

108355. If the department finds that, because of the size of the package involved or because of the minor hazard presented by the substance contained therein, or for other good and sufficient reasons, full compliance with the labeling requirements otherwise applicable under this chapter is impracticable or is not necessary for the adequate protection of the public health and safety, the department may exempt the substance from these requirements to the extent it determines to be consistent with adequate protection of the public health and safety.

108360. The department may exempt from the requirements established by, or pursuant to, this chapter any container of a hazardous substance with respect to which it finds that adequate requirements satisfying the purposes of this chapter have been established by, or pursuant to, any other law enacted by the Legislature.

108365. The department may appoint agents as it may deem necessary.

108370. The department or its duly authorized agent shall have free access to all reasonable hours to any factory, warehouse, or establishment in which hazardous substances are manufactured, processed, packed, or held for introduction into commerce, or to enter any vehicle being used to transport or hold hazardous substances, in commerce, for either of the following purposes:

(a) Inspecting the factory, warehouse, establishment, or vehicle to determine if any of the provisions of this chapter are being violated.

(b) To secure samples or specimens of any hazardous substances. If the agent obtains any sample, prior to leaving the premises, he or she shall give to the owner, operator, or agent in charge a receipt describing the samples obtained. If an analysis is made of the sample, a copy of the results of the analysis shall be furnished promptly to the owner, operator, or agent in charge.

108375. Whenever a duly authorized agent of the department finds, or has probable cause to believe, that any hazardous substance is so misbranded as to be dangerous or fraudulent or is a banned hazardous substance, he or she shall affix to the article a tag or other appropriate marking, giving notice that the article is, or is suspected of being, misbranded and has been detained or quarantined, and warning all persons not to remove or dispose of the article by sale or otherwise until permission for removal or disposal is given by the department or the court.

108380. Whenever the findings of the department show, after investigation and examination, that any hazardous substance found

in the possession of any person is misbranded, or banned, the hazardous substance may be seized and quarantined.

108385. A hazardous substance found to be misbranded, or to be a banned hazardous substance may, by order of a court or judge, or in the absence of the order, with the written consent of the owner thereof, be seized or destroyed.

108390. When a misbranded hazardous substance or a banned hazardous substance is detained or quarantined under this article, the department shall commence proceedings in the name of the people of the State of California against the article in the superior court of the county or city and county in which the article is detained or quarantined by petitioning the court for a judgment to forfeit, condemn, and destroy the article. Upon the filing of the petition, the clerk of the court shall fix a time and place for the hearing thereof, and cause notices thereof to be prepared notifying all persons who may claim an interest in the article of the time and place of the hearing. A copy of the petition and notice shall be posted for 14 days in at least three public places in the city or city and county where the court is held, and in a conspicuous place where the article is detained or quarantined. A copy of the petition and notice shall also be served upon each person in possession of the article and on each owner or claimant whose name and address is known. The service may be made by personal service or by registered mail by mailing a copy of the notice and petition by registered mail to the last known address of the person. At any time prior to the date of the hearing any person in possession of the article, or owner thereof or claimant thereto, may file an answer that may include a prayer for a judgment of release of the article or relief in accordance with Sections 108400 and 108405. At the time set for the hearing, the court shall commence to hear and determine the proceeding, but may, for good cause shown, continue the hearing to a day certain; provided, the court shall finally determine all the issues presented by the petition.

108395. If the court finds that a detained or quarantined article is misbranded, after entry of the decree the article shall be destroyed at the expense of the claimant thereof, under the supervision of the agent of the department. All court costs and fees, and storage and other proper expenses, shall be taxed against the claimant of the article or his or her agent.

108400. If the misbranding can be corrected by proper labeling or processing of the article, after entry of the decree and after costs, fees, and expenses have been paid and a good and sufficient bond, conditioned that the article shall be so labeled or processed, has been executed, the court may by order direct that the article be delivered to the claimant thereof for the labeling or processing under the supervision of an agent of the department. The expense of the supervision shall be paid by the claimant.

108405. The bond shall be returned to the claimant of the article on representation to the court by the department that the article is no longer in violation of this chapter, and that the expenses of the supervision have been paid.

108410. The department shall cause to be published from time to time reports summarizing any judgments, decrees, or court orders that have been rendered under this chapter, including the nature of the charge and the disposition thereof.

The department shall also cause to be disseminated information regarding hazardous substances in situations involving, in the opinion of the department, imminent danger to health. Nothing in this section shall be construed to prohibit the department from collecting, reporting, and illustrating the results of the investigations of the department.

108415. In addition to the remedies heretofore provided, the department is hereby authorized to bring an action in superior court and the court shall have jurisdiction upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of this chapter. Any proceeding under this section shall conform to the requirements of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the department shall not be required to allege facts necessary to show or tending to show lack of adequate remedy at law or to show or tending to show irreparable damage or loss.

108420. If any provision of this chapter is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the chapter and the applicability thereof to other persons and circumstances shall not be affected thereby.

Article 6. Art or Craft Materials

108500. For the purposes of this article, an art or craft material shall be presumed to contain an ingredient that is a toxic substance causing chronic illness if the ingredient, whether an intentional ingredient or an impurity, is 1 percent or more by weight of the mixture or product, or if the department determines that the toxic or carcinogenic properties of the art or craft material are such that labeling is necessary for the adequate protection of the public health and safety.

108505. The Legislature finds and declares that there exists a significant danger to the public health and safety from exposure to art or craft material that contains toxic chemicals. This health risk threatens not only professional artists and craftspersons, but art teachers, students at every educational level, hobbyists, and children.

Toxic substances may be employed during the course and scope of creating art or craft objects of all varieties.

The Legislature additionally finds and declares that present labeling of ingredients and hazards of art or craft material is insufficient to adequately protect the consumers of this state from chronic adverse health effects. Because many persons do not know what toxic chemical substances they work with, proper precautionary actions cannot be taken. Disclosure of toxic ingredients, their possible adverse effects on health, and instructions for safe handling, will substantially minimize unnecessary exposure to excessive risk.

Additionally, the Legislature finds and declares that it is consistent to impose upon those who manufacture, repackage, distribute, and sell art or craft material a duty to convey to consumers information about the potential health hazards of the products they manufacture.

Therefore, the Legislature intends by this article to ensure that consumers be provided information concerning the nature of the toxic substances with which they are working and the known and suspected health hazards of these substances, and to ensure the uniformity of labeling standards, so that materials with similar hazards also have essentially similar labels.

108510. No person shall distribute, sell, offer for sale, or expose for sale any art or craft material containing toxic substances causing chronic illness on which the person:

(a) Has failed to affix a conspicuous label containing the signal word ‘‘WARNING,’’ to alert users of potential adverse health effects.

(b) Has failed to affix a conspicuous label warning of the health-related dangers of the art or craft material.

(1) If the product contains a human carcinogen, the warning shall contain the statement: ‘‘CANCER HAZARD! Overexposure may create cancer risk.’’

(2) If the product contains a potential human carcinogen, and does not contain a human carcinogen, the warning shall contain the statement: ‘‘POSSIBLE CANCER HAZARD! Overexposure might create cancer risk.’’

(3) If the product contains a toxic substance causing chronic illness, the warning shall contain, but not be limited to, the following statement or statements where applicable:

(A) May cause sterility or damage to reproductive organs.

(B) May cause birth defects or harm to developing fetus.

(C) May be excreted in human milk causing harm to nursing infant.

(D) May cause central nervous system depression or injury.

(E) May cause numbness or weakness in the extremities.

(F) Overexposure may cause damage to (specify organ).

(G) Heating above (specify degrees) may cause hazardous decomposition products.

(4) If a product contains more than one chronically toxic substance, or if a single substance can cause more than one chronic health effect, the required statements may be combined into one warning statement.

(c) Has failed to affix on the label a list of ingredients that are toxic substances causing chronic illness.

(d) Has failed to affix on the label a statement or statements of safe use and storage instructions, conforming to the following list. The label shall contain, but not be limited to, as many of the following risk statements as are applicable:

(1) Keep out of reach of children.

(2) When using, do not eat, drink, or smoke.

(3) Wash hands after use and before eating, drinking, or smoking.

(4) Keep container tightly closed.

(5) Store in well ventilated area.

(6) Avoid contact with skin.

(7) Wear protective clothing (specify type).

(8) Wear NIOSH certified masks for dusts, mists, or fumes.

(9) Wear NIOSH certified respirator with appropriate cartridge for (specify type).

(10) Wear NIOSH certified supplied-air respirator.

(11) Use window exhaust fan to remove vapors and assure adequate ventilation (specify explosion proof if necessary).

(12) Use local exhaust hood (specify type).

(13) Do not heat above (specify degrees) without adequate ventilation.

(14) Do not use or mix with (specify material).

(e) Has failed to affix on the label a statement on where to obtain more information, such as ''call your local poison control center for more health information.''

(f) Has failed to affix on the label the name and address of the manufacturer.

(g) If all of the above information cannot fit on the package label, a package insert shall be required to convey all the necessary information to the consumer. In this event, the label shall contain a statement to refer to the package insert, such as ''CAUTION: see package insert before use.'' For purposes of this section, ''package insert'' means a display of written, printed, or graphic matter upon a leaflet or suitable material accompanying the art supply. The language on this insert shall be nontechnical and nonpromotional in tone and content.

Art or craft material offered for sale in containers that contain less than one fluid ounce (30 milliliters) or one ounce net (29 grams) shall be deemed to comply with this section if there is affixed on the container a precautionary label that includes the words ''USE WITH CAUTION: Contains Hazardous Substances.''

The requirements set forth in subdivisions (a) to (g), inclusive, shall not be considered to be complied with unless the required words, statements, or other information appear on the outside container or wrapper, or on a package insert that is easily legible through the outside container or wrapper and is painted in a color in contrast with the product or the package containing the product.

(h) Pursuant to Section 108355, the department may exempt a material from full compliance with this article. In considering this exemption, the department shall take into consideration the potential for reasonably foreseeable misuse of a material by a child.

(i) If an art or craft material complies with labeling standards D-4236 of the American Society for Testing and Materials (ASTM), the material complies with the provisions of this article, unless the department determines that the label on an art or craft material does not satisfy the purposes of this article.

108515. (a) The manufacturer of any art or craft material sold, distributed, offered for sale, or exposed for sale in this state shall supply to a national poison control network approved by the director the formulation information required by that network for dissemination to poison control centers. Failure to file formulation information with an approved poison control network is a violation of this chapter.

(b) The requirements set forth in Section 108510 shall not be considered to be complied with unless all required words, statements, or other information accompany art or craft materials from manufacturer to consumer, not excluding any distributor, packager, repackager, or retailer.

CHAPTER 5. CONSUMER PRODUCTS

Article 1. Water Heater Warning Labels

108525. A warning label shall be affixed near the thermostat of all new water heaters to be sold in the state for residential use. This warning shall read as follows:

‘‘Warning: Setting of the water heater thermostat in excess of 130 degrees Fahrenheit or 54 degrees centigrade may cause accidental scalding or other injury, particularly to children or elderly persons.’’

The Legislature does not intend by the enactment of this section to impose any duty on public utilities to affix this warning label or otherwise warn their customers relative to existing water heaters.

Article 2. Toy Safety

108550. ‘‘Toy,’’ as used in this article, means an article designed and made for the amusement of a child or for his or her use in play.

108555. (a) No person shall manufacture, sell, or exchange, have in his or her possession with intent to sell or exchange, or expose or offer for sale or exchange to any retailer, any toy that is contaminated with any toxic substance or that is any of the following:

(1) Is coated with paints and lacquers containing compounds of lead of which the lead content (calculated as Pb) is in excess of that permitted by federal regulations contained in Section 1500.17 of Title 16 of the Code of Federal Regulations adopted pursuant to the Federal Hazardous Substances Act, Chapter 30 (commencing with Section 1261) of Title 15 of the United States Code, or soluble compounds of antimony, arsenic, cadmium, mercury, selenium or barium, introduced as such. Compounds shall be considered soluble if quantities in excess of 0.1 percent are dissolved by 5 percent hydrochloric acid after stirring for 10 minutes at room temperature.

(2) Consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance.

(3) Has been produced, prepared, packed, shipped, or held under unsanitary or other conditions whereby it may have become contaminated with filth or hazardous materials or otherwise rendered injurious to health.

(4) Is stuffed, padded, or lined with materials that are toxic or that would otherwise be hazardous if ingested, inhaled, or contacted.

(5) Is a stuffed, padded, or lined toy that is not securely wrapped or packaged.

(b) The department and local health officers shall enforce this article.

(c) Violation of this section is a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000) for each violation or by imprisonment in the county jail for a period not exceeding one year, or both.

108560. (a) All toys offered for sale or exchange, shall contain a label with the name and place of business of the manufacturer, distributor, or importer in the United States.

(b) It is unlawful to fail to provide any information required by this section upon the request of the department.

108565. (a) Whenever a duly authorized representative of the department or a local health officer finds, or has probable cause to believe, that any toy is or would be in violation of this article, he or she shall affix to the toy or a component thereof a tag or other appropriate marking, and shall give notice that the toy is suspected of being in violation of this article, that the toy has been embargoed, and that no person shall remove the toy until permission for removal or disposal is given by an authorized agent of the department, the local health officer, or the court.

(b) A local health officer shall notify the department within 48 hours of any action taken by the local health officer pursuant to subdivision (a).

108570. No person shall knowingly remove, sell, or dispose of a detained or embargoed toy without permission of an authorized agent of the department, the local health officer, or the court. Violation of this section is a misdemeanor punishable by a fine not exceeding one thousand dollars ($1,000) for each violation or by imprisonment in the county jail for a period not exceeding one year, or both.

108575. When an authorized agent of the department or the local health officer finds, or has reasonable cause to believe, that an embargo will be violated, he or she may remove the embargoed toy to a place of safekeeping.

108580. When a toy is alleged to be in violation of this article, the department or the local health officer shall commence proceedings in the superior court, or lower court in whose jurisdiction the toy is located, for condemnation of the article.

108585. (a) No person shall knowingly manufacture, sell, or offer for sale any toy that is designed to depict torture or resemble an instrument specifically designed for torture, or that specifically resembles a bomb or grenade.

(b) This section shall not apply to any model of an aircraft, ship, motor vehicle, railroad engine, car, or rocketship or other spacecraft, or to any part of the model.

(c) Violation of this section is a misdemeanor punishable by a fine of not more than six hundred dollars ($600).

Article 3. Beer Dispensing Equipment Safety

108600. As used in this article, unless the context requires otherwise:

(a) ‘‘Beer dispensing equipment’’ means any machine, tool, or implement used in the operation of dispensing beer.

(b) ‘‘Commercial establishment’’ means any owner or operator of a business that uses beer dispensing equipment.

(c) ‘‘Retail distributor’’ means any person engaged in the manufacture, rental, lease, sale, or distribution of beer dispensing equipment.

108605. On or after January 1, 1984, a visually inspectable without disassembly, pressure-relief rupture apparatus or other pressure relief device that performs equivalently shall be required on beer dispensing equipment manufactured, rented, leased, sold, or distributed that uses an external source of pressure, other than hand pumping. This apparatus is not required to be placed directly on the keg itself. On or after January 1, 1984, a warning shall be clearly displayed on or securely attached to all beer kegs. The word ‘‘WARNING’’, ‘‘ATTENTION’’, or other suitable wording shall appear in capital letters. The remainder of the warning shall read substantially as follows: ‘‘This keg will rupture and may cause injury

if overpressured with compressed air or CO_2. Tapping system and pressure regulator should be equipped with a pressure-relief (blowoff) device. If you are not familiar with tapping equipment, consult your retailer or the local beer distributor.''

108610. Any commercial establishment or retail distributor that violates the provisions of this article shall be subject to a civil penalty not to exceed five hundred dollars ($500) for each violation.

Article 4. Bucket Labeling

108625. A manufacturer, distributor, or seller of plastic or metal four-gallon to six-gallon, inclusive, straight sided, slightly tapered, open head, industrial containers, as defined by the American Society for Testing and Materials (ASTM), intended for use, sale, distribution, or any other purpose within the state, irrespective of point of origin, shall ensure that the industrial containers bear warning labels, that shall be applied prior to release for shipment into the stream of commerce, and shall meet all of the following requirements:

(a) The labels shall be a permanent paper, plastic, silk screened, or an offset printed label and shall be easily removable only by the use of tools or a solvent.

(b) The labels shall be at least five inches in height, by two and three-quarters inches in width or any larger size as the labeler may voluntarily choose, and shall be centered on each side of the bucket near where the handle is inserted. The label on one side shall be in Spanish, and the label on the other side shall be in English.

(c) The label shall contain on a contrasting background both the word ''WARNING'' in block print and the words ''Children Can Fall Into Bucket and Drown—Keep Children Away From Buckets With Even a Small Amount of Water.''

(d) The label shall contain a picture of a child reaching into an industrial container and shall include an encircled slash and a triangle with an exclamation point upon a contrasting field before the word ''WARNING''.

108630. Any person subject to the labeling requirements of this article is exempt from those requirements if the person has a label that is in substantial compliance with the requirements of this article.

108635. Any person who violates this article is guilty of a misdemeanor and shall be subject to Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code.

108640. This article shall become operative on September 1, 1993, and shall remain in effect unless or until preempted by federal law. Notwithstanding this section, any industrial containers, as defined in Section 108625, manufactured prior to September 1, 1993, shall not be subject to this article.

Article 5. Charcoal Hazards

108650. No person shall sell or offer for sale charcoal intended for use in the cooking or preparation of food, unless the package containing the charcoal has affixed a warning label on the outside visible surface pursuant to Section 108660.

108655. The warning label required pursuant to Section 108650 shall be the same as the following:

> WARNING: Do Not Use for Indoor Heating or Cooking Unless Ventilation Is Provided for Exhausting Fumes to Outside. Toxic Fumes May Accumulate and Cause Death.

108660. For bags of charcoal, the warning label specified in Section 108655 shall appear within a heavy borderline in a color sharply contrasting to that of the background, on both front and back panels in the upper 25 percent of the panels of the bag at least two inches below the seam, and at least one inch above any reading material or design elements in type size as follows: The signal word ''WARNING'' shall appear in capital letters at least three-eighths inch in height; the remaining text of the warning shall be printed in letters at least three-sixteenths inch in height.

108665. Any violation of any provision of this chapter shall be a misdemeanor.

CHAPTER 6. POISON PREVENTION PACKAGING ACT

Article 1. Definitions and General Provisions

108675. This chapter shall be known and may be cited as the ''California Poison Prevention Packaging Act.''

108680. Unless the provisions or the context otherwise requires, these definitions, rules of construction, and general provisions shall govern the construction of this chapter. As used in this chapter:

(a) ''Department'' means the State Department of Health.

(b) ''Household substance'' means any substance that is customarily produced or distributed for sale for consumption or use, or customarily stored by individuals in or about the household and is one of the following:

(1) A hazardous substance as that term is defined in Section 108125.

(2) A food, drug, or cosmetic, as those terms are defined in Sections 109900, 109925, and 109935, that (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or

combustible, or (vi) generates pressure through decomposition, heat, or other means; if it may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.

(3) A substance intended for use as fuel when stored in a portable container and used in the heating, cooking, or refrigeration system of a residential dwelling.

(c) ''Package'' means the immediate container or wrapping in which any household substance is contained for consumption, use, or storage by individuals in or about the household, and, for purposes of household substances, also means any outer container or wrapping used in the retail display of any such substance to consumers.

''Package'' does not include the following:

(1) Any shipping container or wrapping used solely for the transportation of any household substance in bulk or in quantity to manufacturers, packers, or processors, or to wholesale or retail distributors thereof.

(2) Any shipping container or outer wrapping used by retailers to ship or deliver any household substance to consumers unless it is the only container or wrapping.

(d) ''Special packaging'' means packaging that is designed or constructed to be significantly difficult for children under five years of age to open or obtain a toxic or harmful amount of the substance contained therein within a reasonable time and not difficult for normal adults to use properly, but does not mean packaging that all such children cannot open or obtain a toxic or harmful amount of within a reasonable time.

(e) ''Labeling'' means all labels and other written, printed, or graphic matter upon any household substance or its package, or accompanying the substance.

(f) ''Federal act'' means the ''Poison Prevention Packaging Act of 1970'' (15 U.S.C. Sec. 1471 et seq.).

Article 2. Regulations

108685. The department shall, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, adopt regulations establishing standards for the special packaging of any household substance in accordance with this chapter if the regulations do not differ in substance or proscribe or require conduct that differs from the federal act or regulations issued pursuant to the federal act and if the department finds as follows:

(a) The degree or nature of the hazard to children in the availability of the substance, by reason of its packaging, is such that special packaging is required to protect children from serious

personal injury or serious illness resulting from handling, using, or ingesting the substance.

(b) The special packaging to be required by the standard is technically feasible, practicable, and appropriate for the substance.

108690. In establishing a standard under Section 108685, the department shall consider all of the following:

(a) The reasonableness of the standard.

(b) Available scientific, medical, and engineering data concerning special packaging and concerning childhood accidental ingestions, illness, and injury caused by household substances.

(c) The manufacturing practices of industries affected by the standard.

(d) The nature and use of the household substance.

108695. To the extent that the requirements of this chapter are identical with the federal act, all regulations and any amendments to the regulations adopted pursuant to the federal act, that are in effect on January 1, 1978, or that are adopted on or after that date, shall be the poison prevention packaging regulations of this state.

108700. Any federal regulation adopted by the department pursuant to this chapter shall take effect in this state 30 days after it becomes effective as a federal regulation. Any person who would be adversely affected by adoption of the federal regulation in this state may, within the 30 days prior to its becoming effective in this state, file with the state department, in writing, objections and a request for a hearing. The timely filing of substantial objections to a regulation that has become effective under the federal act, shall stay the adoption of the regulation in this state as a state regulation.

108705. If substantial objections are made to a federal regulation within 30 days prior to its becoming effective in this state or to a proposed regulation within 30 days after it is published, the department, after notice, shall conduct a public hearing to receive evidence on issues raised by the objections. Any interested person or his or her representative shall be heard at the hearing. The department shall act upon objections by order and shall mail the order to objectors by certified mail within a reasonable period of time after the hearing. The order shall be based on evidence contained in the record of the hearing. If the order concerns a proposed regulation of the department, the department may withdraw it or set an effective date for the regulation as published or as modified by the order. The effective date shall be at least 60 days after publication of the order.

108710. Nothing in this chapter shall authorize the department to prescribe specific packaging designs, product content, or package quantity, except as provided in subdivision (b) of Section 108715. In the case of a household substance for which special packaging is required pursuant to a regulation under this chapter, the department

may prohibit the packaging of the substance in packages that it determines are unnecessarily attractive to children.

Article 3. Marketing of Conventional Packages

108715. For the purposes of making any household substance that is subject to a standard established under Section 108685 readily available to elderly or handicapped persons unable to use the substance when packaged in compliance with the standard, the manufacturer or packer, may package any household substance, subject to the standard in packaging of a single size that does not comply with that standard if both of the following are present:

(a) The manufacturer or packer also supplies the substance in packages that comply with the standards.

(b) The packages of the substance, that do not meet the standard, shall bear conspicuous labeling stating: ''This package for household without young children.'' The department regulation may prescribe a substitute statement to the same effect for packaging too small to accommodate the labeling.

108720. If a household substance subject to such a standard is dispensed pursuant to an order of a physician, dentist, or other licensed medical practitioner authorized to prescribe the substance, then it may be dispensed in noncomplying packages only when directed in the order or when requested by the purchaser.

108725. If a household substance subject to such a standard is packaged pursuant to subdivision (b) of Section 108715 in a noncomplying package, and the department determines that the substance is not also being supplied by a manufacturer or packer in popular size packages that comply with the standard, the department may, after giving the manufacturer or packer an opportunity to comply with the purposes of this chapter, require by order that the substance be packaged by the manufacturer or packer exclusively in special packaging complying with the standard if it finds, after opportunity for hearing, that the exclusive use of a special packaging is necessary to accomplish the purposes of this chapter.

CHAPTER 7. CHILDREN'S POISON PREVENTION PACKAGING ACT

108750. This chapter shall be known and may be cited as the Children's Poison Protection Act of 1990.

108755. As used in this chapter:

(a) ''Household'' means any product used under any of the following circumstances:

(1) Directly on humans or pets.

(2) In, on, or around any structure, vehicle, article, surface, or area associated with the household, including, but not limited to,

nonagricultural outbuildings, noncommercial greenhouses, pleasure boats, and recreational vehicles.

(3) In or around any preschool or day care facility.

(b) ''Liquid'' means a liquid preparation that flows readily in its natural state at room temperature containing one or more soluble chemical substances usually dissolved in water or other solvents. ''Solvent'' includes, but is not limited to, aqueous acids (acetic, hydrochloric, and nitric acids) and nonaqueous solutions (spirits, liniments).

(c) ''Toxic household product'' means any substance or mixture of substances that are customarily produced or distributed for sale for use in or about the household, or are customarily stored by individuals in or about the household, and the substance or mixture of substances have the capacity to produce significant personal injury or illness to humans when orally ingested in moderate amounts.

''Toxic household product'' shall not include any of the following:

(1) Products that contain hydrocarbons in which the only known toxicity is through lung aspiration of minute amounts and not absorption through the stomach.

(2) Products that are intended for use in or around the mouth or are reasonably expected to be used orally or ingested.

(3) Economic poisons packaged in containers of more than one gallon liquid or more than 10 pounds dry weight.

(4) With the exception of products containing 2.5 percent or more by weight camphor in liquid formulations, any drug, as defined in the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 301 et seq.) and the Sherman Food, Drug, and Cosmetic Law (Part 5 (commencing with Section 109875)).

(5) Products that, immediately upon ingestion, cause severe damage or irritation to the mouth or tongue, or are fatal upon a single taste.

(6) Products packaged in pressurized aerosol containers.

(7) Products containing ethylene glycol that are described in paragraphs (7), (9), and (38) of subdivision (a) of Section 1500.83 of Part 1500 of Title 16 of the Code of Federal Regulations.

108760. (a) Except as provided in subdivision (b), any toxic household product that contains any substance listed in subdivision (a) of Section 108765, and manufactured on and after January 1, 1992, and sold in California, shall include within the product a bittering agent that is nontoxic, in a concentration so as to render the product aversively bitter, unless the product is packaged with child-resistant safety closures in accordance with the federal Poison Prevention Packaging Act of 1970 (15 U.S.C. Sec. 1471 et seq.) and regulations adopted thereunder (16 C.F.R. 1700.1 et seq.).

(b) Any toxic household product that (1) is required to be registered with the Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec.

135 et seq.), (2) is formulated for outdoor or food use economic poisons purposes, and (3) will be reformulated to include a bittering agent, shall comply with subdivision (a) no later than two years from the date when the Environmental Protection Agency has approved a bittering agent for use in outdoor or food use economic poisons.

108765. (a) Manufacturers of toxic household products that contain any of the following substances shall comply with Section 108760, unless the manufacturer documents that there are no signs of toxicity at an oral dose of five grams of product per kilogram of body weight, or the product's container, when full, contains a dose less than that which has previously been documented by the manufacturer to be nontoxic:

(1) Acetonitrile.
(2) Sodium bromate (600 mg or more).
(3) Potassium bromate (50 mg or more).
(4) Carbamates (used in insecticide formulations).
(5) Chlorinated hydrocarbon insecticides and solvents (5 percent or more by weight).
(6) Cyanide.
(7) Diquat.
(8) Ethylene glycol (10 percent or more by weight).
(9) Organophosphate insecticides.
(10) Metaldehyde.
(11) Methanol (methyl alcohol)(4 percent or more by weight).
(12) Phenol (10 percent or more by weight).
(13) Pine oil, in concentrations of 20 percent or more.
(14) Strychnine formulations.

(b) Due to the lack of long-term testing results for dermal exposure of available bittering agents, manufacturers of toxic household products that contain any of the following substances in liquid formulations shall, in lieu of complying with Section 108760, package their products with child-resistant safety closures in accordance with the federal Poison Prevention Packaging Act of 1970 (15 U.S.C. Sec. 1471 et seq.) and regulations adopted thereunder (16 C.F.R. 1700.1 et seq.):

(1) Camphor (2.5 percent or more by weight).
(2) Diethyltoluamide (5 percent or more by weight).
(3) Ethylhexanediol (5 percent or more by weight).

108770. (a) It is unlawful for any person to distribute or sell a toxic household product or cause a toxic household product to be distributed or sold in this state if it does not meet the requirements of this chapter.

(b) The prohibition contained in subdivision (a) shall not apply to a person engaged in the business of wholesale or retail distribution of a toxic household product, unless the person is engaged in the manufacture of the product, or has knowledge that a toxic household

product that he or she is distributing or selling is in violation of this chapter.

(c) Nothing in this section shall be construed to exempt a distributor of a house brand from any provision of this chapter.

108775. (a) Any person may bring a civil action in a court of competent jurisdiction to enforce the requirements of this chapter. The court may grant injunctive relief in any action brought pursuant to this section.

(b) Exemplary damages, as provided for in Section 3294 of the Civil Code, may also be awarded in any action brought pursuant to this section.

(c) Whenever the person bringing the action pursuant to this section is the prevailing party, he or she shall be awarded attorney's fees and costs by the court.

108780. Any person who violates any provision of this chapter shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for each day of violation, that shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General in any court of competent jurisdiction.

108785. All civil penalties collected pursuant to Section 108780 shall be deposited in the Children's Poison Protection Act of 1990 Fund, that is hereby created in the State Treasury. Money in the fund shall be allocated by the Emergency Medical Services Authority, when appropriated thereto by the Legislature, to the California Regional Poison Control Centers for the purpose of their poisoning prevention education programs.

CHAPTER 8. LEAD IN TABLEWARE

108800. Cautionary statements that are required by law, or regulations adopted pursuant to law, to be printed upon the labels of containers in which dangerous drugs, poisons, and other harmful substances are packaged shall be printed in the English language in a conspicuous place in type of conspicuous size in contrast to the typography, layout, or color of the other printed matter on the label.

108805. Unless a specific color is prescribed, the cautionary statements may be printed in any color, but preferably red, upon a plain and distinctly contrasting background.

108810. The words ''safe,'' ''safely,'' ''safety,'' or words having the same meaning that would detract from the value of the cautionary statement shall not be used upon the labels of containers of dangerous drugs, poisons, and other highly toxic substances.

108815. Nothing in this chapter shall apply to products produced by a laboratory licensed under Section 351 of Title III of the Public Health Service Act (Public Law 410, Chapter 373, Seventy-eighth Congress, Second Session).

108820. Any violation of this chapter is a misdemeanor.
108825. This chapter shall become operative January 1, 1960.

CHAPTER 9. CONTROL OF LEAD RELEASE FROM TABLEWARE

Article 1. Definitions

108850. The Legislature finds and declares all of the following:
(a) The program maintained by the United States Food and Drug Administration to regulate the amount of lead and cadmium released from ceramic, metal, and other dishware and tableware is inadequate to protect Californians from the importation and sale of unsafe tableware in this state.
(b) Recent inspection and sampling conducted by local and state health departments in California has demonstrated that significant amounts of unsafe tableware are in fact being imported and sold in California.
(c) The standards established by the federal government for acceptable lead and cadmium release are likely inadequate to fully protect public health and may be inconsistent with requirements that already exist in California law governing exposure to lead and cadmium.
(d) It is the intent of the Legislature that the department, first, establish its own program to protect the public from unsafe tableware and, second, develop standards for lead and cadmium release from tableware that are consistent with existing state law.
108855. For purposes of this chapter the following definitions shall apply:
(a) ''Director'' means the Director of Health Services.
(b) ''Department'' means the State Department of Health Services.
(c) ''Distributor'' means any person who brings tableware into California from another state for sale.
(d) ''Importer'' means any person who brings tableware into California from another country for sale.
(e) ''Manufacturer'' means any person who makes tableware sold in California.
(f) ''Small business'' means any manufacturer, importer, or distributor whose gross annual revenue for the sale of tableware is thirty thousand dollars ($30,000) or less.
(g) ''Tableware'' means any glazed ceramic, enamel metalware, or pewter article, container, or utensil that may be used in the preparation, serving, or storage of food or drink.

Article 2. Standards

108860. It is unlawful to manufacture, process, import, sell, deliver, hold for sale, supply, or offer for sale in this state any tableware that releases a level of lead or cadmium in violation of the standards contained in the Compliance Policy Guides 7117.06 and 7117.07 as described in 54 Federal Register 23485 or any subsequent, more stringent standards adopted by the United States Food and Drug Administration, as determined by the director.

108865. On or before January 1, 1993, the department shall evaluate the standards specified in Section 108860 to determine whether they are adequate to protect the public health, including, but not limited to, the health of children and other sensitive groups of the population, and shall report the results of this evaluation to the Legislature. The evaluation and report shall specifically include recommendations regarding standards governing the release of lead and cadmium from tableware that would be necessary to adequately protect the public health and shall include comparisons with other public health standards governing exposure to lead and cadmium. The report shall also identify any additional studies necessary to adequately evaluate the public health impacts of exposures to lead and cadmium.

108870. (a) Except as provided in subdivisions (c) and (d), each piece of tableware sold, or offered for sale, in this state shall be permanently and indelibly marked with the name of the manufacturer or importer responsible for the sale of the tableware in California.

(b) For the purposes of this section, permanently and indelibly marked means fired or manufactured into the glazed tableware.

(c) This section shall not apply to any tableware that is manufactured without lead or cadmium as an intentionally added ingredient or as an unintentional contaminant.

(d) This section shall not apply to any tableware product that is of a peculiar structure or too small to accommodate the name of the manufacturer or importer in accordance with subdivision (a), provided that the product either (1) is permanently and indelibly marked with a registered trademark that is on file with the department, or is described and depicted in a certificate of registration that is on file with the department, or (2) is part of a tableware set or pattern, one or more pieces that are marked in accordance with subdivision (a).

Article 3. Enforcement

108875. The department is responsible for the administration and enforcement of this chapter. The department shall annually report to the Legislature concerning the number and findings of inspections

performed and samples taken to determine compliance with this chapter.

108880. (a) For fiscal years 1991–92 and 1992–93, the department shall levy a fee of five hundred dollars ($500) for each manufacturer, importer, and distributor of tableware sold in this state to be used for the implementation of this chapter, except that the department shall levy a fee of one hundred fifty dollars ($150) for small businesses. A penalty of 10 percent per month shall be added to any fee that is not paid when due. The fee shall not exceed the costs of administering and enforcing this chapter for the 1991–92 and 1992–93 fiscal years.

No later than July 1993, the department shall establish and implement a fee schedule that assesses an annual fee upon manufacturers, importers, and distributors of tableware sold in California. The fees shall be based on the reasonable anticipated costs that will be incurred by the department, and by local health officers if an agreement is executed pursuant to Section 108885, to implement and enforce this chapter. In calculating the necessary fees, the department shall include any civil penalties generated pursuant to Section 100425. Commencing in fiscal year 1993–94, the fee established pursuant to this subdivision shall be adjusted pursuant to Section 100425 and shall further be adjusted annually by reducing the fee by an amount equal to the total amount of civil penalties collected pursuant to Section 108900 during the previous calendar year, divided by the total number of manufacturers, importers, and distributors having paid fees during the previous calendar year. The fee collected pursuant to subdivision (a) shall terminate upon implementation of the fee schedule developed pursuant to this subdivision. The fee schedule shall provide for the recovery of all costs of implementing this chapter, including the cost of establishing the fee schedule as prescribed in this section. In the event that the department's reasonable costs in any one fiscal year exceed the available fees for that year, the department shall, as necessary, delay any activities in administering this chapter that will incur costs exceeding available fees until the following year. All moneys collected as fees pursuant to this section shall be expended in carrying out this chapter.

108885. The department and a health officer, as defined in Section 111015, may enter into an agreement designating the local health department of a city, county, city and county, or local health district as the department's authorized agent for the purposes of enforcing this chapter. If an agreement is executed pursuant to this section, the department shall make fee revenues available to the health officer for performing duties relating to enforcing this chapter.

108890. (a) For the purposes of enforcing this chapter, any authorized agent of the department may, upon presenting

credentials showing that he or she is an authorized agent of the department and at a reasonable time, do any of the following:

(1) Enter any factory, warehouse, or establishment in which any tableware is manufactured, held, distributed, used, or sold.

(2) Enter any vehicle that is being used to transport or hold tableware.

(3) Enter any place where any tableware is suspected of being held or sold in violation of this chapter.

(4) Inspect any factory, warehouse, establishment, vehicle, or place in which any tableware is manufactured, held, transported, distributed, used, or sold, and all equipment, raw materials, finished and unfinished materials, containers, and tableware therein. The inspection shall include any record, file, paper, process, control, and facility that has a bearing on whether the tableware complies with this chapter.

(5) Secure any sample or specimen of any tableware or of any release of lead or cadmium from tableware. If the agent obtains any samples prior to leaving the premises, he or she shall leave a receipt describing any sample obtained. The department shall secure only the quantity of tableware that is reasonably necessary to conduct the tests to determine the release of lead or cadmium as determined appropriate by the department.

(6) Have access to all records of carriers in commerce relating to the movement in commerce of any tableware, or the holding for sale of the tableware, and the quantity, shipper, and consignee.

(b) It is unlawful for any person to refuse to permit entry or inspection, the taking of samples or other evidence, including photographs, or access to copying of any record as authorized by this chapter, or to conceal the samples or evidence, or withhold evidence concerning them.

108895. The department may publish or publicly distribute any information regarding tableware, including results of tests and investigations, after assuring the accuracy of those tests and investigations, as the department considers necessary for the protection of public health and safety of the consumer or for the protection of the consumer from fraud.

108900. (a) The department may impose a civil penalty payable to the department upon any person who violates any provision of this chapter or any regulation adopted pursuant to this chapter in the amount of not more than five thousand dollars ($5,000) per day. Each day a violation continues shall be considered a separate violation.

(b) If, after examination of a possible violation and the facts surrounding that possible violation, the department concludes that a violation has occurred, the department may issue a complaint to the person charged with the violation. The complaint shall allege the acts or failures to act that constitute the basis for the violation and the amount of the penalty. The complaint shall be served by personal

service or by certified mail and shall inform the person so served of the right to a hearing.

(c) Any person served with a complaint pursuant to subdivision (c) may, within 20 days after service of the complaint, request a hearing by filing with the department a notice of defense. A notice of defense is deemed to have been filed within the 20-day period if it is postmarked within the 20-day period. If a hearing is requested by the person, it shall be conducted within 90 days after the receipt by the department of the notice of defense. If no notice of defense is filed within 20 days after service of the complaint, the department shall issue an order setting the penalty as proposed in the complaint unless the department and the person have entered into a settlement agreement, in that case the department shall issue an order setting the penalty in the amount specified in the settlement agreement. When the person has not filed a notice of defense or where the department and the person have entered into a settlement agreement, the order shall not be subject to review by any court or agency.

(d) Any hearing required under this section shall be conducted by a departmental hearing officer appointed by the director. The department shall adopt regulations establishing a hearing process to review complaints. Until the department adopts these regulations, all hearings shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that hearings shall be conducted by a departmental hearing officer appointed by the director. The department shall have all the powers granted in that chapter.

(e) Orders setting civil penalties under this section shall become effective and final upon issuance thereof, and payment shall be made within 30 days of issuance. A copy of the order shall be served by personal service or by certified mail upon the person served with the complaint.

(f) Within 30 days after service of a copy of a decision issued by the director, any person so served may file with the superior court a petition for writ of mandate for review of the decision. Any person who fails to file the petition within this 30-day period may not challenge the reasonableness or validity of the decision or order of the director in any judicial proceeding brought to enforce the decision or order or for other remedies. Section 1094.5 of the Code of Civil Procedure shall govern any proceedings conducted pursuant to this subdivision. In all proceedings pursuant to this subdivision, the court shall uphold the decision of the director if the decision is based upon substantial evidence in the whole record. The filing of a petition for writ of mandate shall not stay any corrective action required pursuant to this chapter or the accrual of any penalties assessed pursuant to this section. This subdivision does not prohibit the court from granting any appropriate relief within its jurisdiction.

(g) The remedies under this section are in addition to, and do not supersede, or limit, any and all other remedies, civil or criminal.

(h) If the violation is committed after a previous imposition of a penalty under this section that has become final, or if the violation is committed with intent to mislead or defraud, or if the violation concerns tableware primarily used by children or marketed for children, the person shall be subject to imprisonment for not more than one year in the county jail or imprisonment in state prison, or a fine of not more than ten thousand dollars ($10,000), or both the imprisonment and fine.

108905. (a) Whenever an authorized agent of the department finds, or has probable cause to believe, that any tableware has the potential to release amounts of lead or cadmium in violation of this chapter, he or she shall affix to the tableware a detention tag, embargo tag, or other similar marking, as determined appropriate by the authorized agent. The tag or other marking shall give notice that the tableware is suspected of releasing amounts of lead or cadmium in violation of this chapter and that no person shall remove or dispose of the tableware by sale or otherwise until permission for removal or disposal is given by an authorized agent of the department or the court.

(b) For the purposes of this section, an authorized agent has probable cause to believe that tableware has the potential to release amounts of lead or cadmium in violation of this chapter when, but not limited to instances when, the tableware tests positive for lead or cadmium release using the field test described in the document published by the United States Food and Drug Administration entitled Analytical Letters Vol. 21, 1988, pages 2145 to 2154, inclusive, or any other test for lead release subsequently approved for field use by the United States Food and Drug Administration and determined by the department to be at least as effective a test for lead or cadmium release as the test described in this subdivision.

(c) If a field test conducted pursuant to subdivision (b) tests positive for lead release, the department shall use the Association of Official Analytical Chemists/American Society for Testing and Material 24-hour test method, or any other test subsequently approved by the federal Food and Drug Administration determined by the department to be at least as effective a test for lead or cadmium release as the test described in this subdivision. The department shall conduct or obtain those tests within a reasonable time after embargoing affected tableware, and shall release any tableware found not to violate the standards of this chapter within a reasonable time after the laboratory test has been completed. For any food establishment, as defined in Section 113780, the department shall conduct or obtain those tests within a reasonable time, not to exceed 10 days, after embargoing affected tableware, and shall

release any tableware found not to violate the standards of this chapter within 96 hours after the laboratory test has been conducted.

(d) If an item of tableware is found to violate this chapter, the manufacturer, importer, retailer, and distributor shall, at the option of the holder of the tableware, either provide the holder of the tableware with comparable replacement tableware acceptable to the holder or be liable to the holder of the tableware for the cost of purchasing comparable replacement tableware.

(e) No person shall remove, sell, or dispose of detained or embargoed tableware without permission of an authorized agent of the department or a court.

108910. Any tableware that violates this chapter shall also be governed by the procedures set forth in Sections 111875, 111880, 111885, 111895, 111900, 111910, and 111915. Except for use of the procedures set forth in those sections, nothing in this section shall be interpreted as making this chapter part of Part 5 (commencing with Section 109875).

108915. This chapter shall become operative on July 1, 1991.

PART 4. DRUGS, DEVICES, AND COSMETICS

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. TREATMENT OF CANCER AND OTHER SERIOUS DISEASES

Article 1. Intent and Definitions

109250. The effective diagnosis, care, treatment or cure of persons suffering from cancer is of paramount public importance. Vital statistics indicate that approximately 16 percent of the total deaths in the United States annually result from one or another of the forms of cancer. It is established that accurate and early diagnosis of many forms of cancer, followed by prompt application of methods of treatment that are scientifically proven, either materially reduces the likelihood of death from cancer or may materially prolong the useful life of individuals suffering therefrom.

Despite intensive campaigns of public education, there is a lack of adequate and accurate information among the public with respect to presently proven methods for the diagnosis, treatment, and cure of cancer. Various persons in this state have represented and continue to represent themselves as possessing medicines, methods, techniques, skills, or devices for the effective diagnosis, treatment, or cure of cancer, whose representations are misleading to the public,

with the result that large numbers of the public, relying on the representations, needlessly die of cancer, and substantial amounts of the savings of individuals and families relying on the representations are needlessly wasted.

It is, therefore, in the public interest that the public be afforded full and accurate knowledge as to the facilities and methods for the diagnosis, treatment, and cure of cancer available in this state and that to that end there be provided means for testing and investigating the value or lack thereof of alleged cancer remedies, devices, drugs, or compounds, and informing the public of the facts found, and protecting the public from misrepresentation in these matters.

The importance of continuing scientific research to determine the cause or cure of cancer is recognized, and the department shall administer this article and Article 2 (commencing with Section 109300) with due regard for the importance of bona fide scientific research and the clinical testing in hospitals, clinics, or similar institutions of new drugs or compounds.

109255. There is in the department a Cancer Advisory Council composed of nine physicians and surgeons licensed to practice medicine in, and residing in, this state, three persons who are not physicians and surgeons, two persons representing nonprofit cancer research institutes recognized by the National Cancer Institute, and the director of the department, who shall be an ex officio member. The members of the council shall be appointed by the Governor to serve for terms of four years. The Governor, in appointing the first members, shall appoint at least one member from the faculty of each of the schools teaching medicine and surgery and located in this state that are approved by the Medical Board of California. The Governor shall endeavor to maintain one member from the faculty of each school in making subsequent appointments.

109260. The members of the council, other than the director of the department, shall receive no compensation for their services, but shall be allowed their actual necessary traveling expenses incurred in the discharge of their duties.

Except as provided in Section 109390 the council is not required to conduct meetings open to the public in accordance with Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code.

109265. The council shall annually elect one of its members to serve as chairman. The council shall meet at least twice each year, and as often in addition as necessary, for the purpose of carrying out its duties.

109270. The department shall:

(a) Prescribe reasonable regulations with respect to the administration of this article and Article 2 (commencing with Section 109300).

(b) Investigate violations of this article and Article 2 (commencing with Section 109300), and report the violations to the appropriate enforcement authority.

(c) Secure the investigation and testing of the content, method of preparation, efficacy, or use of drugs, medicines, compounds, or devices proposed to be used, or used, by any individual, person, firm, association, or other entity in the state for the diagnosis, treatment, or cure of cancer, prescribe reasonable regulations with respect to the investigation and testing, and make findings of fact and recommendations upon completion of any such investigation and testing.

(d) Adopt a regulation prohibiting the prescription, administration, sale or other distribution of any drug, substance, or device found to be harmful or of no value in the diagnosis, prevention or treatment of cancer.

(e) Hold hearings in respect of those matters involving compliance with this article and Article 2 (commencing with Section 109300) and subpoena witnesses and documents. Any or all hearings may be held before the Cancer Advisory Council. Any administrative action to be taken by the department as a result of the hearings shall be taken only after receipt of the recommendations of the council. Prior to issuance of a cease and desist order under Section 109345, a hearing shall be held. The person furnishing a sample under Section 109295 shall be given due notice of the hearing and an opportunity to be heard.

(f) Contract with independent scientific consultants for specialized services and advice.

In the exercise of the powers granted by this section, the department shall consult with the Cancer Advisory Council.

109275. (a) Physicians and surgeons shall inform patients being treated for any form of breast cancer of the alternative efficacious methods of treatment by providing the patient with the written summary described in subdivision (c).

(b) The failure of a physician and surgeon to inform a patient, by means of a standardized written summary developed by the department on the recommendation of the Cancer Advisory Council in accordance with subdivision (c), in layman's language and in a language understood by the patient, of alternative efficacious methods of treatment that may be medically viable, including surgical, radiological, or chemotherapeutic treatments or combinations thereof, when the patient is being treated for any form of breast cancer, constitutes unprofessional conduct within the meaning of Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

(c) (1) A standardized written summary in layman's language and in a language understood by the patient shall be developed by the department with the recommendations of the Cancer Advisory

Council, and shall be printed and made available by the Medical Board of California to physicians and surgeons, for the purposes of informing the patient of the advantages, disadvantages, risks and descriptions of the procedures with regard to medically viable and efficacious alternative methods of treatment for breast cancer as required by subdivision (a).

(2) Commencing no later than January 1, 1995, and every three years thereafter, the department shall review the written summary and shall revise the written summary if the department determines that new or revised information should be included in the written summary.

(3) At the next revision of the standardized written summary required by this section, the department shall incorporate all of the following additional information:

(A) Information regarding methods of treatment for breast cancer that are in the investigational or clinical trial stage and are recognized for treatment by the Physician's Data Query of the National Cancer Institute.

(B) Available reference numbers, including, but not limited to, the ''800'' telephone numbers for the National Cancer Institute and the American Cancer Society, in order for breast cancer patients to obtain the most recent information.

(C) A discussion of breast reconstruction surgery, including, but not limited to, problems, benefits, and alternatives.

(D) Statistics on the incidence of breast cancer.

(d) Prior to performance of a biopsy, the physician and surgeon shall note on the patient's chart that he or she has given the patient the written summary required by this section.

(e) The Medical Board of California shall establish a distribution system for the breast cancer treatment alternatives written summary that is linked to the process of biennial renewal of physician and surgeon licenses.

109280. A standardized written summary in layman's language and in a language understood by patients shall be developed by the department on the recommendation of the Cancer Advisory Council and printed and made available by the Medical Board of California to physicians and surgeons, concerning the advantages, disadvantages, risks, and descriptions, of procedures with regard to medically viable and efficacious alternative methods of treatment of prostate cancer. Physicians and surgeons are urged to make the summary available to patients when appropriate.

109285. For the purposes of this article and Article 2 (commencing with Section 109300) ''cancer'' means all malignant neoplasms regardless of the tissue of origin, including malignant lymphoma, Hodgkins disease, and leukemia.

109290. No person may undertake to treat or alleviate cancer by use of drugs, surgery, or radiation unless the person holds a license

issued under a law of this state expressly authorizing the diagnosis and treatment of disease by use of drugs, surgery, or radiation.

109295. On written request by the department, delivered personally or by mail, any individual, person, firm, association, or other entity engaged, or representing himself, or itself, as engaged, in the diagnosis, treatment, alleviation, or cure of cancer shall furnish the department with the sample as the department may deem necessary for adequate testing of any drug, medicine, compound, or device used or prescribed by the individual, person, firm, association, or other entity in the diagnosis, treatment, alleviation, or cure of cancer, and shall specify the formula of any drug or compound and name all ingredients by their common or usual names, and shall, upon like request by the department, furnish further necessary information as it may request as to the composition and method of preparation of and the use that any drug, compound, or device is being put by the individual, person, firm, association, or other entity. This section shall apply to any individual, person, firm, association, or other entity that renders health care or services to individuals who have or believe they have cancer. This section also applies to any individual, person, firm, association, or other entity that by implication causes individuals to believe they have cancer.

The failure to either provide the sample, disclose the formula, or name the ingredients as required by this section shall be conclusively presumed that the drug, medicine, compound or device that is the subject of the department's request has no value in the diagnosis, treatment, alleviation, or cure of cancer.

Article 2. Prohibitions and Enforcement

109300. The sale, offering for sale, holding for sale, delivering, giving away, prescribing or administering of any drug, medicine, compound, or device to be used in the diagnosis, treatment, alleviation, or cure of cancer is unlawful and prohibited unless (1) an application with respect thereto has been approved under Section 505 of the federal Food, Drug and Cosmetic Act, or (2) there has been approved an application filed with the board setting forth:

(a) Full reports of investigations that have been made to show whether or not the drug, medicine, compound, or device is safe for the use, and whether the drug, medicine, compound, or device is effective in the use;

(b) A full list of the articles used as components of the drug, medicine, compound, or device;

(c) A full statement of the composition of the drug, medicine, compound, or device;

(d) A full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of the drug, medicine, or compound or in the case of a device, a full

statement of its composition, properties, and construction and the principle or principles of its operation;

(e) Such samples of the drug, medicine, compound, or device and of the articles used as components of the drug, medicine, compound, or device as the board may require; and

(f) Specimens of the labeling and advertising proposed to be used for the drug, medicine, compound, or device.

109305. Within 180 days after the filing of an application provided for in subdivision (2) of Section 109300 or an additional period as may be agreed upon by the board and the applicant, the board shall either:

(a) Approve the application if it finds that none of the grounds for denying approval specified in Section 109315 applies.

(b) Give the applicant notice for an opportunity for a hearing before the board on the question whether the application is approvable. If the applicant elects to accept the opportunity for hearing by written request within 30 days after the notice, the hearing shall commence not more than 90 days after the expiration of the 30 days unless the board and the applicant otherwise agree. Any hearing shall thereafter be conducted on an expedited basis and the board order thereon shall be issued within 90 days after the date fixed by the board for filing final briefs.

Prior to approving the application or giving the applicant notice for an opportunity for a hearing, the board shall have received a written report from the Cancer Advisory Council setting forth its recommendations on the action the board should take. The report shall be signed by a majority of the members of the council.

109310. In the case of any drug, medicine, compound or device for that an approval of an application filed pursuant to this article and Article 1 (commencing with Section 109250) is in effect, the applicant shall establish and maintain the records, and make the reports to the board, of data relating to clinical experience and other data or information, received or otherwise obtained by the applicant with respect to the drug, medicine, compound, or device, as the board may prescribe on the basis of a finding that the records and reports are necessary in order to enable the board to determine, or facilitate a determination, whether there is or may be ground for suspension of the application.

Every person required under this section to maintain records, and every person in charge of custody thereof, shall, upon request of an agent of the board, permit the agent at all reasonable times to have access to and copy and verify the records.

109315. The board shall issue an order refusing to permit the application to become effective, if, after due notice to the applicant and opportunity for a hearing, the board finds any of the following:

(a) The investigations, reports that are required to be submitted to the board pursuant to subdivision (2) of Section 109300 do not include adequate tests by all methods reasonably applicable to show

whether or not a drug, medicine, compound, or device is safe for use in the diagnosis, treatment, alleviation, or cure of cancer.

(b) The results of tests specified in subdivision (a) show that a drug, medicine, compound or device is unsafe for use under the conditions specified in subdivision (a) or do not show that the drug, medicine, compound, or device is safe for use under the conditions.

(c) The methods used in, and the facilities and controls used for, the manufacture, processing, and packing of a drug, medicine, compound, or device are inadequate to preserve its identity, strength, quality, and purity and with respect to a device are inadequate to preserve its safety or effectiveness.

(d) Upon the basis of the information submitted to it as part of the application, or upon the basis of any other information before it with respect to a drug, medicine, compound, or device, it has insufficient evidence to determine whether the drug, medicine, compound, or device is safe for use under the conditions specified in subdivision (a).

(e) Evaluated on the basis of the information submitted to it as part of the application and any other information before it with respect to the drug, medicine, compound, or device, there is a reasonable doubt that the drug, medicine, compound, or device will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling or advertising thereof.

(f) The application contains any untrue statement of a material fact.

109320. (a) The board shall issue an order withdrawing approval of an application concerning any drug, medicine, compound, or device if, after due notice to the applicant and opportunity for a hearing, the board finds any of the following:

(1) That clinical or other experience, tests, or other scientific data show that the drug, medicine, compound, or device is unsafe for use under the conditions of use upon the basis that the application was approved;

(2) That new evidence of clinical experience, not contained in the application or not available to the board until after the application was approved, or tests by new methods, or tests by methods not deemed reasonably applicable when the application was approved, evaluated together with the evidence available to the board when the application was approved, shows that the drug, medicine, compound, or device is not shown to be safe for use under conditions of use upon the basis that the application was approved; or

(3) On the basis of new information with respect to the drug, medicine, compound, or device, evaluated together with the evidence available to the board when the application was approved, that there is a lack of substantial evidence that the drug, medicine, compound, or device will have the effect it purports or is represented

to have under the conditions of use prescribed, recommended, or suggested in the labeling or advertising thereof; or

(4) That the application contains any untrue statement of a material fact.

(b) If the board finds that there is an imminent hazard to the public health, it may suspend the approval of the application immediately.

(c) The board may also, after due notice and opportunity for hearing, withdraw the approval of an application with respect to any drug, medicine, compound, or device under this section if the board finds any of the following:

(1) That the applicant has failed to establish a system for maintaining required records, or has repeatedly or deliberately failed to maintain the records or to make required reports, or the applicant has refused to permit access to, or copying or verification of, the records.

(2) That on the basis of new information before the board, evaluated together with the evidence before it when the application was approved, the methods used in, or the facilities and controls used for, the manufacture, maintenance, processing, and packing of the drug, medicine, compound, or device are inadequate to assure and preserve its identity, strength, quality, and purity and with respect to a device are inadequate to preserve its safety or effectiveness and were not made adequate within a reasonable time after receipt of written notice from the board specifying the matter complained of.

(3) That on the basis of new information before it, evaluated together with the evidence before it when the application was approved, the labeling of the drug, medicine, compound, or device, based on a fair evaluation of all material facts, is false or misleading in any particular and was not corrected within a reasonable time after receipt of written notice from the board specifying the matter complained of.

(d) Any order under this section shall state the findings upon which it is based.

109325. This article and Article 1 (commencing with Section 109250) shall not apply to the use of any drug, medicine, compound, or device intended solely for legitimate and bona fide investigational purposes by experts qualified by scientific training and experience to investigate the safety and therapeutic value thereof unless the department shall find that the drug, medicine, compound, or device is being used in diagnosis or treatment for compensation and profit. In order to qualify for an exemption under this section there shall be on file with the federal Department of Health, Education, and Welfare a current and unrevoked investigational new drug application issued pursuant to subdivision (i) of Section 505 of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 355(i)), or the following conditions shall be complied with:

(a) The label of the drug, medicine, compound, or device shall bear the statement ‘‘Caution: New drug (or medicine or compound or device). Use in the diagnosis, treatment, alleviation, or cure of cancer limited by law to investigational use.’’

(b) The drug, medicine, compound, or device has had adequate testing on appropriate experimental animals to demonstrate a lack of toxicity and hazard sufficient to permit its use in or on human beings and to establish with clarity the margins of safety ordinarily recognized by experts qualified by scientific training and experience to investigate the safety and effectiveness of the drugs, substances, or devices.

(c) The drug, medicine, compound, or device is to be used solely for investigational use by, or under the direction of, an expert qualified by scientific training and experience to investigate the safety and effectiveness of the drug, medicine, compound, or device.

(d) A written statement signed by the expert has been filed with the board. The statement shall show what facilities the expert will use for the investigation to be conducted by him or her, and that the drug, medicine, compound, or device will be used solely by him or her or under his or her direction for the investigation. The statement shall contain information identifying any assistant or agent of the expert who uses the drug, medicine, compound, or device under the direction of the expert.

(e) Complete records of the investigation shall be kept by the expert and all records shall be made available by the expert for inspection upon the request of any agent of the board at any reasonable hour as long as the expert desires exemption.

(f) The expert shall inform any persons who participate in the investigation as patients, that the drug, medicine, compound, or device is being used for investigational purposes and shall obtain the consent of the persons or their representatives.

109330. Section 109300 does not apply to any device used within the scope of his or her license privileges by a physician and surgeon or dentist licensed as such in this state.

109335. The failure of any individual, person, firm, association, or other entity representing himself, or itself, as engaged in the diagnosis, treatment, alleviation, or cure of cancer to comply with any of the regulations adopted under this article and Article 1 (commencing with Section 109250) is a misdemeanor. A third, and subsequent violations, of this section is a felony.

This article and Article 1 (commencing with Section 109250) shall not apply to any person who depends exclusively upon prayer for healing in accordance with the teachings of a bona fide religious sect, denomination, or organization, nor practitioner thereof.

109340. The investigation or testing of any product shall not be deemed to imply or indicate any endorsement of the qualifications or value of any product. No person shall make any representation that

investigation or testing hereunder constitutes any approval or endorsement of his or her, or its, activities by the Cancer Advisory Council or the department. The investigation or testing of any product shall not be deemed to imply or indicate that the product is useless or harmful and during testing no person shall make any representation, except to the department or Cancer Advisory Council, that the product under test is discredited or that it has been found useless or harmful.

109345. Following an investigation or testing of the content or composition of any drug, medicine, compound, or device used by any individual, person, firm, association, or other entity in the diagnosis, treatment, alleviation, or cure of cancer, and after hearing as provided in Section 109270, the department, upon recommendation of the Cancer Advisory Council, may direct that any individual, person, firm, association, or other entity shall cease and desist any further prescribing, recommending, or use of any drug, medicine, compound, or device, or any substantially similar drug, medicine, compound, or device, in the diagnosis or treatment of cancer.

In the investigation or testing required by this article and Article 1 (commencing with Section 109250) to determine the value or lack thereof of any drug, medicine, compound or device in the diagnosis, treatment, or cure of cancer, the department shall, as it deems necessary or advisable, utilize the facilities and findings of its own laboratories or other appropriate laboratories, clinics, hospitals, and nonprofit cancer research institutes recognized by the National Cancer Institute, within this State or the facilities and findings of the Federal Government, including the National Cancer Institute. Upon a recommendation by the Cancer Advisory Council, the department shall arrange, by contract, for investigation by and submission to it of findings, conclusions, or opinions of trained scientists in the appropriate departments of universities, medical schools, clinics, hospitals, and nonprofit cancer research institutes recognized by the National Cancer Institute, and the submission to it of findings, conclusions, or opinions of other qualified scientists. Prior to the issuance of a cease and desist order under this section, the Cancer Advisory Council, by the affirmative vote of at least 11 of its members, at least one of whom shall not be a physician and surgeon, shall make a written finding of fact based on the investigation that the drug, medicine, compound, or device so investigated has been found to be either definitely harmful or of no value in the diagnosis, treatment, alleviation, or cure of cancer and the department must be satisfied beyond a reasonable doubt that the written findings of the fact are true.

109350. The department may direct that any individual, person, firm, association, or other entity shall cease and desist any further prescribing, recommending or use of any drug, medicine, compound or device for that no application has been approved under this article

and Article 1 (commencing with Section 109250) unless its use is exempt under Section 109325 or Section 109330.

109355. (a) Any violation of this article and Article 1 (commencing with Section 109250), of the regulations adopted thereunder or of a cease and desist order issued by the department under Section 109345 or 109350 may be enjoined by the superior court in any county, on application of the department.

(b) Proceedings under this section shall be governed by Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure.

109360. Any person against whom an injunction or cease and desist order has been issued, under this article and Article 1 (commencing with Section 109250), may not undertake to use in the diagnosis, treatment, alleviation or cure of cancer any new, experimental, untested, or secret drug, medicine, compound, or device for that there is no approved application on file or that does not qualify for an exemption, without first submitting an application to the department.

109365. It is unlawful for any person, with the intent to defraud, to falsely represent and provide for compensation a device, substance, method or treatment as effective to diagnose, arrest, prevent, or cure cancer. Nothing in this section shall abridge the existent rights of the press.

109370. Except as provided in Section 109335, a violation of this article and Article 1 (commencing with Section 109250) is punishable by imprisonment in the county jail for a period not exceeding one year, or in the state prison, or by a fine not exceeding ten thousand dollars ($10,000), or by both the imprisonment and fine.

109375. The director shall investigate possible violations of this article and Article 1 (commencing with Section 109250) and report violations to the appropriate enforcement authority.

109380. County health officers, district attorneys and the Attorney General shall cooperate with the director in the enforcement of this article and Article 1 (commencing with Section 109250).

109385. The department, upon recommendation of the Cancer Advisory Council, may from time to time publish reports based on its investigation or testing of any drug, medicine, compound, or device prescribed, recommended, or used by any individual, person, firm, association, or other entity, and when, in the opinion of a majority of the members of the Cancer Advisory Council, the use of any drug, medicine, compound, or device in the diagnosis, treatment or cure of cancer constitutes an imminent danger to health or a gross deception of the public, the department may take appropriate steps to publicize the same.

109390. All hearings authorized by this article and Article 1 (commencing with Section 109250) shall be conducted in accordance

with Chapter 5 (commencing with Section 11500) of Part 1, Division 3, Title 2 of the Government Code.

109395. No provision of this article and Article 1 (commencing with Section 109250) shall preclude reconsideration of an application for use of any drug, medicine, compound or device for the diagnosis, treatment, alleviation or cure of cancer if new evidence or matter is presented to the department and the reconsideration is predicated upon compliance with the applicable sections of the law, and presentation of data developed subsequent to the applicable ruling of the board.

Article 3. AIDS Fraud (Reserved)

Article 4. Unlawful Advertising of Drugs and Devices (Reserved)

Article 5. Labeling, Sale, and Use of DMSO

109500. As used in this article, ''DMSO'' means dimethyl sulfoxide.

109505. DMSO sold in California other than by prescription shall be labeled by the manufacturer, distributor, or seller to contain a description of all of the contents in the solution, statement of purity, the percent of DMSO in the solution, and the manufacturer's name and address.

The label shall contain (a) the name and address of the distributor of the DMSO, if any, (b) the name and address of the manufacturer of the finished DMSO, and (c) the manufacturer's lot or control number. Finished DMSO means DMSO that requires no further manufacture prior to retail sale other than packaging or labeling. Whenever DMSO is sold or otherwise supplied, other than by prescription, the seller or supplier shall give additional printed material to the person receiving the DMSO that provides adequate warning against use that may be dangerous to the health of the user, and information that prescriptive DMSO is available from a physician.

The label of DMSO sold pursuant to this section shall contain the following statement: ''It is unlawful to represent in any way that this product is useful or safe to use for medicinal purposes.'' The label shall include appropriate precautionary measures for proper handling and first aid treatment and a warning statement to keep the product out of reach of children.

CHAPTER 5. IMITATION CONTROLLED SUBSTANCES

Article 1. Provisions and Definitions

109525. This chapter shall be known as the ''California Imitation Controlled Substances Act.''

109530. Unless the context otherwise requires, the definitions in this article govern the construction of this chapter.

109535. ''Controlled substance'' means a substance as defined in Section 11007.

109540. ''Distribute'' means the actual, constructive, or attempted transfer, delivery, or dispensing to another of an imitation controlled substance.

109545. ''Manufacture'' means the production, preparation, compounding, processing, encapsulating, packaging or repackaging, labeling or relabeling, of an imitation controlled substance.

109550. ''Imitation controlled substance'' means (a) a product specifically designed or manufactured to resemble the physical appearance of a controlled substance, that a reasonable person of ordinary knowledge would not be able to distinguish the imitation from the controlled substance by outward appearances, or (b) a product, not a controlled substance, that, by representations made and by dosage unit appearance, including color, shape, size, or markings, would lead a reasonable person to believe that, if ingested, the product would have a stimulant or depressant effect similar to or the same as that of one or more of the controlled substances included in Schedules I through V, inclusive, of the Uniform Controlled Substances Act, pursuant to Chapter 2 (commencing with Section 11053) of Division 10.

109555. The provisions of this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party.

Article 2. Offenses and Penalties

109575. Any person who knowingly manufactures, distributes, or possesses with intent to distribute, an imitation controlled substance is guilty of a misdemeanor and shall, if convicted, be subject to imprisonment for not more than six months in the county jail or a fine of not more than one thousand dollars ($1,000), or both the imprisonment and fine.

109580. Any person 18 years of age or over who violates Section 109575 by knowingly distributing an imitation controlled substance to a person under 18 years of age is guilty of a misdemeanor and shall, if convicted, be subject to imprisonment for not more than one year in the county jail or a fine of not more than two thousand dollars ($2,000), or both the imprisonment and fine. Upon a second or

subsequent conviction of this offense, the person shall be subject to imprisonment for not more that one year in the county jail and a fine of not less than six thousand dollars ($6,000).

109585. No civil or criminal liability shall be imposed by virtue of this chapter on any person registered under the California Uniform Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use by a practitioner, as defined in Section 11026, in the course of lawful professional practice or research.

109590. All imitation controlled substances shall be subject to forfeiture in accordance with the procedures set forth in Chapter 8 (commencing with Section 11470) of Division 10.

PART 5. SHERMAN FOOD, DRUG, AND COSMETIC LAWS

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

109875. This part shall be known as the Sherman Food, Drug, and Cosmetic Law.

109880. Unless the context otherwise requires, the definitions set forth in this article govern the construction of this part.

109885. ''Advertisement'' means any representations, including, but not limited to, statements upon the products, its packages, cartons, and any other container, disseminated in any manner or by any means, for the purpose of inducing, or that is likely to induce, directly or indirectly, the purchase or use of any food, drug, device, or cosmetic.

109890. ''Antibiotic drug'' means any drug intended for use by man or other animal and that contains any quantity of any chemical substance produced by a micro-organism or the chemically synthesized equivalent and that, in dilute solutions, has the capacity to inhibit or destroy micro-organisms.

109895. ''Color additive'' means a substance that satisfies both of the following requirements:

(a) It is a dye, pigment, or other substance made by a process of synthesis or similar artifice, or extracted, isolated, or otherwise derived, with or without intermediate or final change of identity, from a vegetable, animal, mineral, or other source.

(b) When added or applied to a food, drug, device, or cosmetic, or to the human body or any part of the body, it is capable, alone or through reaction with any other substance, of imparting color to the food, drug, device, or cosmetic, or to the human body or the part of the human body, to which it is added or applied.

The term ''color additive'' does not include any material that the department, by regulation, determines is used, or intended to be used, solely for a purpose or purposes other than coloring.

The term ‘‘color,’’ as used in this section, includes black, white, and intermediate grays.

This section does not apply to any pesticide chemical, soil, or plant nutrient, or other agricultural chemical, solely because of its effect in aiding, retarding, or otherwise affecting, directly or indirectly, the growth or other natural physiological process of produce of the soil and thereby affecting its color, whether before or after harvest.

109900. ‘‘Cosmetic’’ means any article, or its components, intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to, the human body, or any part of the human body, for cleansing, beautifying, promoting attractiveness, or altering the appearance.

The term ‘‘cosmetic’’ does not include soap.

109905. ‘‘Counterfeit’’, as used in respect to any food, drug, device, or cosmetic, means a food, drug, device, or cosmetic that bears or whose package or labeling bears, without authorization, the trademark, trade name, or other identifying mark, imprint, or device, or any likeness or trademark, trade name, or other identifying mark, imprint, or device of a manufacturer, processor, packer, or distributor, other than the actual manufacturer, processor, packer, or distributor, or that falsely purports or is represented to be the product of, or to have been packed or distributed by, the other manufacturer, processor, packer, or distributor.

109910. ‘‘Department’’ means the State Department of Health Services.

109915. ‘‘Director’’ means the State Director of Health Services.

109920. ‘‘Device’’ means any instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is any of the following:

(a) Recognized in the official National Formulary or the United States Pharmacopoeia, or any supplement to them.

(b) Intended for use in the diagnosis of disease or other condition, or in the cure, mitigation, treatment, or prevention of disease in humans or any other animal.

(c) Intended to affect the structure or any function of the body of humans or any other animal and that does not achieve any of its principal intended purposes through chemical action within or on the body of humans or other animals and that is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

109925. ‘‘Drug’’ means any of the following:

(a) Any article recognized in an official compendium.

(b) Any article used or intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or any other animal.

(c) Any article other than food, that is used or intended to affect the structure or any function of the body of human beings or any other animal.

(d) Any article used or intended for use as a component of any article designated in subdivision (a), (b), or (c) of this section.

The term ''drug'' does not include any device.

Any food for which a claim, (as described in Sections 403(r)(1)(B) (21 U.S.C. Sec. 343(r)(1)(B)) and 403(r)(3) (21 U.S.C. Sec. 343(r)(3)) or Sections 403(r)(1)(B) (21 U.S.C. Sec. 343(r)(1)(B)) and 403(r)(5)(D) (21 U.S.C. Sec. 343(r)(5)(D)) of the federal act), is made in accordance with the requirements set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act, is not a drug under subdivision (b) solely because the label or labeling contains such a claim.

109930. ''Federal act'' means the federal Food, Drug, and Cosmetic Act, as amended (21 U.S.C. Sec. 301 et seq.).

109935. ''Food'' means any of the following:

(a) Any article used or intended for use for food, drink, confection, condiment, or chewing gum by man or other animal.

(b) Any article used or intended for use as a component of any article designated in subdivision (a).

109940. ''Food additive'' means any substance, the intended use of which results or may reasonably be expected to result, directly or indirectly, in the substance becoming a component of the food or otherwise affecting characteristics of the food. This includes any substance or radiation source intended for use in producing, manufacturing, packing, treating, packaging, transporting, or holding any food.

The term ''food additive'' does not include any of the following:

(a) A pesticide chemical in or on a raw agricultural commodity.

(b) A pesticide chemical that is used, or intended for use, in the production, storage, or transportation of any raw agricultural commodity.

(c) A color additive.

(d) Any substance used in accordance with a sanction or approval granted prior to the enactment of the Food Additives Amendment of 1958 (72 Stat. 1784), pursuant to the federal act; the Poultry Products Inspection Act (71 Stat. 441; 21 U.S.C. Sec. 451 et seq.); the Meat Inspection Act of March 4, 1907 (34 Stat. 1260), as amended and extended (21 U.S.C. Sec. 71 et seq.); or the Food and Agricultural Code of this state.

109945. ''Food and drug inspector'' means any authorized agent of the Bureau of Food and Drug of the department, who shall have the powers set forth in Section 106500.

109950. ''Immediate container'' does not include any package liner.

109955. ‘‘Label’’ means a display of written, printed, or graphic matter upon a food, drug, device, or cosmetic or upon its immediate container.

109960. ‘‘Labeling’’ means any label or other written, printed, or graphic matter upon a food, drug, device, or cosmetic or upon its container or wrapper, or that accompanies any food, drug, device, or cosmetic.

109965. ‘‘Local health department’’ means the health department of a city, county, city and county, or local health district that qualifies for state assistance pursuant to Chapter 3 (commencing with Section 101175) of Part 3 of Division 101, or any city health department of a city that has had its own health department for 12 years or more.

109970. ‘‘Manufacture’’ means the preparation, compounding, propagation, processing, or fabrication of any food, drug, device, or cosmetic. The term ‘‘manufacture’’ includes repackaging or otherwise changing the container, wrapper, or labeling of any food, drug, device, or cosmetic in furtherance of the distribution of the food, drug, device, or cosmetic. The term ‘‘manufacture’’ does not include repackaging from a bulk container by a retailer at the time of sale to its ultimate consumer.

109975. ‘‘New device’’ means any of the following:

(a) Any device the composition, construction, or properties of which are such that the device is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of devices, as having been adequately shown, through scientific investigations to be safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling or advertising thereof.

(b) Any device the composition, construction, or properties of which are such that the device, as a result of such investigation to determine its safety and effectiveness for use under these conditions, has become so recognized, but which has not, otherwise than in the investigations, been used to a material extent or for a material time under the conditions.

109980. ‘‘New drug’’ means either of the following:

(a) Any drug the composition of which is such that the drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling or advertising thereof.

(b) Any drug the composition of which is such that the drug, as a result of investigations to determine its safety and effectiveness for use under these conditions, has become so recognized, but that has not, otherwise than in the investigations, been used to a material extent or for a material time under the conditions.

109985. ‘‘Official compendium’’ means the latest edition of the United States Pharmacopoeia, the latest edition of the Homeopathic Pharmacopoeia of the United States, or the latest edition of the National Formulary, or any supplement to any of these.

109990. ‘‘Package’’ means any container or wrapper that may be used by a manufacturer, producer, jobber, packer, or dealer for enclosing or containing any food, drug, device, or cosmetic.

The term ‘‘package’’ does not include any of the following:

(a) Any shipping container or outer wrapping used solely for the transportation of a food, drug, device, or cosmetic in bulk quantity to any manufacturer, packer, processor, or wholesale or retail distributor.

(b) Any shipping container or outer wrapping used by any retailer to ship or deliver any food, drug, device, or cosmetic to any retail consumer if the container or wrapping bears no printed matter pertaining to any food, drug, device, or cosmetic.

109995. ‘‘Person’’ means any individual, firm, partnership, trust, corporation, limited liability company, company, estate, public or private institution, association, organization, group, city, county, city and county, political subdivision of this state, other governmental agency within the state, and any representative, agent, or agency of any of the foregoing.

110000. ‘‘Pesticide chemical’’ means any substance that alone, in chemical combination, or in formulation with one or more substances, is an ‘‘economic poison’’ within the meaning of Section 12753 of the Food and Agricultural Code of this state or the Federal Insecticide, Fungicide, and Rodenticide Act (61 Stat. 163; 7 U.S.C. Sec. 135 et seq.), and that is used in the production, storage, or transportation of any raw agricultural commodity.

110005. ‘‘Potentially hazardous food’’ means any food capable of supporting growth of infections or toxicogenic micro-organisms when held at temperatures above 45 degrees Fahrenheit.

110010. ‘‘Prescription’’ means an oral order given individually for the patient for whom prescribed directly from the prescriber to the furnisher or indirectly by means of a written order signed by the prescriber that bears the name and address of the prescriber, the license classification of the prescriber, the name and address of the patient, the name and quantity of drug or device prescribed, the directions for use, and the date of issue.

110015. ‘‘Principal display panel’’ means that part of a label most likely to be displayed, presented, shown, or examined under normal and customary conditions of display for retail sale.

110020. ‘‘Raw agricultural commodity’’ means any food in its raw or natural state. It includes, but is not limited to, any fruit that is washed, colored, or otherwise treated in its unpeeled natural form prior to marketing.

110025. ‘‘Substantial evidence’’ means evidence consisting of adequate and well-controlled investigations, including clinical investigations, by experts qualified by scientific training and experience to evaluate the effectiveness of the drug or device involved, on the basis of that it could be fairly and responsibly concluded by the experts that the drug or device will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the labeling, proposed labeling, or advertising of any drug or device.

110030. The provisions of this part regarding the selling of any food, drug, device, or cosmetic include, but are not limited to, all of the following:

(a) The manufacture, production, processing, and packing of any food, drug, device, or cosmetic.

(b) The exhibition, offer, possession, or holding of any food, drug, device, or cosmetic for sale, dispensing, giving, supplying, or applying in the conduct of any establishment.

(c) The sale, dispensing, giving, supplying, or applying of any food, drug, device, or cosmetic in the conduct of any establishment.

110035. All regulations pertaining to any food, drug, device, or cosmetic adopted by the department that are in effect on the effective date of this part shall remain in effect until the department adopts regulations pursuant to this part which repeal the regulations.

110040. This part shall be so construed as to not be in conflict with the Food and Agricultural Code, or with the Alcoholic Beverage Control Act, Division 9 (commencing with Section 23000) of the Business and Professions Code, and the regulations adopted pursuant thereto.

CHAPTER 2. ADMINISTRATION

Article 1. General

110045. The department shall administer and enforce this part.

110050. The Food Safety Fund is hereby created as a special fund in the State Treasury. All moneys collected by the department under Section 110470 and under Article 7 (commencing with Section 110810) of Chapter 5 shall be deposited in the Food Safety Fund, for use by the department, upon appropriation by the Legislature, for the purposes of providing funds necessary to carry out and implement the inspection provisions of this part relating to food and the registration provisions of Article 7 (commencing with Section 110810) of Chapter 5.

110055. All money collected by the department under Sections 111830, 111885, and 111905 shall be deposited into the State Treasury to the credit of the General Fund.

110060. The director and authorized agents of the department shall have the powers set forth in Sections 100165 and 106500.

110065. The department may adopt any regulations that it determines are necessary for the enforcement of this part. The regulations shall be adopted by the department in the manner prescribed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. The department shall, insofar as practicable, make these regulations conform with those adopted under the federal act or by the United States Department of Agriculture or by the Internal Revenue Service of the United States Treasury Department.

110070. Whenever public health or other considerations in this state require, the department may adopt, upon its own motion, or upon the petition of any interested party, regulations that prescribe tolerances, included but not limited to zero tolerances, for poisonous or deleterious substances, food additives, pesticide chemicals, or color additives. The department may also prescribe the conditions under which a food additive or a color additive may be safely used and may grant exemptions for a food additive or color additive when it is to be used solely for investigational or experimental purposes.

A petitioner shall establish, by data submitted to the department, that a necessity exists for such regulations and that its effect will not be detrimental to the public health. If the data furnished by the petitioner is not sufficient to allow the department to determine whether such regulations should be adopted, the department may require additional data to be submitted. Failure to comply with this requirement shall be sufficient grounds to deny the request.

110075. In adopting regulations, pursuant to Section 110070 of this part, the department shall consider all of the following factors that the petitioner shall furnish:

(a) The name and all pertinent information concerning the poisonous or deleterious substance, food additive, pesticide chemical, or color additive, including its chemical identity and composition, its proposed use, including directions, recommendations, and suggestions, its proposed labeling, and all other relevant data bearing on its physical or other technical effect, and the quantity required to produce that effect.

(b) The probable composition of any substance formed in or on a food, drug, device, or cosmetic resulting from the use of the substance.

(c) The probable consumption and effect of the substance in the diet of man or any other animal.

(d) Safety factors that, in the opinion of qualified experts, are generally recognized as appropriate for the use of animal experimentation data.

(e) Practicable methods of analysis for determining the identity and quantity of all of the following:

(1) Any substance which is in or on the food, drug, device, or cosmetic.

(2) Any substance formed in or on the food, drug, device, or cosmetic because of the use of the substance.

(3) The pure substance and its anticipated breakdown products and impurities.

(f) Facts supporting the contention that the use of the substance will serve a useful purpose.

110080. (a) All pesticide regulations and any amendments to these regulations adopted pursuant to the federal act or the Food and Agricultural Code, in effect on November 23, 1970, or adopted on or after this date, are the pesticide regulations in this state. The department may, by regulation, prescribe tolerances for pesticides in processed foods in this state whether or not these tolerances are in accordance with the regulations adopted pursuant to the federal act or the Food and Agricultural Code.

(b) Except as otherwise provided in this subdivision, the department shall evaluate the tolerance prescribed, or an exemption from a tolerance granted, for a pesticide in processed foods and make a determination whether or not the existing tolerance, or the exemption from a tolerance, is protective of the public health whenever any one of the following occurs:

(1) The Director of Food and Agriculture designates the pesticide as a restricted material pursuant to subdivisions (a) and (b) of Section 14004.5 of the Food and Agricultural Code.

(2) The Director of Food and Agriculture refuses to register or cancels the registration of the pesticide pursuant to Section 12825, or suspends the registration of the pesticide pursuant to Section 12826, of the Food and Agricultural Code, upon determining that the pesticide is detrimental to the public health and safety.

(3) The Director of Food and Agriculture adopts regulations restricting worker entry into areas treated with the pesticide pursuant to Section 12981 of the Food and Agricultural Code.

(4) The pesticide is the subject of a proceeding pursuant to a determination by the Environmental Protection Agency under paragraph (3)(i)(A), (3)(ii)(A), (3)(ii)(B), or (3)(iii) of subsection (a) of Section 162.11 of Title 40 of the Code of Federal Regulations.

The requirement to evaluate a tolerance prescribed, or an exemption from a tolerance granted, for a pesticide does not apply if the department finds that any of the actions described in paragraphs (1) to (4), inclusive, occurred for reasons that are not related to the question whether or not the existing tolerance, or the exemption from a tolerance, adequately protects the public health. If the department makes such a finding, the reasons for the finding shall be stated in writing.

(c) The determination required by subdivision (b), and the reasons for the determination, shall be stated in writing. If the

determination is required because any of the actions described in paragraphs (1) to (4), inclusive, of subdivision (b) occurs after January 1, 1985, the determination shall be completed within one year of the date of the action. If the determination is required because any of those actions occurred prior to January 1, 1985, the determination shall be completed by January 1, 1990.

(d) In any case where the department, after consultation with the Department of Food and Agriculture, determines, pursuant to subdivision (b), that the tolerance prescribed, or an exemption from a tolerance granted, for a pesticide is not protective of the public health, the department shall, if it does not act immediately pursuant to subdivision (a), transmit notice of its determination to the responsible federal agencies and shall request that they take action, pursuant to the federal act, to modify the tolerance or an exemption from a tolerance. If, after one year from the date the notice is transmitted, the department finds that the responsible federal agencies have failed to take appropriate action to protect the public health, the department shall exercise its authority pursuant to subdivision (a) to prescribe a tolerance that is protective of the public health and shall notify the responsible federal agencies of its action.

110085. All food additive regulations and any amendments to the regulations adopted pursuant to the federal act in effect on November 23, 1970, or adopted on or after that date, are the food additive regulations of this state. The department may, by regulation, prescribe conditions under which a food additive may be used in this state whether or not these conditions are in accordance with the regulations adopted pursuant to the federal act.

110090. All color additive regulations and any amendments to the regulations adopted pursuant to the federal act, in effect on November 23, 1970, or adopted on or after that date, are the color additive regulations of this state. The department may, by regulation, prescribe conditions under which a color additive may be used in this state whether or not those conditions are in accordance with regulations adopted pursuant to the federal act.

110095. All special dietary use regulations and any amendments to regulations adopted pursuant to the federal act, in effect on November 23, 1970, or adopted on or after that date, are the special dietary use regulations of this state. If the department finds that it is necessary to inform purchasers of the value of a food for special dietary use, it may adopt any special dietary use regulation, whether or not the regulation is in accordance with the regulations adopted pursuant to the federal act.

110100. (a) All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.

(b) The department may, by regulation, adopt additional food labeling regulations. Prior to the adoption of any food labeling regulation pursuant to this subdivision, the department shall seek comments from consumer groups and representatives of the food industry that have been identified by the department as being affected by the proposed regulation.

110105. All good manufacturing practices regulations for any food, drug, device, or cosmetic and any amendments to the regulations adopted pursuant to the federal act in effect on November 23, 1970, or adopted on or after such date, are the good manufacturing practices regulations of this state. If the department finds that it is necessary for the protection of consumers, it may adopt interpretative regulations as necessary to define ''current good manufacturing practice'' as used in this part.

110110. (a) All regulations relating to (1) new drug applications, except for abbreviated new drug applications, adopted pursuant to Section 505 of the federal act (21 U.S.C. Sec. 355), (2) applications for premarket approval of new devices, adopted pursuant to Section 515 of the federal act (21 U.S.C. Sec. 360e), and (3) postmarketing reports, recordkeeping, and other postapproval requirements for approved new drug applications or approved new device premarket approval applications, adopted pursuant to the federal act, that are in effect on January 1, 1993, or that are adopted on or after that date, shall be the new drug and new device application regulations of this state.

(b) The department may, by regulation, adopt any new drug or new device application regulation that it determines is necessary for the administration and enforcement of this part, whether or not the regulation is in accordance with the regulations adopted pursuant to the federal act.

110115. A federal regulation adopted pursuant to this part takes effect in this state 30 days after it becomes effective as a federal regulation. Any person who will be adversely affected by adoption of the federal regulation in this state may, within the 30 days prior to its becoming effective in this state, file with the department, in writing, objections and a request for a hearing. The timely filing of substantial objections to a regulation that has become effective under the federal act, stays the adoption of the regulation in this state.

110120. If no substantial objections are received and no hearing is requested within 30 days after publication of a newly proposed state regulation, it shall take effect on the date set by the department. The effective date shall be at least 60 days after the time for filing objections has expired.

110125. If substantial objections are made to a federal regulation within 30 days prior to its becoming effective in this state or to a proposed regulation within 30 days after it is published, the department, after notice, shall conduct a public hearing to receive

evidence on issues raised by the objections. Any interested person or his or her representative may be heard. The department shall act upon objections by order and shall mail the order to objectors by certified mail as soon after the hearing as practicable. The order shall be based on evidence contained in the record of the hearing. If the order concerns a federal regulation, the department may adopt, rescind, or modify it. If the order concerns a proposed regulation, the department may withdraw it or set an effective date for the regulation as published or as modified by the order. The effective date shall be at least 60 days after publication of the order.

110130. Hearings authorized or required by this part shall be conducted by the department or agent as the department may designate for that purpose.

110135. Before any alleged violation of this part is reported to the Attorney General, a district attorney, or a city attorney for the institution of a criminal proceeding, the person against whom this proceeding is contemplated may be given appropriate notice and an opportunity to show cause why he or she should not be prosecuted and to present additional facts that may mitigate the action. The showing may be presented either orally or in writing, in person, or by attorney.

Article 2. Inspection and Sampling

110140. For purposes of enforcement of this part, any authorized agent of the department may, upon presenting appropriate credentials and at a reasonable time, do any of the following:

(a) Enter any factory, warehouse, or establishment in which any food, drug, device, or cosmetic is manufactured, packed, or held; enter any vehicle that is being used to transport or hold the food, drug, device, or cosmetic; or enter any place where any food, drug, device, or cosmetic is suspected of being held in violation of this part.

(b) Inspect any factory, warehouse, establishment, vehicle, or place, and all pertinent equipment, raw material, finished and unfinished materials, containers, and labeling in the factory, warehouse, establishment, vehicle, or place. In the case of any factory, warehouse, establishment, or consulting laboratory in which any food, drug, device, or cosmetic is manufactured, packed, or held, inspection shall include any record, file, paper, process, control, and facility that has a bearing on whether the food, drug, device, or cosmetic is adulterated or misbranded, or falsely advertised within the meaning of this part or whether it has been or is being manufactured, packed, transported, sold, or offered for sale in violation of this part.

110145. The inspection authorized by Section 110140 shall not include any of the following:

(a) Financial data.

(b) Sales data, other than shipment data.

(c) Pricing data.

(d) Personnel data, except data as to qualifications of technical and professional personnel.

(e) Research data, except data relating to any new drug or antibiotic drug that is subject to reporting and inspection under this part or the federal act.

110150. An authorized agent of the department may secure any sample or specimen of any food, drug, device, or cosmetic. If the agent obtains any samples prior to leaving the premises, he or she shall leave a receipt describing any sample obtained.

110155. An authorized agent of the department shall have access to all records of carriers in commerce relating to the movement in commerce of any food, drug, device, or cosmetic, or the holding of that food, drug, device, or cosmetic during or after the movement, and the quantity, shipper, and consignee of the food, drug, device, or cosmetic. Evidence obtained under this section shall not be used in a criminal prosecution of the person from whom it is obtained. The carrier shall not be subject to the other provisions of this part by reason of their receipt, carriage, holding, or delivery of any food, drug, device, or cosmetic in the usual course of business as carriers.

110160. It is unlawful for any person to refuse to permit entry or inspection, the taking of samples or other evidence, or access to copying of any record as authorized by this part, or to conceal the samples or evidence, or withhold evidence concerning them.

110165. It is unlawful for any person to use to his or her own advantage, or to reveal to any person other than to the director or officers or employees of this department, or to the courts when relevant in any judicial proceeding under this part, any information acquired under authority of this part concerning any method or process which as a trade secret is entitled to protection.

Article 3. Publicity

110170. The department may publish reports summarizing all judgments and court orders that have been rendered under this part, including the nature of the charge and the disposition of the charge.

110175. The department may distribute information regarding any food, drug, device, or cosmetic as the department considers necessary for the protection of the health and safety of the consumer or for his or her protection from fraud.

110180. The department may collect, report, or illustrate the results of any investigation of the department.

Article 4. Export Documents

110185. Any person who ships to another state or country a food, drug, or device manufactured or produced in this state may request the department to issue an export document to reference the shipment of the food, drug, or device or a person who manufactures or produces the food, drug, or device. The requesting person shall submit to the department all of the following:

(a) Each request for referencing the shipment of a food, drug, or device shall include all of the following information:

(1) Copies of any labels, labeling, and advertising affixed to or accompanying the food, drug, or device.

(2) If not clearly evident from the materials submitted pursuant to paragraph (1) both of the following:

(A) The name and place of business of the manufacturer or producer of the food, drug, or device.

(B) The identity of the food, drug, or device.

(3) The quantity of the food, drug, or device being shipped.

(4) The name of the state or country to which the food, drug, or device is being shipped.

(5) The date and means of shipment of the food, drug, or device.

(6) Additional statements the requesting person wishes to have incorporated into the export document.

(7) The name and telephone number of a person to whom the department may refer questions or requests for additional information about the request.

(b) Each request for referencing a person who manufactures or produces foods, drugs, or devices shall include all of the following information:

(1) The name and place of business of the person and whether the products manufactured or produced are foods, drugs, or devices.

(2) The name of the state or country to which the export document will be sent.

(3) Additional statements the requesting person wishes to have incorporated into the export document.

(4) The name and telephone number of a person to whom the department may refer questions or requests for additional information about the request.

110190. Any person who ships to another state or country a food, drug, device, or cosmetic manufactured or produced in this state may request the department to issue an export document to reference the shipment of the food, drug, device, or cosmetic. The food, drug, device, or cosmetic shall be manufactured or produced in this state by a person who has a valid registration, license, certificate, or permit issued by the department under this part or the Miscellaneous Food, Food Facility, and Hazardous Substances Act (Section 27). For each

request, the requesting person shall submit to the department all of the following:

(a) All original labels, labeling, and advertising affixed to, accompanying, or relating to the food, drug, device, or cosmetic. The department may accept copies if submission of original labels, labeling, or advertising is impractical.

(b) If not clearly evident from the materials submitted pursuant to subdivision (a), the requester shall submit both of the following:

(1) The name, place of business, and the type and number of the registration, license, certificate, or permit issued by the department to the manufacturer or producer of the food, drug, device, or cosmetic.

(2) The identity of the food, drug, device, or cosmetic being shipped.

(c) The name of the state or country to which the food, drug, device, or cosmetic is being shipped.

(d) The approximate date of shipment of the food, drug, device, or cosmetic.

(e) Additional statements the requesting person wishes to have incorporated into the export document.

(f) The name and telephone number of the requesting person to whom the department may refer questions or requests for additional information.

(g) The one-time fee required by paragraph (1) of subdivision (a) of Section 110210, if the fee has not yet been paid, and the minimum charge required by paragraph (2) of subdivision (a) of Section 110210.

110195. Each export document issued by the department shall do all of the following:

(a) The reference of the shipment of a food, drug, or device in the export document shall do all of the following:

(1) Identify the name and place of business of the manufacturer or producer of the food, drug, or device.

(2) Identify the food, drug, or device being shipped and its quantity.

(3) Identify the state or country to which the food, drug, or device is being shipped.

(4) Identify the date and means of shipment of the food, drug, or device.

(5) Describe the department’s authority over the food, drug, or device to be shipped and its manufacturer or producer, including, but not limited to, the expiration date of any applicable license, registration, certificate, or permit issued by the department.

(6) State that the department does not object to the sale of the food, drug, or devise in this state or the shipment of the food, drug, or devise to any other state or country.

(b) The reference of a person who manufactures or produces foods, drugs, or devices shall do all of the following:

(1) Identify the state or country to which the export document will be sent.

(2) Describe the department's authority over the person, including, but not limited to, the expiration date of any applicable license, registration, certificate, or permit issued by the department.

(3) State that the person is regularly engaged in the business of selling foods, drugs, or devices in this state.

(c) Each export document issued by the department may, in the department's sole discretion, include additional statements requested by the person who requested the export document.

(d) Each export document issued by the department shall be signed by the Chief of the Food and Drug Branch of the department, or his or her designee. The Chief or his or her designee may issue an export document prepared by the department or by the requesting person.

110200. (a) Each export document issued by the department shall do all of the following:

(1) Identify either or both of the following:

(A) The name and place of business of the manufacturer or producer of the food, drug, device, or cosmetic.

(B) The name and place of business of the distributor of the food, drug, device, or cosmetic.

(2) Identify the food, drug, device, or cosmetic being shipped.

(3) Identify the state or country to which the food, drug, device, or cosmetic is being shipped.

(4) Identify the approximate date of shipment.

(5) Describe the department's authority over the food, drug, device, or cosmetic to be shipped and its manufacturer or producer.

(6) State that the department does not object to the sale of the food, drug, device, or cosmetic in this state or the shipment of the food, drug, device, or cosmetic to any other state or country.

(b) Each export document issued by the department may, in the department's sole discretion, include additional statements requested by the person who requested the export document.

(c) Each export document issued by the department shall be issued by the Chief of the Food and Drug Branch of the department, or his or her designee. The chief or his or her designee may issue an export document prepared by the department or by the requesting person.

(d) The export document shall expire 180 days after its issue date.

110210. (a) Each person requesting the department to issue an export document shall pay nonreturnable fees as follows:

(1) A one-time fee of one hundred dollars ($100).

(2) A fee for service charge at the rate of eighty dollars ($80) per hour, at a minimum of twenty-five dollars ($25) per request.

(3) Any attendant costs incurred by the department, including, but not limited to, the costs of additional inspection, priority mailing, or notary service necessitated by the request.

(b) The fee amounts shall be adjusted annually pursuant to Section 100425.

(c) In no case shall the fees exceed the reasonable costs of the department in administering this article.

(d) The department shall provide to the person who pays the fees a statement or invoice that describes the costs paid from the fees.

110220. (a) The department may refuse to accept any request where the information required to be submitted by this article is incomplete.

(b) The department may refuse to issue an export document, or may invalidate an export document, if it finds, or has probable cause to believe, any of the following:

(1) The food, drug, device, or cosmetic, or requesting person violated any provision of this part, the Miscellaneous Food, Food Facility, and Hazardous Substances Act (Section 27), or any regulation adopted pursuant to this part or that act.

(2) Any information required to be submitted by this article is incomplete or false.

(3) The requesting person has not paid all outstanding fees required by this article.

(4) The food, drug, device, or cosmetic is not manufactured or produced in this state.

(5) The food, drug, device, or cosmetic is intended to be exported under Section 110655, 110790, 111315, 111460, 111720, or 111785.

(6) The food is a raw agricultural commodity or dairy product regulated by the Department of Food and Agriculture or a poultry or meat product regulated by the United States Department of Agriculture.

(c) If the department refuses to issue an export document, or invalidates an export document, the department shall inform the requesting person in writing of the reasons for the refusal or invalidation. The requesting person may request reconsideration by forwarding a written request to the Chief of the Division of Environmental Health of the department. The request for reconsideration must be postmarked or received by the department no later than 30 days after the date of the department's refusal or invalidation, and shall include a complete statement of all arguments and evidence that support the request for reconsideration. The Chief of the Division of Environmental Health shall notify the requesting person of his or her decision within 30 days. The decision of the Chief of the Division of Environmental Health shall be final.

(d) It is the intent of the Legislature that the department shall respond to each request for issuance of an export document within

five working days of receipt of the request by the Food and Drug Branch of the department.

110225. It is unlawful for any person to knowingly supply the department with false material facts in a request for an export document or to falsely represent that the department has issued an export document.

110230. Any person who has a valid registration, license, certificate, or permit issued by the department to manufacture or produce a food, drug, device, or cosmetic in this state may request the department to issue an official copy of the valid registration, license, certificate, or permit.

110235. (a) Each person requesting the department to issue an official copy of a valid registration, license, certificate, or permit shall pay nonreturnable fees as follows:

(1) Fifteen dollars ($15) per official copy.

(2) Any attendant costs incurred by the department, including, but not limited to, the costs of additional inspection, priority mailing, or notary service necessitated by the request.

(b) The fee amount shall be adjusted annually pursuant to Section 100425.

(c) The department shall provide to the person who pays the fees a statement or invoice that describes the costs paid from the fees.

110240. There is established an Export Document Program Fund within the General Fund. All fees collected pursuant to Sections 110210 and 110235 shall be deposited into the Export Document Program Fund and, upon appropriation, shall be expended by the department for the purpose of administering this article.

CHAPTER 3. GUARANTEES

110245. No dealer shall be prosecuted under this part for a violation concerning any food, drug, device, or cosmetic that is contained in an original, unbroken, and undamaged package that bears the original labeling if all of the following requirements are satisfied:

(a) He or she has used reasonable care in the storage and handling of the food, drug, device, or cosmetic.

(b) He or she received the food, drug, device, or cosmetic in the usual channels of trade as first-class merchantable stock and not as seconds or damaged articles or job lots purchased under conditions that indicate that the food, drug, device, or cosmetic was not usual first-class merchandise.

(c) He or she can produce a guarantee to the effect that the food, drug, device, or cosmetic is not adulterated, misbranded, or falsely advertised, within the meaning of this part, or that it is not a food, drug, device, or cosmetic which, pursuant to this part, may not be sold or offered for sale in this state.

110250. The guarantee shall be dated prior to the date of sale of the food, drug, device, or cosmetic and it shall be signed by the wholesaler, jobber, manufacturer, or other person located or residing in this state from whom the dealer received the food, drug, device, or cosmetic in good faith.

110255. A guarantee may be either a general guarantee or a special guarantee and shall be produced prior to the time of reporting an alleged violation to the Attorney General, the district attorney, or a city attorney for prosecution.

110260. A general guarantee shall guarantee without condition or restriction any food, drug, device, or cosmetic that is produced, prepared, compounded, packed, distributed, or sold by the guarantor as not adulterated, mislabeled, misbranded, falsely advertised, or that the article is not an article under this part that may not be sold or offered for sale.

110265. A special guarantee shall guarantee in the same manner as a general guarantee the particular food, drug, device, or cosmetic listed in an invoice of the food, drug, device, or cosmetic, and shall be attached to, or shall fully identify, the invoice.

110270. All guarantees shall contain the name and address of the guarantor making the sale of food, drug, device, or cosmetic. A guarantee shall protect the person only when the food, drug, device, or cosmetic covered by the guarantee remains identical, both as to composition and labeling, with the food, drug, device, or cosmetic as composed and labeled when originally received from the guarantor.

110275. It is unlawful for any person to give a guarantee or undertaking that is false.

110280. If the guarantee is to the effect that the food, drug, device, or cosmetic is not in violation within the meaning of the federal act, it shall be sufficient for all the purposes of this part, and shall have the same force and effect as though it referred to this part, unless, pursuant to this part, the standard for the food, drug, device, or cosmetic concerned is higher than the standard for a like food, drug, device, or cosmetic under the federal act. In that case, this part shall prevail over the federal act.

110285. In any case where the department has adopted a regulation prescribing a tolerance, including, but not limited to, a zero tolerance, for a poisonous or deleterious substance, food additive, pesticide chemical, or color additive in processed foods, the department may require manufacturers to guarantee that foods they market in the state comply with the tolerance. The department may require a guarantee periodically but in no case more often than once each calendar quarter.

CHAPTER 4. PACKAGING, LABELING, AND ADVERTISING

Article 1. General

110290. In determining whether the labeling or advertisement of a food, drug, device, or cosmetic is misleading, all representations made or suggested by statement, word, design, device, sound, or any combination of these, shall be taken into account. The extent that the labeling or advertising fails to reveal facts concerning the food, drug, device, or cosmetic or consequences of customary use of the food, drug, device, or cosmetic shall also be considered.

110295. The requirement that any word, statement, or other information appear on the label shall not be considered to be complied with unless the word, statement, or other information also appears on the outside container or wrapper of the retail package of any food, drug, device, or cosmetic, or is easily legible through the outside container or wrapper.

110300. It is unlawful for any person to forge, counterfeit, simulate, falsely represent, or without proper authority use, any mark, stamp, tag, label, or other identification device that is authorized or required by regulations adopted pursuant to this part or the federal act.

110305. It is unlawful for any person to use on the labeling of any drug or device, or any advertisement relating to any drug or device, any representation or suggestion that an application with respect to the drug or device is effective under Section 111550 or that the drug or device complies with that section.

110310. It is unlawful for any manufacturer, packer, or distributor of a prescription drug or device offered for sale in this state to fail to maintain for transmittal or to fail to transmit to any practitioner licensed by applicable state law to administer the drug or device who makes written request for information as to the drug or device true and correct copies of all printed matter that is required to be included in any package in which that drug or device is distributed or sold. Nothing in this section shall be construed to exempt any person from any labeling requirement imposed by or under other provisions of this part.

110315. It is unlawful for any person, with the intent to deceive, to place, or cause to be placed upon any food, drug, device, or cosmetic, or its package, the trade name or other identifying mark or imprint of another person or any likeness of the trade name or other identifying mark or imprint of another person.

110320. It is unlawful for any person to sell, dispense, dispose of, hold, or conceal any food, drug, device, or cosmetic or its package, with knowledge that the trade name or other identifying marks, imprint, or likeness of the trade name or other identifying mark or

imprint of another person has been placed on the food, drug, device, or cosmetic or its package in a manner prohibited by Section 110315.

110325. It is unlawful for any person to possess, make, sell, dispose of, cause to be made, or conceal any punch, die, plate, or other device that may be used to render a food, drug, device, or cosmetic or its package or labeling a counterfeit.

110330. It is unlawful for any person to do any act that causes any food, drug, device, or cosmetic to be a counterfeit, or to sell, dispense, or hold for sale or dispensing, the counterfeit food, drug, device, or cosmetic.

110335. The department may adopt regulations exempting from any labeling or packaging requirements of this part any food, drug, device, or cosmetic that is in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed and packed, on condition that the food, drug, device, or cosmetic is not adulterated or misbranded under the provisions of this part upon removal from the processing, labeling, or repacking establishment. Such food, drug, device, or cosmetic is subject to all other applicable provisions of this part.

All regulations relating to the exemptions that are in effect on the effective date of this part, or that are adopted on or after that date, pursuant to the federal act, are automatically effective in this state. The department may, however, adopt any additional regulations concerning exemptions.

Article 2. Fair Packaging and Labeling

110340. All labels of foods, drugs, devices, or cosmetics shall conform with the requirements of the declaration of net quantity of contents of Section 4 of the Fair Packaging and Labeling Act (80 Stat. 1296; 15 U.S.C., Sec. 1451) and the regulations adopted pursuant thereto. Foods, drugs, devices, and cosmetics exempted from the requirements of Section 4 of the Fair Packaging and Labeling Act, however, are also exempt from this article.

110345. The label of any package of a food, drug, device, or cosmetic that bears a representation as to the number of servings of the commodity contained in the package shall bear a statement of the net quantity, in terms of weight, measure, or numerical count, of each serving.

110350. It is unlawful for any person to distribute, or cause to be distributed, in commerce any packaged food, drug, device, or cosmetic if any qualifying words or phrases appear in conjunction with the separate statement of the net quantity of contents required by Section 110340.

This section, however, does not prohibit supplemental statements, at other places on the package, describing in nondeceptive terms the

net quantity of contents. Such supplemental statements of net quantity of contents shall not include any term qualifying a unit of weight, measure, or count that tends to exaggerate the amount of the commodity contained in the package.

110355. Whenever the department determines that regulations containing prohibitions or requirements, other than those prescribed by Section 110340, are necessary to prevent the deception of consumers or to facilitate value comparisons as to any food, drug, device, or cosmetic, the department shall adopt regulations with respect to that commodity.

110360. The department may establish and define standards for the characterization of the size of a package that encloses any food, drug, device, or cosmetic, that may be used to supplement the label statement of net quantity of contents of packages containing the commodity. This section, however, does not authorize any limitation on the size, shape, weight, dimension, or number of packages that may be used to enclose any food, drug, device, or cosmetic.

110365. The department may regulate the placement upon any package that contains any food, drug, device, or cosmetic or upon any label affixed to the article, of any printed matter stating or representing by implication that the article is offered for retail sale at a price lower than the ordinary and customary retail sale price or that a retail sale price advantage is accorded to any purchaser of the article by reason of the size of that package or the quantity of its contents.

110370. The department may require that the label on each package of a food, drug, device, or cosmetic bear the common or usual name of the article, if any, and in case the article consists of two or more ingredients, the common or usual name of each ingredient listed in order of decreasing predominance by weight. This section, however, does not require that any trade secret be divulged.

110375. The department may prohibit the nonfunctional slack fill of packages containing any food, drug, device, or cosmetic.

As used in this section, ''nonfunctional slack-filled'' means that a package is filled to substantially less than its capacity for any reason other than any of the following:

(a) Protection of the contents of the package.

(b) The requirements of machines used for enclosing the contents in the package.

110380. All regulations and their amendments pertaining to foods, drugs, devices, and cosmetics that are in effect on the effective date of this part, or that are adopted on or after that date, pursuant to the Fair Packaging and Labeling Act (80 Stat. 1296; 15 U.S.C. Sec. 1451 et seq.) shall be the regulations of this state. The department may, when necessary, prescribe any packaging and labeling regulation for foods, drugs, devices, and cosmetics whether or not the regulation is in accordance with regulations adopted under the Fair

Packaging and Labeling Act. No regulations shall be adopted that are contrary to the labeling requirements for the net quantity of contents required pursuant to Section 4 of the Federal Fair Packaging and Labeling Act and the regulations adopted pursuant to that section.

110385. It is unlawful for any person to distribute in commerce any food, drug, device, or cosmetic, if its packaging or labeling does not conform to the provisions of this article or to regulations adopted pursuant to this article. This section does not apply to persons engaged in business as wholesale or retail distributors of foods, drugs, devices, or cosmetics, except to the extent that they are engaged in the packaging or labeling of the commodities or they prescribe or specify the manner in which the commodities are packaged or labeled. This section shall not be construed to repeal, invalidate, or supersede any other section of this part.

Article 3. Advertising

110390. It is unlawful for any person to disseminate any false advertisement of any food, drug, device, or cosmetic. An advertisement is false if it is false or misleading in any particular.

110395. It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food, drug, device, or cosmetic that is falsely advertised.

110398. It is unlawful for any person to advertise any food, drug, device, or cosmetic that is adulterated or misbranded.

110400. It is unlawful for any person to receive in commerce any food, drug, device, or cosmetic that is falsely advertised or to deliver or proffer for delivery any such food, drug, device, or cosmetic.

110403. It is unlawful for any person to advertise any drug or device represented to have any effect in any of the following conditions, disorders, or diseases:

(a) Appendicitis.
(b) Blood disorders.
(c) Bone or joint diseases.
(d) Kidney disease or disorders.
(e) Cancer.
(f) Carbuncles.
(g) Disease, disorder, or condition of the eye.
(h) Diabetes.
(i) Diphtheria.
(j) Gall bladder disease or disorder.
(k) Heart and vascular diseases.
(*l*) High blood pressure.
(m) Diseases or disorders of the ear or auditory apparatus, including hearing loss and deafness.
(n) Measles.
(o) Meningitis.

(p) Mental disease or mental retardation.
(q) Paralysis.
(r) Pneumonia.
(s) Poliomyelitis.
(t) Prostate gland disorders.
(u) Conditions of the scalp, affecting hair loss, or baldness.
(v) Alcoholism.
(w) Periodontal diseases.
(x) Epilepsy.
(y) Goiter.
(z) Endocrine disorders.
(aa) Sexual impotence.
(ab) Sinus infection.
(ac) Encephalitis.
(ad) Tumors.
(ae) Venereal disease.
(af) Tuberculosis.
(ag) Ulcers of the stomach.
(ah) Varicose ulcers.
(ai) Scarlet fever.
(aj) Typhoid fever.
(ak) Whooping cough.
(a*l*) Acquired immune deficiency syndrome (AIDS).
(am) AIDS-related complex (ARC).
(an) Diseases, disorders, or conditions of the immune system.

110405. An advertisement that is not unlawful under Section 110390 is not unlawful under Section 110403 if it is disseminated only to members of the medical, dental, pharmaceutical, or veterinary professions, or appears only in the scientific periodicals of these professions, or is disseminated only for the purpose of public health education by persons not commercially interested, directly or indirectly, in the sale of drugs or devices.

110408. Whenever the department determines that an advance in medical science has made any type of self-medication safe and effective as to any of the conditions, disorders, or diseases named in Section 110403, the department shall, by regulation, authorize the advertisement of any such drug or device as having a curative or therapeutic effect for the disease, subject to conditions and restrictions as the department may consider necessary to the interests of public health.

110410. Section 110403 shall not be construed as indicating that self-medication for conditions, disorders, or diseases other than those named is safe or efficacious.

110413. No publisher, radio or television broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor, or seller of the food, drug, device, or cosmetic to which a false advertisement relates, shall be

liable under this article for the dissemination of the false advertisement, unless he or she has refused to furnish the department with the name and address of the manufacturer, packer, distributor, seller, or advertising agency, residing in this state who caused him or her to disseminate the advertisement.

110415. It shall be unlawful to advertise or otherwise represent chopped or ground beef or hamburger in violation of Section 110805.

110420. (a) Any fragrance advertising insert contained in a newspaper, magazine, mailing, or other periodically printed material shall contain only microencapsulated oils. Glue tabs or binders shall be used to prevent premature activation of the fragrance advertising insert.

''Fragrance advertising insert'' means a printed piece with encapsulated fragrance applied to it that is activated by opening a flap or removing an overlying ply of paper.

Paperstocks employed in the manufacture of fragrance advertising inserts shall have a maximum porosity of 20 Sheffield units or 172 Gurley-Hill units.

(b) Any person who distributes fragrance advertising inserts in violation of this section, is guilty of an infraction and shall, if convicted, be subject to a fine of one hundred dollars ($100) for each distribution. The fine shall apply to each mass mailing or distribution, and to each mass publication of a magazine or newspaper in violation of this section. The fine shall not apply, however, to each individual letter, magazine, newspaper, or fragrance advertising insert so distributed. Section 111825 is not applicable to violations of this section.

(c) This section shall become operative on January 1, 1992.

CHAPTER 5. FOOD

Article 1. Generally

110425. Beer, that is subject to the Alcoholic Beverage Control Act, Division 9 (commencing with Section 23000) of the Business and Professions Code, shall only be subject to the provisions of this chapter that relate to adulteration and misbranding.

110430. Whenever the department finds that a class of food distributed in this state may, by reason of contamination with micro-organisms during manufacture, packing, or storage, be injurious to the health of any man or other animal that consumes it and that the injurious nature cannot be adequately determined after this food has entered commerce, the department shall adopt regulations providing for the issuance of permits to manufacturers, processors, or packers of the class of food. These permits shall establish conditions governing the manufacture, packing, or storage of the class of food for the period of time as may be necessary to

protect the public health. The regulations shall prescribe a date after which no person shall introduce or deliver for introduction into commerce any food manufactured, packed, or stored by any manufacturer, processor, or packer, unless the person holds a permit issued by the department as provided by the regulations.

110435. The department may suspend immediately, upon written or oral notice, any permit issued pursuant to Section 110430 if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended may at any time apply for reinstatement of the permit. The department shall, after prompt hearing and inspection of the establishment, reinstate the permit immediately, if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit.

110440. Any authorized agent of the department shall have access to any factory or establishment that operates under permit from the department for the purpose of ascertaining whether or not the conditions of the permit are being complied with. Denial of access for such inspection shall be grounds for suspension of the permit until the access is freely given by the holder of the permit or his or her agent.

110445. Any added poisonous or deleterious substance, or any food additive, pesticide chemical, preservative, or color additive, shall be considered unsafe for use with respect to any food unless there is in effect a regulation adopted pursuant to Section 110080, 110085, or 110090, that limits the quantity and the use, or intended use, of the substance to the terms prescribed by the regulation.

110450. On or before September 1, 1985, the department shall, within the limits of available resources, prepare and submit to the Legislature a program for detecting and monitoring chemical and pesticide residues in processed foods. In preparing the program, the department shall do all of the following:

(a) Establish a list of chemical and pesticides developed from a knowledge of chemicals used in the food industry in processed foods and from the 96 pesticides on the Department of Food and Agriculture residue scan, for which analysis will be done by the department. The list shall include an explanation of why the listed chemicals and pesticides were selected. The Department of Food and Agriculture shall cooperate with the department in establishing the list required by this subdivision. In selecting the chemicals and pesticides to be placed on the list, the department shall make use of the following criteria:

(1) Chemicals that have been identified as having possible carcinogenic, reproductive, or mutagenic effects.

(2) Patterns of use in California.

(3) Quantities of use in California.

(4) Chemicals appearing as residues in processed food because of environmental persistence or resistance to degradation under

conditions existing in the processing, manufacturing, milling, or shipping of processed foods sold in California.

(5) Chemicals that have the potential of chronic toxicity due to low continuous exposure.

The department may revise the list and is authorized to add or remove chemicals or pesticides based on relevant information that becomes available to it after the list has been established and based on its experience in detecting the presence of chemical substances in processed foods under the sampling and testing program developed pursuant to subdivision (b).

(b) The department shall design a sampling and testing program that does all of the following:

(1) Samples and tests processed food products that form a significant portion of the diet of the general population, and that may contain residues of the chemical substances on the list established pursuant to subdivision (a).

(2) Provides for specific testing of individual chemicals on the list established pursuant to subdivision (a) when a chemical cannot be detected using multiresidue testing procedures and when the department determines that the chemical may be the cause of chronic health effects.

(3) Lists the foods to be sampled, the stages of processing in which the foods will be sampled, the sampling frequency, and the techniques used in sampling.

(4) A description of plans for sampling processed imported foods from other states and countries.

(c) As used in this section, ‘‘processed food’’ means any food chemically or physically altered from a raw agricultural commodity by chemical, mechanical, thermal, or other processes.

110455. (a) On or before July 1, 1990, the department shall commence and maintain a program for monitoring processed foods for pesticide residues, chemicals, microbes, and other contaminants. In designing the program, the department shall take into consideration any information developed pursuant to Section 110450.

(b) The department shall consult with the Department of Food and Agriculture in designing the pesticide residue component of the monitoring program, to facilitate focusing the testing in areas of greatest concern. Among the pesticides to be reviewed for possible monitoring shall be those contained in the lists of pesticides identified in Section 12535 of the Food and Agricultural Code.

(c) In the development and ongoing operation of the department’s monitoring program, the department shall consider, in establishing priorities:

(1) Potential concentration effects that may occur during processing.

(2) Targeting foreign and domestic imported processed foods according to their estimated California market share.

(3) The extent to which processed foods are a part of the infant and child diet.

Article 2. Registration

110460. Every person upon first engaging in the manufacture, packing, or holding of processed food in this state shall immediately register with the department. The registration is valid for one calendar year from the date of validation by the department of the completed registration form. The department shall provide to each registrant a validated copy of the completed registration form, sent to the mailing address shown on the form, as evidence of valid registration.

110465. A separate registration is required for each place of manufacture, packing, or holding.

110470. A registration form provided by the department shall be completed annually and accompanied by a nonreturnable registration fee. The registration or renewal of registration shall set forth all applicable information called for by the registration form.

The fee for registration or renewal of registration shall be as follows:

Holding Food Only:

Size of Establishment	Fee
0–10,000 square feet	$250
Over 10,000 square feet	375

Manufacturing or Packing Food:

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Number of Employees	Size of Establishment	Fee
0 – 5	0 – 5,000 square feet	$250
6 – 20	0 – 5,000 square feet	375
More than 20	0 – 5,000 square feet	500
0 – 5	Over 5,000 square feet	375
6 – 20	Over 5,000 square feet	500
More than 20	Over 5,000 square feet	625

A penalty of 1 percent per month shall be added to any registration fee not paid when due.

The fee amount shall be adjusted annually pursuant to Section 100425.

110475. Any person registered pursuant to this article shall immediately notify the department of any change in the information reported on the registration form.

110480. The registration provisions of this chapter shall not apply to any of the following:

(a) Any person who has a valid bottled water or water vending machine license issued pursuant to Article 12 (commencing with Section 111070).

(b) Any person who has a valid pet food license issued pursuant to Chapter 10 (commencing with Section 113025) of Part 6.

(c) Any retail food facility as defined in Chapter 4 (commencing with Section 113700) of Part 7.

(d) Any person who has a valid cold storage license issued pursuant to Chapter 6 (commencing with Section 112350) of Part 6.

(e) Any person who has a valid cannery license issued pursuant to Chapter 8 (commencing with Section 112650) of Part 6.

(f) Any person who has a valid shellfish certificate issued pursuant to Chapter 5 (commencing with Section 112150) of Part 6.

(g) Any person who has a valid frozen food locker plant license issued pursuant to Chapter 7 (commencing with Section 112500) of Part 6.

(h) Any person who has a valid winegrower's license or wine blender's license pursuant to Division 9 (commencing with Section 23000) of the Business and Professions Code.

(i) Any person who has a valid milk products plant, margarine, imitation ice cream, imitation ice milk, or a products resembling milk products plant license, issued pursuant to Division 15 (commencing with Section 32501) of the Food and Agricultural Code.

110485. In addition to the fee paid pursuant to Section 110470, each registrant shall pay a surcharge of one hundred dollars ($100) to the Department of Pesticide Regulation, in a form and manner that the Director of Pesticide Regulation prescribes. This section shall not apply to those registrants the Director of Pesticide Regulation determines should not be assessed due to a determination of limited applicability pursuant to Sections 12535, 12536, 12797, 12798, 13134, and 13135 of the Food and Agricultural Code or Section 110455 of this code to those registrants, or because substantial economic hardship would result to individual registrants. Revenue received pursuant to this section shall be deposited in the Food Safety Account in the Department of Pesticide Regulation Fund. A penalty of 10 percent per month shall be added to any surcharge not paid when due.

110490. (a) A laboratory that performs analyses of foods for pesticide chemical residues for other persons shall be accredited pursuant to Article 3 (commencing with Section 100825) of Chapter

4 of Part 1 of Division 101. This subdivision shall not apply to any of the following:

(1) A laboratory operated by a government agency.

(2) A laboratory not operated for commercial purposes that performs pesticide chemical residue analysis on foods for research or quality control for the internal use of the person initiating the analysis. For purposes of this section, ''commercial purposes'' means that the laboratory performs pesticide chemical residue analysis on the foods primarily for the purpose of making a profit.

(b) A laboratory accredited pursuant to Section 12591 of the Food and Agricultural Code shall not be required to be accredited under this section until January 1, 1992.

(c) A laboratory that performs analyses of foods for pesticide chemical residues, but that is not required by subdivision (a) to be accredited may apply for accreditation pursuant to Article 3 (commencing with Section 100825) of Chapter 4 of Part 1 of Division 101.

(d) This section shall become operative on January 1, 1991, or 60 days after the initial set of regulations adopted pursuant to Sections 100830 and 100835 becomes effective, whichever is later.

110495. (a) Every laboratory or other person which performs or which brokers or otherwise arranges for the performance of pesticide chemical analysis on food shall report to the appropriate state agency any finding of pesticide chemical residues in a food for which no chemical residue tolerance has been established or that is in excess of federal or state residue tolerances or tolerances for a pesticide suspended, banned, or otherwise not permitted by the Department of Pesticide Regulation or the Environmental Protection Agency, if the food is in the channels of trade. The report shall be made as soon as possible, and in any event, not later than 24 hours after the analyzing laboratory makes the finding. Findings on raw agricultural commodities and dairy products shall be reported to the Department of Food and Agriculture. Findings on raw agricultural commodities shall also be reported to the Department of Pesticide Regulation. Findings on all other foods shall be made to the State Department of Health Services.

(b) For the purpose of reporting findings regarding raw agricultural commodities, ''in the channels of trade'' means the point at which the raw agricultural commodities leave the farm, including raw agricultural commodities bound for processing up to the point that processing is initiated. For the purpose of reporting findings in processed foods, ''in the channels of trade'' means at the point the processed food leaves the direct control of the processor, which means either that the product is not located on the premises owned by, or under the control of, the processor or a portion of the product has been released for sale or use.

Article 3. Standard of Identity, Quality, and Fill

110505. Definitions and standards of identity, quality, and fill of container, and any amendments to the definitions and standards, adopted pursuant to the federal act in effect on the effective date of this part, or adopted on or after that date, are the definitions and standards of identity, quality, and fill of container in this state. The department may, by regulation, establish definitions and standards of identity, quality, and fill of container for any food whether or not the definitions and standards are in accordance with the federal regulations, when in its judgment such action will promote honesty and fair dealing in the interest of consumers. This section shall not apply to wine.

110510. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the department shall designate the optional ingredients that shall be named on the label. This section shall not apply to wine.

110515. A temporary permit which is granted by the Food and Drug Administration of the Department of Health, Education and Welfare of the United States for interstate shipment of experimental packs of food that vary from the requirements of federal definitions and standards of identity is automatically effective in this state under the provisions provided in the permit. The department shall issue a permit when no federal permit exists and when the experimental packs are to be manufactured and tested only within this state. The permit is subject to any term or condition that the department may prescribe.

110520. Definitions and standards of identity and quality for distilled spirits and their amendments adopted by the Internal Revenue Service of the Treasury Department of the United States in effect on the effective date of this part, or adopted on or after that date, are the definitions and standards of identity and quality for distilled spirits in this state. The department may, by regulation, establish definitions and standards of identity and quality for any distilled spirit whether or not the definitions and standards are in accordance with regulations adopted by the Internal Revenue Service of the Treasury Department of the United States, when in its judgment the action will promote honesty and fair dealing in the interest of the consumers.

110525. The department may, by regulation, establish definitions and standards of identity and quality for wine. Such definitions and standards may incorporate in whole or in part, the regulations adopted by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act, pertaining to the standards of identity and quality for wine. Standards of identity and quality for wine adopted pursuant to this section may differ from or be inconsistent with the standards promulgated by the Secretary of the Treasury

pursuant to the Federal Alcohol Administration Act. No standard of size, type, or fill of container for any wine subject to the provisions of the Alcoholic Beverage Control Act, Division 9 (commencing with Section 23000) of the Business and Professions Code, shall be adopted, but containers of wine sold in this state shall conform to the then current standards for the containers, including standards of fill, established by the Secretary of the Treasury pursuant to the Federal Alcohol Administration Act.

Article 4. Enrichment of Food and Food Products

110530. When a definition and standard of identity for an enriched food has been established pursuant to Section 110505, only the enriched form of the food shall be sold at retail in California.

110535. The nonenriched form of a food identified and standardized pursuant to Section 110505 may be used as an ingredient of another food only if it comprises less than 25 percent of the total ingredients, or it comprises 25 percent or more of the total ingredients and vitamins and minerals have been added to make it nutritionally equivalent to the enriched form of the ingredient.

110540. The department shall conduct a study of feasible methods for the packaging and sale of food products that will afford the greatest protection to the public from the adulteration of those products. The study shall be conducted in conjunction with the Department of Food and Agriculture, as well as representatives of consumer groups and food producers and retailers.

In carrying out this study, the department shall cooperate with the federal Food and Drug Administration to avoid unnecessary duplication. The department shall also evaluate the applicability of federal recommendations on food product safety to the needs of California. The department shall complete the study and report its findings to the Legislature on or before March 1, 1984.

Article 5. Adulterated Food

110545. Any food is adulterated if it bears or contains any poisonous or deleterious substance that may render it injurious to health of man or any other animal that may consume it. The food is not considered adulterated if the substance is a naturally occurring substance and if the quantity of the substance in the food does not render it injurious to health.

110550. Any food is adulterated if it bears or contains any added poisonous or deleterious substance that is unsafe within the meaning of Section 110445.

110555. Any food is adulterated if it is, bears, or contains any food additive that is unsafe within the meaning of Section 110445. If, however, a pesticide chemical has been used in or on a raw

agricultural commodity in conformity with an exemption granted or a tolerance prescribed under this part or the Food and Agricultural Code and the raw agricultural commodity has been subject to processing, such as canning, cooking, freezing, dehydrating, or milling, the residue of a pesticide chemical remaining in or on the processed food shall not be deemed unsafe if the residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice, and the concentration of the residue in the processed food when ready to eat is not greater than the tolerance prescribed for the raw agricultural commodity.

110560. Any food is adulterated if it consists in whole or in part of any diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food.

110565. Any food is adulterated if it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered unwholesome, diseased, or injurious to health.

110570. Any food is adulterated if it is, in whole or in part, the product of any diseased animal, any animal that has died otherwise than by slaughter, or any animal that has been fed on the uncooked offal from a slaughterhouse.

110575. Any food is adulterated if its container is composed, in whole or in part, of any poisonous or deleterious substance that may render the contents injurious to health.

110580. Any food is adulterated if it has been intentionally subjected to ionizing radiation unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to Section 110070.

110585. Any food is adulterated if any one of the following conditions exist:

(a) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(b) If any substance has been substituted wholly or in part therefor.

(c) If damage or inferiority has been concealed in any manner.

(d) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is.

110590. Any food is adulterated if it is confectionery and any one of the following conditions exist:

(a) It has partially or completely embedded therein any nonnutritive object, provided that this subdivision shall not apply in the case of any nonnutritive object if, in the judgment of the department as provided by regulation, the object is of practical functional value to the confectionery product and would not render the product injurious or hazardous to health.

(b) It bears or contains any alcohol in excess of 5 percent by weight.

(c) It bears or contains any nonnutritive substance, provided that this subdivision shall not apply to a safe nonnutritive substance that is in or on confectionery by reason of its use for some practical functional purpose in the manufacture, packaging, or storage of the confectionery if the use of the substance does not promote deception of the consumer or otherwise result in adulteration or misbranding in violation of any provision of this act; and provided further that the department may, for the purpose of avoiding or resolving uncertainty as to the application of this clause, issue regulations allowing or prohibiting the use of particular nonnutritive substances.

110595. Any food is adulterated if it bears or contains any color additive that is unsafe within the meaning of Section 110445.

110600. Any food is adulterated if it is fresh meat and it contains any preservative or other chemical substance not approved for use in fresh meat by the department, the United States Department of Agriculture, or the Department of Food and Agriculture of this state.

110605. Any food is adulterated if it is chopped or ground beef or hamburger unless it is composed of voluntary striated muscle of fresh beef that does not contain any substance that is not approved by the department and unless it has a total fat content that is not in excess of 30 percent by weight.

110610. Any food is adulterated if it is pork sausage or breakfast sausage and it has a total fat content that is in excess of 50 percent by weight.

110615. The methods of analysis used in determining the fat content of products described in Sections 110605 and 110610 shall be those prescribed by the current issue of ''Official and Tentative Methods of Analysis of the Association of Official Analytical Chemists,'' and the supplements thereto.

110620. It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is adulterated.

110625. It is unlawful for any person to adulterate any food.

110630. It is unlawful for any person to receive in commerce any food that is adulterated or to deliver or proffer for delivery any such food.

110635. While any regulation relating to a substance referred to in Section 110080, 110085, or 110090 is in effect, any food bearing or containing a substance in accordance with the regulation shall not be considered to be adulterated.

110640. The director, with the assistance of the Department of Food and Agriculture, and in cooperation with the federal Food and Drug Administration and Environmental Protection Agency, shall identify those pesticides most likely to leave residue in processed foods.

110645. Whenever the director has been notified by the Director of Food and Agriculture pursuant to Section 12582 of the Food and Agricultural Code, the director shall immediately notify the processor, if known, by telephone, with immediate written confirmation, and take appropriate action pursuant to Section 110045.

110650. This article does not prohibit the addition of fluorine or fluorine compounds to water intended for sale to the public as bottled water for domestic use in the manner and to the extent as may be approved by the department. The label of the bottled water shall, however, satisfy all of the labeling requirements prescribed by this part.

110655. Any food intended for export shall not be deemed to be adulterated within the provisions of this part if it satisfies all of the following requirements:

(a) It accords to the specifications of the foreign purchaser.

(b) It is not in conflict with the laws of the importing country.

(c) It is labeled on the outside of the shipping package to show that it is intended for export.

If the article is sold or offered for sale in domestic commerce, this section shall not exempt it from any of the provisions of this part.

Article 6. Misbranded Food

110660. Any food is misbranded if its labeling is false or misleading in any particular.

110665. Any food is misbranded if its labeling does not conform with the requirements for nutrition labeling as set forth in Section 403(q) (21 U.S.C. Sec. 343(q)) of the federal act and the regulations adopted pursuant thereto. Any food exempted from those requirements under the federal act shall also be exempt under this section.

110670. Any food is misbranded if its labeling does not conform with the requirements for nutrient content or health claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulations adopted pursuant thereto. Any food exempted from those requirements under the federal act shall also be exempt under this section.

110675. Any food is misbranded if it is in package form, unless it bears a label containing all of the following information:

(a) The name and place of business of the manufacturer, packer, or distributor.

(b) An accurate statement of the quantity of the contents in terms of weight, measure, or numerical count.

Reasonable variations from the requirements of subdivision (b) shall be permitted. Requirements for placement and prominence of the information required by subdivision (b), and exemptions as to

small packages, shall be established in accordance with regulations adopted pursuant to Sections 110100 and 110380.

110680. Any food is misbranded if its labeling or packaging does not conform to the requirements of Chapter 4 (commencing with Section 110290).

110685. Any food is misbranded if it is offered for sale under the name of another food, or if it is an imitation of another food for which a definition and standard of identity has been established by regulation and its label does not bear, in type of uniform size and prominence the word ''imitation,'' and immediately following, the name of the food imitated.

110690. Any food is misbranded if its container is so made, formed, or filled as to be misleading.

110695. Any food is misbranded if it is a confectionery and contains alcohol in excess of $^1/_2$ of 1 percent by weight and that fact does not appear on the label for the food.

110700. Any food is misbranded if it is a potentially hazardous processed food that is preserved by refrigeration at temperatures of 45 degrees Fahrenheit or lower and it is not conspicuously labeled ''Perishable Keep Refrigerated.''

110705. Any food is misbranded if any word, statement, or other information required pursuant to this part to appear on the label or labeling is not prominently placed upon the label or labeling with conspicuousness, as compared with other words, statements, designs, or devices in the labeling and in terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

110710. Any food is misbranded if it purports to be, or is represented as, a food for which a definition and standard of identity has been established under Section 110505 and the label fails to bear the name of the food specified in the standard or otherwise fails to conform to the definition and standard.

110715. Any food is misbranded if it purports to be, or is represented as, a food for which a standard of quality or fill has been prescribed by regulation under Section 110505 and its quality or fill is below the standard unless its label bears, in a manner and form as specified by regulation, a statement that it is below the standard.

110720. Any food for which no standard of identity exists is misbranded unless it bears a label clearly stating the common or usual name of the food.

110725. (a) Any food fabricated from two or more ingredients is misbranded unless it bears a label clearly stating the common or usual name of each ingredient, and if the food purports to be a beverage containing vegetable or fruit juice, a statement with appropriate prominence on the information panel of the total percentage of fruit or vegetable juice contained in the food. Any spice, flavoring, or color not required to be certified under Section 110090, except any spice,

flavoring, or color sold as such, may be designated as spice, flavoring, or color without naming each.

(b) Exemptions may be established by the department, when compliance with any requirement of this section is impractical or results in deception or unfair competition.

(c) In adopting any regulations relating to this section, the department shall take into consideration the current regulations established by the Secretary of Health and Human Services under authority contained in the federal act.

(d) Notwithstanding Section 110040 or any other provision of law, as used in this section, the term ''food'' includes, but is not limited to, meat. The term ''food'' does not, however, include any alcoholic beverage.

(e) This section shall not apply to any food sold for consumption on or off the premises of any restaurant in the course of its business as a restaurant, or to any milk or dairy product.

110730. The requirements of Sections 110720 and 110725 do not apply to any food that is packaged at the direction of retail purchasers at the time of sale if the ingredients are disclosed to the purchasers by other means in accordance with the regulations adopted by the department.

110735. Any food is misbranded if it purports to be, or is represented, for special dietary uses as prescribed by regulation under Section 110095 and its label does not bear information concerning any vitamin or mineral content, or other dietary property as the department prescribes, by regulation, as necessary to fully inform purchasers as to the food's value for that use.

110740. Any food is misbranded if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact. Exemptions may be established by the department.

110745. Any food is misbranded if it is intended as a component of another food and when used in accordance with the directions of the purveyor, it will result in the final food being adulterated or misbranded.

110750. Any food is misbranded if it is a color additive and it is not in conformity with the requirements for color additives prescribed under the provisions of Section 110090.

110755. Any food is misbranded if its packaging or labeling is in violation of an applicable regulation issued pursuant to Section 108685 or 108700.

110760. It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is misbranded.

110765. It is unlawful for any person to misbrand any food.

110770. It is unlawful for any person to receive in commerce any food that is misbranded or to deliver or proffer for delivery any such food.

110775. It is unlawful for any person to alter, mutilate, destroy, obliterate, or remove the label, or any part of the labeling, of any food if the act results in the food being misbranded.

110780. It is unlawful for any person to manufacture, pack, or hold processed food in this state unless in an establishment duly registered, as provided in this part.

110785. It is unlawful for any person to willfully make a false statement or representation, or knowingly fail to disclose a fact required to be disclosed in the application for registration or renewal of registration, as provided in Article 2 (commencing with Section 110460).

110790. Any food intended for export shall not be deemed to be misbranded under this part if it satisfies all of the following requirements:

(a) It accords to the specifications of the foreign purchaser.

(b) It is not in conflict with the laws of the importing country.

(c) It is labeled on the outside of the shipping package to show that it is intended for export.

If the article is sold or offered for sale in domestic commerce, this section shall not exempt it from any of the provisions of this part.

110795. (a) The department may adopt regulations that name and describe the characteristics of salmon and any other fish or other seafood it considers appropriate. The department shall consult with the Department of Fish and Game, the Joint Committee on Fisheries and Aquaculture, consumers, commercial fishermen, aquaculturists, and seafood processors, wholesalers, restaurateurs, and other retailers before adopting these regulations. The department shall not adopt any regulation that conflicts with the common name of any fish designated by the Department of Fish and Game pursuant to Section 8023 of the Fish and Game Code.

(b) In addition to the consultations required by subdivision (a), the department shall consult and seek the recommendations of the groups named in that subdivision concerning the possible need for, or desirability of, any further legislation or regulations affecting seafood labeling. The department shall report to the Legislature the results of the consultations required by this subdivision, and make recommendations to the Legislature concerning any legislation it considers appropriate, on or before January 1, 1986.

(c) No regulation adopted pursuant to this section shall deviate from a pertinent United States standard where the fish or seafood product specified is packed or processed as a standardized product under a United States standard.

(d) Nothing in this section or in regulations adopted pursuant to this section shall be construed to require the use of more than the common family name of any fish or seafood by any restaurant in menus or advertisements.

110800. (a) Any label of any retail cut of beef, veal, lamb, or pork held for sale in a retail food production and marketing establishment or a frozen food locker plant shall clearly identify the species (beef, veal, lamb, or pork) and the primal cut from which it is derived, and the retail name.

This section shall not apply to ground beef or hamburger, boneless stewing meat, cubed steaks, sausage, or soupbones.

(b) ''Primal cuts'' include only the following in the various species:

Beef	Veal	Lamb	Pork
Chuck	Shoulder	Shoulder	Shoulder
Rib	Rib	Rib	—
Loin	Loin	Loin	Loin
Shank	Shank	Shank	—
Brisket	Breast	Breast	—
Plate	Breast	Breast	—
Flank	Flank	—	—
Round	Round or leg	Leg	Leg or ham

Cuts derived from other than the above primal cuts need only show species and the retail name.

(c) It is unlawful and constitutes misbranding for any person to sell or offer for sale in a retail food production and marketing establishment or frozen food locker plant any retail cut of beef that is labeled in violation of this section.

110805. No chopped or ground beef or hamburger that is offered for sale in any retail food production and marketing establishment or frozen food locker plant shall be advertised, labeled, or otherwise held out in any manner to describe or suggest its quality or relative leanness or fat content unless the label, advertisement, or other representation accurately discloses the maximum fat content thereof by one of the following designations:

(a) Does not exceed 30 percent fat.

(b) Does not exceed 22 percent fat.

(c) Does not exceed 15 percent fat.

No designation such as, but not limited to, ''lean,'' ''super lean,'' ''premium,'' ''deluxe'' or similar terms descriptive of quality, leanness, or fat content shall be included on the label unless the label also contains the fat-weight designation specified in subdivision (a), (b), or (c). However, as an alternative to including the fat-weight designation on the label, the fat-weight designation required by this section may be disclosed by means of a sign placed immediately adjacent to the counter on which the chopped or ground beef or hamburger is displayed. Such a sign shall be within plain view of

prospective purchasers and shall display the appropriate designation specified in subdivision (a), (b), or (c) in boldface print.

Chopped or ground beef or hamburger that is processed from primal cuts of round or sirloin shall not be required to disclose the maximum fat content if there is no reference to leanness or other quality designation relating to fat content other than the primal cut from which the product is derived; provided, in the case of ground beef or hamburger processed from the primal cut of chuck when the primal cut designated is being used, the fat content of the chopped ground beef or hamburger shall not exceed 26 percent.

All labeling and advertising for chopped or ground beef or hamburger processed from the primal cut chuck shall disclose the maximum fat weight designated as, ''Does not exceed 26 percent fat.''

It is unlawful and constitutes misbranding for any person to sell or offer for sale in a retail food production and marketing establishment or frozen food locker plant any chopped or ground beef or hamburger that is labeled in violation of this section.

Article 7. The California Organic Foods Act of 1990

110810. This article shall be known, and may be cited as, the California Organic Foods Act of 1990.

110815. The following words and phrases, when used in this article, shall have the following meanings:

(a) ''Administered'' means ingested, injected, or otherwise topically or internally introduced to livestock, fowl, or fish.

(b) ''Applied'' means introduced, incorporated within, added to, or placed upon any seed, crop, plant, livestock, fowl, fish, soil, or growing medium, and shall also mean used in, on, or around any facility or area in which food is kept.

(c) ''Area'' means the physical space surrounding food where there is more than a negligible chance of a prohibited material being absorbed by, incorporated into, or adhered to the food, soil, or growing medium. The area may differ significantly depending on the circumstances. Except in the case of the production of food, area shall not include any physical space surrounding food if an intervening event, such as the use of a cleaning method for processing equipment, or the passage of time, has made the chance of a prohibited material being absorbed by, incorporated into, or adhered to the food, negligible.

(d) ''Botanicals'' means substances derived solely from plants or plant parts.

(e) ''Endemic disease'' means a disease in animal or fish that is either universal or common to a species within the geographic region.

(f) ''Enforcement authority'' means the governmental unit with primary enforcement jurisdiction, as provided in Section 110925.

(g) ‘‘Field’’ means a contiguous area of land for agricultural production that is managed with a consistent set of production methods.

(h) ‘‘Feed’’ means any substance used or intended for consumption by livestock, fowl, or fish to provide nourishment, including range and pasturage vegetation.

(i) ‘‘Growing medium’’ means a substance that provides nutrients for plants or fungi but which is separate from the land surface of the world.

(j) ‘‘Handled’’ means shipped, packed, repacked, sold for resale, warehoused, wholesaled, imported into the state, or stored by other than a grower, producer, processor, or retailer of that food.

(k) ‘‘Management unit’’ means the physical facilities and equipment associated with crop production that is not confined to a field, such as animal production, greenhouse production, or seed sprouting. Management units shall be described by the location and function of the physical facilities and equipment, and other aspects as determined by the enforcement authority. In the case of animal production, the management units shall also be described by the quantity and source of each group of animals that is managed together as a unit.

(*l*) ‘‘Processed’’ means cooking, baking, heating, drying, mixing, grinding, crushing, pressing, churning, separating, extracting juices or other materials, peeling, fermenting, eviscerating, preserving, dehydrating, freezing, or manufacturing that materially alters the flavor, keeping quality, or any other property, or the making of any substantial change of form. ‘‘Processed’’ does not include refrigeration at temperatures that are above the freezing point nor any other treatment that merely retards or accelerates the natural processes of ripening or decomposition.

(m) ‘‘Produced’’ means grown, raised, harvested, handled, or stored under the control of the grower or producer.

(n) ‘‘Producer,’’ ‘‘handler,’’ and ‘‘processor’’ means any person who has, respectively, produced, handled, or processed any food.

(o) ‘‘Production,’’ ‘‘handling,’’ and ‘‘processing’’ means the process by which any food is, respectively, produced, handled, and processed.

(p) ‘‘Prohibited materials’’ means any of the following:

(1) When used in connection with the production, handling, or processing of meat, fowl, or fish:

(A) Any drug, medication, hormone or growth regulator, whether or not synthetic, or any other synthetic substance, including, but not limited to, any substance administered to stimulate or regulate growth or tenderness, and any subtherapeutic dose of antibiotic. The use of a drug or medication for medical treatment of a specific and manifest malady diagnosed and prescribed by a licensed veterinarian, or under the general supervision of a licensed

veterinarian, shall be permitted, but not within 90 days prior to slaughter or twice the withdrawal time specified by the federal Food and Drug Administration, whichever is longer. In addition, vaccines may be administered for prevention of an endemic disease or as required by law. Vitamin and mineral supplements also may be administered.

(B) Any feed administered to livestock, fowl, or fish that does not comply with the requirements of regulations adopted pursuant to Section 14904 of the Food and Agricultural Code.

(C) Any artificial rumen stimulants, such as plastic pellets.

(D) Any manure intentionally fed or refed.

(E) Any synthetically compounded substance applied postslaughter to the meat, fowl, or fish itself, or to its packaging, including preservatives.

(F) Any substance applied to any area where livestock, fowl, or fish or meat, fowl, or fish products are handled or kept at any time that does not consist entirely of microorganisms, microbiological products, or substances consisting of, or derived or extracted solely from, plant, animal, or mineral-bearing rock substances. Prohibited materials shall not include the application of botanicals, lime-sulfur, gypsum, soaps, and detergents. Prohibited materials shall include the application of petroleum solvents, diesel, and other petroleum fractions.

(2) When used in connection with the production, distribution, or processing of dairy products or eggs:

(A) Any drug, medication, hormone, or growth regulator, whether or not synthetic, and any other synthetic substance, including, but not limited to, any substance administered to stimulate or regulate growth, milk or egg production, and any subtherapeutic dose of antibiotic. The use of a drug or medication for medical treatment of a specific and manifest malady diagnosed and prescribed by a licensed veterinarian, or under the general supervision of a licensed veterinarian, shall be permitted, but not less than 30 days prior to taking of the milk or laying of eggs, or twice the withdrawal time specified by the federal Food and Drug Administration, whichever is longer. In addition, vaccines may be administered for prevention of an endemic disease or as required by law. Vitamin and mineral supplements may also be administered.

(B) Any feed administered to livestock within one year of the taking of the milk, or to fowl within six months of the laying of eggs, that does not comply with the requirements of regulations adopted pursuant to Section 14904 of the Food and Agricultural Code.

(C) Any artificial rumen stimulants, such as plastic pellets.

(D) Any manure intentionally fed or refed.

(E) Any substance applied to any area where livestock, fowl, or fish, or meat, dairy, fowl, or fish products are handled or kept at any time that does not consist entirely of micro-organisms,

microbiological products, or substances consisting of, or derived or extracted solely from, plant, animal, or mineral-bearing rock substances. Prohibited materials shall not include the application of botanicals, lime-sulfur, gypsum, soaps, and detergents. Prohibited materials shall include the application of petroleum solvents, diesel, and other petroleum fractions.

(3) When used in connection with the production, handling, or processing of raw agricultural commodities and any other food not specified in paragraphs (1) and (2), any synthetically compounded fertilizer, pesticide, growth regulator, or any other substance that does not consist entirely of micro-organisms, microbiological products, or substances consisting of, or derived or extracted solely from plant, animal, or mineral-bearing rock substances. Before harvest, prohibited materials shall not include the application of bordeaux mixes and trace elements for known deficiencies as determined by plant or animal tissue or by soil testing, soluble aquatic plant products, botanicals, lime-sulfur, gypsum, dormant oils, summer oils, fish emulsion, soaps, and detergents, except for petroleum solvents, diesel, and other petroleum fractions, used as weed or carrot oils. Prohibited materials shall not include the application of soaps and detergents.

(4) Water, including substances dissolved in water, shall not be a prohibited material, even if it contains incidental contamination from a prohibited material, if the prohibited material was not added by, or under the direction or control of, the producer, handler, processor or retailer.

(q) ‘‘Retailer’’ means a person engaged in the sale to consumers of food sold as organic and not engaged in the production, handling or processing of food sold as organic.

(r) ‘‘Sold as organic’’ means any use of the terms ‘‘organic,’’ ‘‘organically grown,’’ ‘‘naturally grown,’’ ‘‘ecologically grown,’’ or ‘‘biologically grown,’’ or grammatical variations of those terms, whether orally or in writing, in connection with any food grown, handled, processed, sold, or offered for sale in this state, including, but not limited to, any use of these terms in labeling or advertising of any food and any ingredient in a multi-ingredient food, except as provided in Section 110880.

(s) ‘‘Substance’’ includes all components of a substance, including active and inert ingredients.

(t) ‘‘Synthetically compounded’’ means formulated or manufactured by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, excepting microbiological processes.

110820. Except as otherwise provided in this article, no food shall be sold as organic unless it consists entirely of any of the following:

(a) Raw agricultural commodities that meet the following requirements:

(1) The commodity has been produced and handled without any prohibited material or color additive having been applied, and without irradiation.

(2) In the case of any raw agricultural commodity produced from seed, the seed has not been treated with any prohibited material. If untreated seed is not available, seed treated with a fungicide may be used, except for seed used for sprouts, as described in paragraph (6).

(3) Prior to January 1, 1995, in the case of perennial crops, no prohibited material shall have been applied to the crop, field, management unit, or area where the commodity is grown for 12 months prior to the appearance of flower buds. During the 1995 calendar year, in the case of perennial crops, no prohibited material shall have been applied to the crop, field, management unit, or area where the commodity is grown for 24 months prior to harvest. Commencing January 1, 1996, in the case of perennial crops, no prohibited material shall have been applied to the crop, field, management unit, or area where the commodity is grown for 36 months prior to harvest.

(4) Prior to January 1, 1995, in the case of annual or two-year crops, no prohibited material shall have been applied to the field, management unit, or area where the commodity is grown for 12 months prior to seed planting or transplanting. During the 1995 calendar year, in the case of annual or two-year crops, no prohibited material shall have been applied to the crop, field, management unit, or area where the commodity is grown for 24 months prior to harvest. Commencing January 1, 1996, in the case of annual or two-year crops, no prohibited material shall have been applied to the crop, field, management unit, or area where the commodity is grown for 36 months prior to harvest.

(5) In the case of any raw agricultural commodity that is grown in any growing medium, such as fungi grown in compost or transplants grown in potting mix:

(A) The growing medium must have been manufactured or produced:

(i) Without any prohibited material having been included in the medium.

(ii) Without any prohibited material having been applied to the area where the medium is manufactured or produced during seeding or inoculation of the medium.

(iii) Using methods that will minimize the migration or accumulation of any pesticide chemical residue in food grown in the medium.

(B) No prohibited material shall have been applied to the area where the commodity is grown during seeding or inoculation. If a prohibited material is applied in the area prior to seeding or inoculation, a residue test shall be performed on the commodity grown from that seeding or inoculation.

(6) In the case of any raw agricultural commodity that is grown directly from seed and harvested within 18 days of germination, including, by way of example, sprouts, no prohibited material shall have been applied to the seed, and no prohibited material shall have been applied to the area where the commodity is grown after introduction of the seed. After January 1, 1992, the seed shall have been produced, handled, and processed in accordance with this article.

(b) Processed food manufactured only from raw agricultural commodities as described in subdivision (a), except as follows:

(1) Water, air, and salt may be added to the processed food.

(2) Ingredients other than raw agricultural commodities as described in subdivision (a) may be added to the processed food if these ingredients are included in the national list adopted by the United States Secretary of Agriculture pursuant to Section 6517 of the federal Organic Foods Production Act (7 U.S.C. Sec. 6501 et seq.) and do not represent more than 5 percent of the weight of the total finished product, excluding salt and water.

(c) Processed food manufactured only from a combination of raw agricultural commodities as described in subdivision (a) and processed food as described in subdivision (b).

(d) Meat, fowl, fish, dairy products, or eggs that are produced, distributed, and processed without any prohibited material having been applied or administered.

110825. No food that contains any prohibited material residue as a result of spray drift or any other contamination beyond the control of the producer, handler, processor, or retailer, may be sold as organic unless the amount of residue does not exceed 5 percent of the federal Environmental Protection Agency tolerance level.

110830. (a) No food grown, handled, processed, sold, advertised, represented, or offered for sale in this state, shall be sold as organic unless it also is prominently labeled, invoiced, and represented as follows, or with substantially similar language:

(1) For raw agricultural commodities:

ORGANICALLY GROWN IN ACCORDANCE WITH THE CALIFORNIA ORGANIC FOODS ACT OF 1990.

(2) For processed food:

ORGANICALLY GROWN AND PROCESSED IN ACCORDANCE WITH THE CALIFORNIA ORGANIC FOODS ACT OF 1990.

(3) For unprocessed meat, fowl, fish, dairy products, or eggs:

ORGANICALLY PRODUCED IN ACCORDANCE WITH THE CALIFORNIA ORGANIC FOODS ACT OF 1990.

(b) For unpackaged food sold as organic to consumers, physical attachment to the food of the applicable language set forth in subdivision (a) shall not be required if the language appears prominently on or near the bin or container holding the food.

(c) For food certified by a registered certification organization in accordance with Sections 110850 to 110870, inclusive, or Section 46009 of the Food and Agricultural Code, the term ''CERTIFIED'' may be used in labeling food sold as organic by the producer and by any handler if the name of the registered certification organization precedes or follows that term in the same size type, and if subdivisions (a) and (b) have been met.

(d) When unprocessed food that has been certified by two or more registered certification organizations, is commingled by a handler or retailer, but is not processed, the food shall thereafter be labeled as set forth in paragraph (1) or (3) of subdivision (a), and subdivisions (b) and (c), with the name of each certification organization that has certified any of the food.

(e) Except as provided in subdivision (f), when less than all of the ingredients in a multi-ingredient food are produced, handled, and, if applicable, processed in accordance with Section 110820, the food shall not be sold as organic. However, those ingredients produced, handled, and processed in accordance with Section 110820 may be described using the terms contained in subdivision (r) of Section 110815 on the principal display panel of the food if the terms are clearly used only to modify those ingredients and only if 100 percent of those ingredients are produced in accordance with Section 110820. The use of the terms shall be limited to no greater than three-quarters of the type size of the statement of identity.

Additionally or alternatively, those ingredients produced, handled, and processed in accordance with Section 110820 may be described using the terms contained in subdivision (r) of Section 110815 on the ingredient list on the packaging, if all other provisions of this article are met.

(f) No food may be advertised or labeled as ''organic when available'' or similar terminology that leaves in doubt whether the food is being sold as organic.

(g) The provisions of this article relating to the labeling of meat and meat products and poultry and poultry products shall not be interpreted to authorize any labeling of those products, that is subject to the jurisdiction of federal labeling laws, in a manner inconsistent with those federal labeling laws.

(h) Notwithstanding subdivision (a), until January 1, 1992, any person may utilize existing supplies of labels that conform to the requirements of former Section 26569.13.

110835. The director may adopt regulations listing specific substances that are in compliance or not in compliance with

subdivision (p) of Section 110815 for use in the processing of foods under the enforcement jurisdiction of the department.

110840. (a) All persons who produce raw agricultural commodities that are sold as organic shall keep accurate and specific records of the following:

(1) For each field or management unit, all substances applied to the crop, soil, growing medium, growing area, irrigation or postharvest wash or rinse water, or seed, including all substances applied during the time periods specified in paragraphs (3) to (6), inclusive, of subdivision (a) of Section 110820, the quantity of each substance applied, and the date of each application. All substances shall be identified by brand name, if any, and by source.

(2) The quantity harvested from each field or management unit, the size of the field or management unit, the field number, and the date of harvest.

(3) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all handlers, processors, or retailers to whom the food is sold or otherwise transferred, the quantity of food sold or otherwise transferred, and the date of the transaction.

(b) All persons who produce meat, fowl, fish, dairy products, or eggs sold as organic shall keep accurate and specific records of the following:

(1) Unless the livestock, fowl, or fish was raised or hatched by the producer, the name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all suppliers of livestock, fowl, or fish and the date of the transaction.

(2) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all suppliers of feed, the quantity of feed purchased, and the date of the transaction.

(3) All substances administered and fed to the animal, including all feed, medication and drugs, and all substances applied in any area in which the animal, milk, or eggs are kept, including the quantity administered or applied, and the date of each application. All substances shall be identified by brand name, if any, and by source.

(4) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all handlers, processors, or retailers to whom the food is sold or otherwise transferred, the quantity of food sold or otherwise transferred, and the date of the transaction.

(c) All persons who handle food sold as organic shall keep accurate and specific records of the following:

(1) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all suppliers of the food, the quantity of food purchased or otherwise transferred, and the date of the transaction.

(2) Invoices for each shipment from the supplier that state that the food may be sold as organic.

(3) If the food is labeled or represented to be certified, invoices from the supplier or separate written documentation from a certification organization that states that the food is certified under this article.

(4) All pesticide chemicals applied to the food while in the control of the handler, including the quantity applied, and the date of each application. All pesticide chemicals shall be identified by brand name, if any, and by source.

(5) All substances routinely applied in or around any area or container in which the food is kept. All substances shall be identified by brand name, if any, and by source. This record may be provided in the form of a single list of substances used.

(6) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all persons to whom the food is sold or otherwise transferred, the quantity of food sold or otherwise transferred, and the date of the transaction.

(d) All persons who process food sold as organic shall keep accurate and specific records of the following:

(1) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all suppliers of the food, the quantity of food purchased or otherwise transferred, and the date of the transaction.

(2) Invoices for each shipment from the supplier that state that the food may be sold as organic.

(3) If the food is labeled or represented to be certified, invoices from the supplier or separate written documentation from a certification organization that states that the food is certified under this article.

(4) All substances applied to the food or used in its processing, all substances applied to the food while in the control of the processor, and all substances applied in or around any area or container in which the food is kept, including the quantity of substances applied and the date of each application. All substances shall be identified by brand name, if any, and by source.

(5) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all handlers, processors, or retailers to whom the food is sold or otherwise transferred, the

quantity of food sold or otherwise transferred, and the date of the transaction.

(e) All persons who sell, at retail, food sold as organic shall keep accurate and specific records of the following:

(1) The name and address and, if applicable, the registration numbers issued pursuant to Section 110875 of this code or Section 46002 of the Food and Agricultural Code of all suppliers of the food, the quantity of food purchased or otherwise transferred, and the date of the transaction.

(2) Invoices for each shipment from the supplier that state that the food may be sold as organic.

(3) If the food is labeled or represented to be certified, invoices from the supplier or separate written documentation from a certification organization that states that the food is certified under this article.

(4) All pesticide chemicals applied to the food while in the control of retailer, including the quantity applied, and the date of each application. All pesticide chemicals shall be identified by brand name, if any, and by source.

(5) All substances routinely applied in or around any area or container in which the food is kept. All substances shall be identified by brand name, if any, and by source. This record may be provided in the form of a single list of substances used. One list may be kept at the retailer's headquarters office if all individual stores operated by that retailer utilize only the substances on the list.

Paragraphs (1) and (2) shall not apply to a person who both produces and sells, at retail, the same food. The records required to be kept pursuant to paragraphs (1) to (4), inclusive, of this subdivision may be kept at the retailer's warehouse or headquarters office.

(f) All records required to be kept under this section shall be maintained by producers for not less than three years and by handlers and processors for not less than two years from the date that the food is sold, and shall be maintained by retailers for not less than one year from the date that the food is received by the retailer. These records shall be made available for inspection at any time by the director or the Director of Food and Agriculture and by each certification organization that certifies the food, if any, for purposes of carrying out this article and Chapter 10 (commencing with Section 46000) of Division 17 of the Food and Agricultural Code.

110845. (a) Notwithstanding any other provision of law, any producer, handler, processor, or retailer of food sold as organic shall immediately make available for inspection by, and shall upon request, within 72 hours of the request, provide a copy to, the director, the Attorney General, any prosecuting attorney, any governmental agency responsible for enforcing laws related to the production or handling of food sold as organic, or the Secretary of

Food and Agriculture of any record required to be kept under this section for purposes of carrying out this article and Chapter 10 (commencing with Section 46000) of Division 17 of the Food and Agricultural Code. Records acquired pursuant to this subdivision shall not be public records as that term is defined in Section 6252 of the Government Code and shall not be subject to Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

(b) Upon written request of any person that establishes cause for the request, the director and the Secretary of Food and Agriculture shall obtain and provide to the requesting party within 10 working days of the request a copy of any of the following records required to be kept under this article that pertain to a specific product sold or offered for sale, and that identify substances applied, administered, or added to that product, except that financial information about an operation or transaction, information regarding the quantity of a substance administered or applied, the date of each administration or application, information regarding the identity of suppliers or customers, and the quantity or price of supplies purchased or products sold shall be removed before disclosure and shall not be released to any person other than persons and agencies authorized to acquire records under subdivision (a):

(1) Records of a producer, as described in paragraph (1) of subdivision (a) and in paragraph (3) of subdivision (b) of Section 110840.

(2) Records of a handler, as described in paragraphs (4) and (5) of subdivision (c) of Section 110840, records of previous handlers, if any, and producers as described in paragraph (1) of subdivision (a) of, paragraph (3) of subdivision (b) of, and paragraphs (4) and (5) of subdivision (c) of, Section 110840, without identifying the previous handlers or producers, and, if applicable, records obtained as required in subdivision (d).

(3) Records of a processor, as described in paragraph (4) of subdivision (d) of Section 110840, except for processing aids that are not residual in the product and spices and seasonings exempt from labeling requirements in Parts 145 and 146 of Title 21 of the Code of Federal Regulation, records of previous processors and handlers, if any, and producers as described in paragraph (1) of subdivision (a) of, paragraph (3) of subdivision (b) of, paragraphs (4) and (5) of subdivision (c) of, and paragraph (4) of subdivision (d) of, Section 110840, without identifying the previous processors, handlers, or producers, and, if applicable, records obtained as required in subdivision (d).

(4) Records of a retailer, as described in paragraphs (4) and (5) of subdivision (e) of Section 110840, records of previous processors and handlers, if any, and producers as described in paragraph (1) of subdivision (a) of, paragraph (3) of subdivision (b) of, paragraphs

(4) and (5) of subdivision (c), and paragraph (4) of subdivision (d) of, Section 110840, without identifying the previous processors, handlers, or producers, and, if applicable, records obtained as required in subdivision (d).

This subdivision shall be the exclusive means of public access to records required to be kept by producers, processors, handlers, and retailers under this article.

A person required to provide records pursuant to a request under this subdivision, may petition the director or the Secretary of Food and Agriculture to deny the request based on a finding that the request is of a frivolous or harassing nature. The secretary or director may, upon the issuance of such a finding, waive the information production requirements of this subdivision for the specific request for information that was the subject of the petition.

(c) Information specified in subdivision (b) that is required to be released upon request shall not be considered a ''trade secret'' under Section 110165, Section 1060 of the Evidence Code, or the Uniform Trade Secrets Act (Title 5 (commencing with Section 3426) of Part 1 of Division 4 of the Civil Code).

(d) The director or the Secretary of Food and Agriculture may charge the person requesting records a reasonable fee to reimburse him or her self or the source of the records for the cost of reproducing the records requested.

(e) Any person who first imports into this state, for resale, food sold as organic shall obtain and provide to the enforcement authority, upon request, proof that the products being sold have been certified by an accredited certifying organization or have otherwise been produced in compliance with this article.

(f) The director shall not be required to obtain records not in his or her possession in response to a subpoena. Prior to releasing records required to be kept pursuant to this chapter in response to a subpoena, the director shall delete any information regarding the identity of suppliers or customers and the quantity or price of supplies purchased or products sold.

110850. (a) Commencing January 1, 1996, all organic products shall be certified by a registered certifying organization, and food shall be sold as organic only in accordance with this section, subdivisions (c) and (d) of Section 110830, Sections 110855 to 110870, inclusive, and Section 46009 of the Food and Agricultural Code. The Secretary of Food and Agriculture, director, and the county agricultural commissioners shall carry out this subdivision to the extent that adequate funds are made available for that purpose.

(b) Food sold as organic may be certified only by a certification organization registered pursuant to subdivisions (c) and (d), by the director pursuant to subdivision (f), by a certification organization registered pursuant to Section 46009 of the Food and Agricultural Code, or by the Secretary of Food and Agriculture or a county

agricultural commissioner pursuant to Section 46009 of the Food and Agricultural Code or a federally accredited certification organization.

(c) In order to be registered, a certification organization shall meet all of the following minimum qualifications:

(1) Be the certification organization for at least five legally separate and distinct, financially unrelated, and independently controlled persons involved in the production or processing of food sold as organic.

(2) Be a legally separate and distinct entity from any person whose food is certified by the organization. A certification organization shall be considered legally separate and distinct notwithstanding the fact that persons or representatives of persons whose food is certified serve as directors, officers, or in other capacities for the certification organization, so long as those persons or representatives of those persons do not exercise decisionmaking authority over certification of that particular food.

(3) Have no financial interest in the sale of the food, except that fees charged by the certification organization to cover the reasonable costs of operating the certification organization do not constitute a financial interest for purposes of this section.

(d) Effective January 1, 1992, a certification organization which certifies processed food sold as organic, except for processed meat, fowl, or dairy products, shall register with the director and shall thereafter annually renew the registration unless no longer engaged in the activities requiring the registration. Registration shall be on a form provided by the director, shall include the filing of a certification plan as specified in Section 110865 and payment of the fee specified in subdivision (f). The director shall make forms available for this purpose on or before December 1, 1993. The registration form shall include a written statement affirming compliance with all requirements for certification organizations specified in Section 110850 to 110870, inclusive, and confirmation that each component of the organization's certification plan has been filed as specified in Section 110865. The director shall reject a registration submission that is incomplete or not in compliance with this article.

(e) Commencing July 31, 1991, the director may, upon the request of a sufficient number of persons to fund the program's cost, establish and maintain a certification program for processors of food sold as organic and shall establish and collect a fee from all processors of food certified under that program to cover all of the department's costs of administering the program. The certification program shall be subject to all provisions regarding certification organizations contained in this article, except that the requirements of subdivisions (c) and (d) shall not apply, and the program shall meet all of the

requirements for federal certification programs, including federal accreditation.

(f) The registration fee shall be five hundred dollars ($500), unless the certification organization is also registered as a certifier of producers by the Secretary of Food and Agriculture under Section 46009 of the Food and Agricultural Code, in which case the registration fee shall be one hundred dollars ($100).

(g) The director may audit the organization's certification procedures and records at any time. Records of certification organizations not otherwise required to be released upon request or made publicly available shall not be released by the director except to other employees of the department, the Department of Food and Agriculture, a county agricultural commissioner, the Attorney General, any prosecuting attorney, or any government agency responsible for enforcing laws related to the activities of the person subject to this part.

110855. Prior to initial certification of a producer, a registered certification organization shall conduct at least one initial physical inspection of the premises where the food to be certified is produced. This inspection shall include the recordkeeping system necessary for compliance with Section 110840 and the area or facility at which the food is produced.

110860. (a) A registered certification organization shall no less often than, at the end of each calendar quarter, prepare a list by name of all persons whose production or processing of food is certified or pending certification by the certification organization. This list shall be filed with the department or the Department of Food and Agriculture, as applicable, by the certification organization and made publicly available within 30 days after the end of each quarter.

(b) A registered certification organization or a federally accredited certification organization shall, at least annually, physically inspect the premises where the food to be certified is produced and processed. The inspection shall include an examination of recordkeeping.

110865. A registered certification organization shall adopt and adhere to a certification plan filed annually and made publicly available. Except in the case of a certification program established pursuant to subdivision (e) of Section 110850, a certification plan shall be filed as part of the registration required pursuant to subdivision (d) of Section 110850. A certification plan shall at minimum include a detailed description of all of the following elements of the certification organization's program:

(a) Minimum information required from producers or processors regarding growing or processing practices and methods for verifying that information.

(b) Qualifications of and training requirements for all inspectors.

(c) Procedures for inspection, including frequency and items covered.

(d) Procedures for soil and tissue sampling and analysis.

(e) Criteria for certification.

(f) Process for certification decisionmaking, including identification of persons with decisionmaking authority.

110870. (a) Only food that has been produced, handled, and processed in accordance with this article may be certified by a registered certification organization.

(b) Processed or multiingredient food sold as organic may only be certified if all the organic ingredients are certified.

110875. (a) Every person engaged in this state in the processing or handling of processed food sold as organic, including the handling or processing of fish or seafood sold as organic, except for processors and handlers of processed meat, fowl, or dairy products, shall register with the director, and shall thereafter annually renew the registration unless no longer so engaged. Processors and handlers of processed food that are registered with the department pursuant to Article 2 (commencing with Section 110460) shall register under this section in conjunction with the annual renewal of their registration pursuant to that article. All others required to register under this subdivision shall register within 30 days of forms being made available for this purpose. Any processor or handler of processed foods required to register under this subdivision that does not pay the registration fee required by subdivision (c) within 30 days of the date on which the fee is due and payable shall pay a penalty of 1 percent per month on the unpaid balance.

(b) Registration shall be on a form provided by the director and shall be valid for a period of one calendar year from the date of validation of the completed registration form. The director shall make forms available for this purpose on or before January 1, 1994. The information provided on the registration form shall include all of the following:

(1) The nature of the registrant’s business, including the types and quantities of each type of product that are sold as organic.

(2) The total current annual gross sales in dollars of products sold as organic.

(3) The names of all certification organizations and governmental entities, if any, providing certification to the registrant pursuant to this article.

(c) A registration form shall be accompanied by payment of a nonrefundable registration fee of one hundred dollars ($100), payable to the department.

(d) To the extent feasible, the director shall coordinate the registration and fee collection procedures of this section with similar licensing or registration procedures applicable to registrants.

(e) The director shall reject a registration submission that is incomplete or not in compliance with this article.

(f) The director shall provide a validated copy of the completed registration form to the registrant.

(g) Registration forms shall be made available to the public for inspection and copying at the main office of the department. Copies of registration forms shall also be made available by mail, upon written request and payment of a reasonable fee, as determined by the director. Registration information regarding quantity of products sold and gross sales volume in dollars shall be deleted prior to public inspection and copying and shall not be released to any person except other employees of the department, the Department of Food and Agriculture, a county agricultural commissioner, the Attorney General, any prosecuting attorney, or any government agency responsible for enforcing laws related to the activities of the person subject to this part.

(h) The requirements of this section shall not apply to retailers of food sold as organic.

110880. This article shall apply to all food sold as organic within the state, wherever produced, handled, or processed, and to all food produced, handled, or processed in the state, wherever sold as organic; except that in lieu of registration under this article, the director may recognize a certification program operating outside the state that certifies processed food sold as organic, except for processed meat, fowl, or dairy products, as functionally equivalent to a certification organization registered under Section 110850, so long as that program meets minimum standards substantially similar to those contained in subdivision (c) of Section 110850 and Sections 110855 to 110870, inclusive. The director may administratively establish a procedure whereby certification organizations operating outside the state may apply for and receive recognition.

110885. This article shall not apply to the term ‘‘natural’’ when used in the labeling or advertising of a food.

110890. (a) It is unlawful for any person to sell, offer for sale, advertise, or label any food in violation of this article.

(b) Notwithstanding subdivision (a), a person engaged in business as a distributor or retailer of food who in good faith sells, offers for sale, labels, or advertises any food in reliance on the representations of a producer, processor, or other distributor that the food may be sold as organic, shall not be found to violate this article unless the distributor either: (1) knew or should have known that the food could not be sold as organic; (2) was engaged in producing or processing the food; or (3) prescribed or specified the manner in which the food was produced or processed.

110895. (a) It is unlawful for any person to certify food in violation of this article.

(b) It is unlawful for any person to certify food as organic unless duly registered as a certification organization pursuant to Section 110850.

(c) It is unlawful for any person to willfully make a false statement or representation, or knowingly fail to disclose a fact required to be disclosed, in registration for a certification organization pursuant to Section 110850.

110900. (a) It is unlawful for any person to produce, handle, or process food sold as organic unless duly registered pursuant to Section 110875.

(b) It is unlawful for any person to willfully make a false statement or representation, or knowingly fail to disclose a fact required to be disclosed, in registration pursuant to Section 110875.

110905. It is unlawful for any person to forge, falsify, fail to retain, fail to obtain, or fail to disclose records pursuant to Sections 110840 and 110845.

110910. It is unlawful for any person to advertise, label, or otherwise represent that any fertilizer or pesticide chemical may be used in connection with the production, processing, or distribution of food sold as organic if that fertilizer or pesticide chemical contains a prohibited material.

110915. (a) In lieu of prosecution, the director may levy a civil penalty against any person who violates this article or any regulation adopted pursuant to this article in an amount not more than five thousand dollars ($5,000) for each violation. The amount of the penalty assessed for each violation shall be based upon the nature of the violation, the seriousness of the effect of the violation upon effectuation of the purposes and provisions of this article, and the impact of the penalty on the violator, including the deterrent effect on future violations.

(b) Notwithstanding the penalties prescribed in subdivision (a), if the director finds that a violation was not intentional, the director may levy a civil penalty of not more than two thousand five hundred dollars ($2,500) for each violation.

(c) For a first offense, in lieu of a civil penalty as prescribed in subdivisions (a) and (b), the director may issue a notice of violation, if he or she finds that the violation is minor.

(d) A person against whom a civil penalty is levied shall be afforded an opportunity for a hearing before the director, upon request made within 30 days after the date of issuance of the notice of penalty. At the hearing, the person shall be given the right to review the director’s evidence of the violation and the right to present evidence on his or her own behalf. If no hearing is requested, the civil penalty shall constitute a final and nonreviewable order.

(e) If a hearing is held, review of the decision of the director may be sought by any person within 30 days of the date of the final order

of the director pursuant to Section 1094.5 of the Code of Civil Procedure.

(f) A civil penalty levied by the director pursuant to this section may be recovered in a civil action brought in the name of the state.

110920. No fee established and collected pursuant to this article shall exceed the department's costs of regulating and enforcing the provisions of this article related to the function for which the fee is established.

110925. Any fees and civil penalties collected pursuant to this article shall be deposited in the General Fund and, upon appropriation by the Legislature, shall be expended to fulfill the responsibilities of the director as specified in this article.

110930. The director shall, to the extent funds are available, enforce this article applicable to all processors and handlers of processed food sold as organic, including handlers and processors of fish and seafood sold as organic, except for processors and handlers of processed meat, fowl, and dairy products.

110935. (a) The director shall maintain in a central location, and make publicly available for inspection and copying, upon request, a list of all penalties levied within the past five years, including the amount of each penalty, the party against whom the penalty was levied, and the nature of the violation. The list also shall be available by mail, upon written request and payment of a reasonable fee, as determined by the director.

(b) On or before January 1, 1994, the director, in cooperation with the Director of Food and Agriculture, shall prepare a report to the Legislature describing enforcement activities under this article and Chapter 10 (commencing with Section 46000) of Division 17 of the Food and Agricultural Code and containing recommendations regarding the need for, and means of, improved enforcement of this article and Chapter 10 (commencing with Section 46000) of Division 17 of the Food and Agricultural Code.

110940. (a) Any person may file a complaint with the director concerning suspected noncompliance with this article by a person over whom the director has responsibility as provided in this article.

(b) The director shall, to the extent funds are available, establish a procedure for handling complaints, including, provision of a written complaint form, and procedures for commencing an investigation within three working days of receiving a written complaint regarding fresh food, and within seven working days for other food, and completing an investigation and reporting findings and enforcement action taken, if any, to the complainant within 90 days thereafter.

(c) The director may establish minimum information requirements to determine the verifiability of a complaint and may provide for rejection of a complaint that does not meet the

requirements. The director shall provide written notice of the reasons for rejection to the person filing the complaint.

(d) The responsibilities of the director under this section shall be carried out to the extent funds are available.

110945. This article shall apply notwithstanding any other provision of law that is inconsistent with this article. Nothing in this article is intended to repeal any other provision of law not inconsistent with this article.

110950. The director may adopt any regulations as are reasonably necessary to assist in the implementation of, or to make more specific, the provisions of, this article.

110955. Any reference in law to former Section 26569.11, whether existing or hereinafter enacted, shall be interpreted to refer to this article and Chapter 10 (commencing with Section 46000) of Division 17 of the Food and Agricultural Code as the successor section.

Article 8. Potentially Hazardous Food

110960. It is unlawful for any person to hold or display any potentially hazardous refrigerated food at any temperature above 45 degrees Fahrenheit.

Article 9. Frozen Foods

110965. (a) No retail food production and marketing establishment shall advertise, label, or otherwise hold out as fresh any meat or fish that has been previously frozen.

(b) For purposes of this section:

(1) ‘‘Frozen’’ means any meat or fish stored in a room or compartment in which the temperature is plus five degrees Fahrenheit or lower.

(2) ‘‘Retail food production and marketing establishment’’ means any room, building, or place, or portion thereof, maintained, used, or operated for, or in conjunction with, the retail sale of food, or preparation of food. ‘‘Retail food production and marketing establishment’’ does not include any food facility, such as any ‘‘mobile food preparation unit’’ any ‘‘vehicle,’’ and any ‘‘vending machine’’ as defined in Chapter 4 (commencing with Section 113700) of Part 7; any wholesale food manufacturing, distributing, or storage establishment, including, but not limited to, the licensed premises or branch office of any winegrower, any brandy manufacturer, or any wine blender, subject to Chapter 4 (commencing with Section 111950) of Part 6; any frozen food locker plant subject to Chapter 7 (commencing with Section 112500) of Part 6; any health facility subject to Chapter 2 (commencing with Section 1250) of Division 2 and Section 127050; any community care facility subject to Chapter 3 (commencing with Section 1500) of Division 2; or any ‘‘official

establishment'' subject to Chapter 4 (commencing with Section 18650) of Part 3 of Division 9 of the Food and Agricultural Code.

(c) On and after the effective date of the act that added this subdivision to this section during the 1993–94 Regular Session, Section 26661 of the Food and Agricultural Code shall apply, to the exclusion of any provision of this section, with respect to the advertising, labeling, or otherwise holding out, of poultry.

110975. The following definitions apply to this article:

(a) ''Ice'' means the product obtained as the result of freezing water by natural, mechanical, or artificial means.

(b) ''Natural ice'' means the product obtained as the result of freezing water by natural means.

110980. In addition to the requirements of this article, unless ice is otherwise specifically excluded, regulations specifying good manufacturing practices applicable to food generally pursuant to Section 110105 shall be applicable to the manufacture of ice.

110985. No person shall make ice from, or cut natural ice from, water that does not comply with primary drinking water standards adopted by the department pursuant to Section 116365. No person shall sell or offer for sale for human consumption or food preservation ice made or cut in violation of this article.

110990. Unless water from a public water system, as defined in Section 116275, is used in the manufacture of ice, the manufacturer shall, on a quarterly basis, obtain from an approved laboratory, a bacterial analysis of the water used. The analysis shall be submitted to the department, indicating whether the water is pure and wholesome.

110995. Any person or entity who manufactures, transports, stores, or sells ice shall comply with all of the following:

(a) A room in which ice is manufactured shall be used for no other purpose than the manufacture of ice and the production of refrigeration, and may contain refrigeration equipment and machinery. This subdivision shall not apply to any food facility as defined in Section 113785.

(b) Ice storage or processing areas shall be maintained in a clean and sanitary condition and no noxious or offensive odors, smoking, or other air pollution shall be permitted therein.

(c) Cover tops for tank cans shall have a smooth, painted, or treated surface, and shall be cleaned daily. Water used for cleaning shall not be permitted to drip into freezing cans. Only potable water shall be used in sprays and in the thaw tanks for the removal of ice from cans. Water coverage tanks shall be covered and provided with filtered vents.

(d) Crushed, cubed, or shaved ice, intended for human consumption, shall be stored in a manner that prevents its pollution or contamination.

(e) Soil, waste, or drain pipes shall not be installed or maintained above any ice platform, loading space, ice container, ice storage room, dip tank or any place where leakage from the pipes may drop into, or upon any ice or upon any area or equipment used in the manufacture of ice, unless a safety device shall be installed under the pipes drained to an open receptacle or drain so as to prevent pollution of ice, water, or equipment used in the manufacture of the ice.

(f) Block ice-loading platforms shall be washed with water as often as necessary to keep them in a clean and sanitary condition, but not less than once each day.

(g) Block ice pullers and block ice storage-room employees shall wear rubber overshoes while on duty. The rubber overshoes shall be removed when the employee leaves the storage or tank room, except that if the rubber overshoes are not removed, they shall be cleaned and disinfected before reentering the storage or tank room. The use of street shoes without rubber overshoes in these areas is prohibited.

(h) All frozen unpackaged ice blocks intended for sale for human consumption or for the refrigeration of food products shall be washed thoroughly with potable water. Ice manufactured for industrial purposes need not be washed prior to shipping but shall be handled and stored separately from ice intended for human consumption.

(i) Ice shall be handled only with clean tongs, ice-carrying bags, scoops, or other sanitary containers, and shall not be directly handled with bare hands.

(j) Single service supplies shall be stored, dispensed, and handled in a sanitary manner and shall be used only once.

(k) Persons not directly involved in the manufacture, processing, packaging, or storing of ice, in the maintenance of facilities and equipment used therefore, or in the management, supervision, or inspection thereof, shall not be permitted in any area where ice is manufactured, processed, packaged, or stored, unless personal cleanliness and hygienic practices are taken to prevent contamination of the product. These areas shall have signs posted to this effect.

(*l*) Bacteriological tests of the finished ice shall be conducted not less than biannually, chemical and physical tests annually, and radiological tests every four years, to insure that ice manufactured for human consumption or for the refrigeration of food products complies with the primary drinking water standards adopted by the department pursuant to Section 116365.

(m) No ice produced out of state shall be sold or distributed within this state unless it complies with this article.

111000. (a) Filter beds and any filtering equipment shall be designed to protect ice from contamination and shall be subject to periodic treatment and cleaning.

(b) All equipment and utensils used in ice production areas shall be of easily cleanable construction, shall be kept clean and in good repair, and shall be handled and stored in a sanitary manner. Materials used as ice contact surfaces shall be smooth, nontoxic, and nonabsorbent. Ice cans shall be leakproof and the inner surfaces of the containers shall be free of corrosion.

(c) Freezing tank covers shall be designed and constructed to protect ice containers from splash, drip, and other contamination, shall be easily cleanable, and shall be kept clean and in good repair. The covers shall be equipped with rings or similar devices when hooks are used for pulling. Can or tank covers, and the ledges or sides of the tank upon which the cover rests, shall be cleaned as often as necessary to keep them in a sanitary condition.

(d) Conveyor surfaces shall be of impervious material and shall protect ice from contaminants that may result from shredding, flaking, peeling, or fragmentation of the conveyor surface.

(e) Equipment lubrication shall not contaminate the ice and only food grade lubricants shall be used.

(f) All product storage and holding areas to be refrigerated shall be cleaned as often as necessary to keep them free of contamination.

(g) Air used for water agitation shall be filtered or otherwise treated to remove dust, dirt, insects, and extraneous material. Filters shall be placed upstream from the compressor and shall be easily removable for cleaning or replacement.

(h) The compressor or blower used to supply air or water agitation shall be designed to deliver oil-free air.

(i) Air lines and core or vacuum devices shall be used as needed to produce ice free of rust or other foreign materials.

111005. In addition to the requirements of this article, ice shall be considered a food subject to all the sanitation requirements applicable to food generally pursuant to Article 1 (commencing with Section 110425), except those provisions that specifically exclude ice.

111010. Any truck, vehicle, or other equipment used for delivery, distribution, or selling ice, shall comply with all of the following:

(a) It shall be constructed and maintained to provide adequate and reasonable protection to the ice transported therein. Care shall be taken to prevent its contact with any contaminants, or other substances that would take the ice out of compliance with the drinking water standards prescribed by this article.

(b) All cubed, crushed, or shaved ice shall be kept in clean receptacles or containers that shall be kept covered while the vehicle is in motion.

Article 11. Local Enforcement

111015. ''Health officer,'' as used in this article, means the health officer appointed by a county board of supervisors pursuant to

Section 101000, by the governing body of a city pursuant to Section 101460, by the governing body of a city and county, or by a local health district board pursuant to former Section 940, that is continued in effect as to any existing district by Section 3 of Chapter 380 of the Statutes of 1959.

111020. The department, upon the request of a health officer, may authorize the local health department of a city, county, city and county, or local health district to enforce this part, and the regulations adopted pursuant to this part that pertain to retail food establishments, as defined by regulation, if the department determines that the local health department has sufficient personnel with adequate training to do so. The enforcement shall be limited to the area under the jurisdiction of the local health department.

111025. The department may revoke any authorization made pursuant to this article, if it determines, after a hearing conducted pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the local health department authorized pursuant to this article is not enforcing this part or the regulations adopted pursuant to this part, or no longer has an adequate staff qualified to do so.

111030. A local health department that is authorized by the department to enforce this part may make inspections, take samples, make laboratory examinations, impose and remove embargoes, hold informal hearings, certify facts to the district attorney, and institute proceedings for the forfeiture, condemnation, and destruction of food found to be adulterated or misbranded. The action shall be instituted in the name of the city, county, city and county, or district of which the local health department is a part, and shall conform to the requirements of this part and the regulations adopted by the department pursuant to this part.

111035. For the purposes of this article, the health officer and his or her deputies shall have the same powers and authority as an inspector of the Bureau of Food and Drug of the department.

111040. When an examination or analysis made pursuant to this part shows that any provision of this chapter has been violated, written notice of that fact together with a copy of the findings shall be furnished to each party from whom the sample was obtained, or who issued the product guarantee.

111045. The health officer shall set a time for an informal hearing, at which the parties may be heard before him or her or his or her representatives. A notice in writing shall be served upon the interested parties at least 15 days prior to the hearing. The informal hearing shall be private and limited to questions of fact. Appearances may be made in person or by attorney. Testimony may be taken and evidence introduced as to the correctness of the findings made by the person making the examination or performing the analysis.

111050. If the examination or analysis is found to be correct, or if any party fails to appear after notice has been duly given, the health officer may certify the facts found to the district attorney of the county. No publication shall be made until after the hearing is concluded.

111055. This article shall not be construed as repealing, either directly or by implication, any of the existing sections of this chapter, but shall be construed as constituting an alternative method of enforcing this part.

111060. This article shall not affect any previous authorization by the department to a local health department of a county, city, or city and county to enforce this part.

111065. The department may adopt regulations relating to the operation of a local health department as it considers necessary to fully effect this article, including, but not limited to, requirements relating to reporting of activities and the numbers and qualification of personnel.

Article 12. Bottled, Vended, Hauled, and Processed Water

111070. (a) ''Bottled water,'' means any water that is placed in a sealed container at a water-bottling plant to be used for drinking, culinary, or other purposes involving a likelihood of the water being ingested by humans. Bottled water shall not include water packaged with the approval of the department for use in a public emergency.

(b) ''Vended water'' means any water that is dispensed by a water-vending machine, retail water facility, or water from a private water source, or other water as defined in Section 111170 that is not placed by a bottler in sealed containers, and that is dispensed by a water-vending machine, retail water facility, water hauler, or any other person or facility for drinking, culinary, or other purposes involving a likelihood of the water being ingested by humans. ''Vended water,'' does not include water from a public water system that has not undergone additional treatment. Water sold without further treatment is not ''vended water'' and shall be labeled in accordance with paragraph (10) of subdivision (a) of Section 111170.

(c) ''Water-bottling plant'' means any facility in which bottled water is produced.

(d) A ''water-vending machine'' means any self-service device that, upon insertion of a coin, coins, or token, or upon receipt of payment by any other means, dispenses a unit volume of water to be used for drinking, culinary, or other purposes involving a likelihood of the water being ingested by humans.

(e) ''Water hauler,'' means any person who hauls water in bulk by any means of transportation if the water is to be used for drinking, culinary, or other purposes involving a likelihood of the water being ingested by humans.

''In bulk,'' as used in this subdivision, means containers having capacities of 250 gallons or greater.

(f) ''Retail water facility'' means any commercial establishment where vended water is sold, and placed in customer's containers, or placed in containers sold or given to customers who come to the establishment to obtain water.

(g) ''Private water source,'' means a privately owned source of water, other than a public water system, that is used for bottled or vended water and meets the requirements of an approved source for bottled water as defined in Section 129.3 of Title 21 of the Code of Federal Regulations.

(h) ''Bottled water distributor'' means any person, other than an employee or representative of a bottled water plant, who delivers bottled water directly to customers.

111075. (a) Any person who processes, packages, distributes, transfers, or stores bottled water or vended water shall comply with the good manufacturing practices described in Part 129 of Title 21 of the Code of Federal Regulations.

(b) Prior to bottling or vending water, the water shall be subjected to filtration and effective germicidal treatment by ozone, ultraviolet, carbon dioxide, or an equivalent disinfection process approved by the department, except that the requirements for filtration and germicidal treatment shall not apply to mineral water as defined in and from a source that is subject to the council directive of the European Economic Community pertaining to natural mineral waters, dated July 15, 1980, or that is subject to any other natural mineral water standard in the country of origin that prohibits filtration and germicidal treatment, so long as both of the following conditions are met:

(1) The source and product are certified by the responsible authority in the country of origin as complying with microbiological standards at least equal to the standards of this article.

(2) The product complies with microbiological standards of this article.

(c) Bottled or vended water that originates from a surface water source that is not protected from surface contamination shall be subjected to ozonation, filtration, or another effective process that removes or destroys the cysts of the parasite Giardia lamblia. For the purposes of this section, a spring house, catchment basin, storage tank, or bore hole adjacent to a natural spring water source as defined in paragraphs (3) and (8) of subdivision (e) of Section 111170, is not a surface water source.

(d) Ollas or other water-holding dispensers, both refrigerated and nonrefrigerated, water-vending machines, and water dispensers in retail water facilities, shall be examined for cleanliness each time they are serviced by the distributor, bottler, retail water facility, or water-vending machine operator. When necessary, these dispensers

shall be sanitized according to the methods described in Part 129 of Title 21 of the Code of Federal Regulations.

(e) Sanitary operations, equipment procedures, and process controls used in the treatment, storage, transport, or dispensing of water at a retail water facility shall comply with the good manufacturing practices described in the following provisions of Part 129 of Title 21 of the Code of Federal Regulations: subdivisions (a) to (c), inclusive, of Section 129.37; Section 129.40; and subdivisions (a), (c), (d), and (h) of Section 129.80.

(f) Sanitary operations, equipment, procedures, and process controls used in the treatment, storage, transfer, transport, or dispensing of water by water haulers, shall comply with the good manufacturing practices described in the following provisions of Part 129 of Title 21 of the Code of Federal Regulations: subdivisions (a) and (b) of Section 129.37; Section 129.40; and subdivisions (a), (c), (d), and (h) of Section 129.89.

(g) The design and construction of wells, bore holes, catchment basins, spring houses, storage tanks, or other water-contact equipment used by private water sources shall comply with the requirements of the local regulatory authority. Sanitary operations, equipment procedures, and transfer controls used in the treatment, storage, transfer, or dispensing of water by private water source operators shall comply with the good manufacturing practices described in the following provisions of Part 129 of Title 21 of the Code of Federal Regulations: subdivision (a) of Section 129.37; Section 129.40; and subdivisions (a), (c), (d), (g), and (h) of Section 129.80.

(h) Bottled water may be processed through lines used also for other food products under the following conditions:

(1) Process lines, including storage tanks and associated equipment, shall be used exclusively for the production of bottled water, except for filling equipment, that may be used also for filling other food products.

(2) Before being used for the bottling of water, filling equipment that is designed to be cleaned in-place and that is used for filling other food products shall be thoroughly cleansed and sanitized in-place in accordance with the manufacturer’s specifications and in compliance with Section 129.80 of Title 21 of the Code of Federal Regulations and the supplementary procedures that follow in paragraphs (3) to (7), inclusive, of this section.

(3) Immediately following completion of filling operations for any other food product other than water, the filler shall be thoroughly rinsed internally and externally with potable water.

(4) In accordance with filler manufacturer’s instructions, any parts that are not designed to be cleaned in-place shall be disassembled and removed. All of these parts shall be cleansed and sanitized prior to reassembly using appropriate cleansing and

sanitizing procedures, as specified in subdivisions (c) and (d) of Section 129.80 of Title 21 of the Code of Federal Regulations.

(5) All surfaces of the filler that do not contact food products shall be cleaned manually so as to render all surfaces clean and free of any residues.

(6) The filler shall be prepared and all appropriate connections made in accordance with the filler manufacturer's instructions to place the filler in the clean-in-place mode. The following procedures shall be followed:

(A) An alkaline cleaning solution of appropriate strength shall be recirculated through the filler to provide effective cleaning of all product contact surfaces, with a minimum recirculation time of 20 minutes at a temperature between 140 and 170 degrees Fahrenheit.

(B) The cleaning solution shall be drained and followed with a potable water rinse-to-drain for the removal of all residual cleaner alkalinity. This step may be supplemented by the application of an acidified rinse prior to the potable water rinse in order to neutralize any residual alkalinity on product contact surfaces.

(7) Following reassembly of all parts to place the filler into the product mode and just prior to bottling water, the filler shall be sanitized in-place in accordance with procedures specified in subdivision (d) of Section 129.80 of Title 21 of the Code of Federal Regulations.

(8) Any alternate cleaning, rinsing, or sanitizing operations or processes not described in this section shall be approved in writing by the department.

(i) Bottled water and bulk waters sold at retail shall not contact equipment, lines, tanks, or vehicles used for processing, packaging, holding, or hauling of any nonfood product.

111080. The quality standard requirements for bottled water and vended water, including mineral water, shall include all standards prescribed by Section 103.35 of Subpart B of Part 103 of Title 21 of the Code of Federal Regulations, except that water labeled as mineral water shall exceed 500 milligrams per liter of total dissolved solids and may exceed the quality standards for chloride, copper, manganese, iron, sulfate, and zinc prescribed in Section 103.35 of Title 21 of the Code of Federal Regulations. The department may develop additional standards for chloride, copper, manganese, iron, sulfate, or zinc in mineral water that the department determines are reasonably necessary to protect the public health. In addition, bottled water and vended water, when bottled, shall comply with the following quality standards and any additional quality standards adopted by regulation that the department determines are reasonably necessary to protect the public health:

(a) Bottled water and vended water shall meet all maximum contaminant levels set for public drinking water that the department determines, after public comment, are necessary or appropriate so

that bottled water may present no adverse effect on public health. New or revised maximum contaminant levels or monitoring provisions adopted for bottled water by the United States Food and Drug Administration under the federal Food, Drug and Cosmetic Act that are more stringent than the state requirements for bottled water are incorporated into this chapter and are effective on the date established by the federal provisions unless otherwise established by regulations of the department.

(b) Bottled and vended water shall not exceed 10 parts per billion of total triahalomethanes or five parts per billion of lead unless the department establishes a lower level by regulation.

(c) Bottled and vended water shall contain no chemicals in concentrations that the United States Food and Drug Administration or the state department has determined may have an adverse effect on public health.

(d) Mineral water producers that bottle 5,000 gallons, or less, per week shall have until February 1, 1990, to comply with the quality standards for bottled water pursuant to this paragraph. Mineral water producers may present to the department data on consumption of mineral water and the health effects of inorganic elements that may be present as listed in the bottled water quality standards prescribed by Section 103.35 of Subpart B of Part 103 of Title 21 of the Code of Federal Regulations.

111085. Polycarbonate resins manufactured after January 1, 1988, and intended for use in fabricating containers for water products defined in this article shall not contain in excess of three parts per million residual methylene chloride or in excess of 200 parts per million residual monochlorobenzene unless the department establishes a lower level by regulation. For the purpose of monitoring compliance with this section, the concentration of methylene chloride and monochlorobenzene shall not exceed one part per billion in water. ''Polycarbonate resins'' means the substances defined by Section 177.1580 of Title 21 of the Code of Federal Regulations except as modified by this section.

111090. Any owner or operator of a water-vending machine or other device from which any operator or customer dispenses vended water shall comply with the following standards of design, construction and sanitation and any additional standards adopted by regulation that the department determines are reasonably necessary to protect the public health. The water-vending machines or devices shall do all of the following:

(a) Comply with the construction and performance standards established by the department or by an independent authority approved by the department.

(b) Be designed and constructed to permit easy cleaning and maintenance of all exterior and interior surfaces.

(c) Have all parts and surfaces that come into contact with the water constructed of approved, corrosive-resistant and nonabsorbent material capable of withstanding repeated cleaning and sanitizing treatment.

(d) Have a recessed or guarded corrosion-resistant dispensing spout.

(e) Be designed so that all treatment of the vended water by distillation, ion exchange, filtration, ultraviolet light, reverse osmosis, mineral addition, or any other acceptable process is done in an effective manner.

(f) Have an effective system of handling drip, spillage, and overflow of water.

(g) Have a backflow prevention device approved by the department for all connections with the water supply.

(h) Dispense water disinfected by ultraviolet light or other method approved by the department prior to delivery into the customer's container.

(i) Be equipped with monitoring devices designed to shutdown operation of the machine when the disinfection unit fails to function, or shall be monitored daily at startup and manually shutdown whenever the unit fails to function.

(j) Be equipped with a self-closing, tight-fitting door on the vending compartment, or enclosing the vending spout to protect the vending spout when the water-vending machine is not in use. As an alternative, water-vending machines or other water-dispensing devices may be enclosed in a room with tight-fitting walls, ceilings, and one of the following: a self-closing door, an effective air screen device, or an alternative effective device approved by the department.

(k) Comply with the American Water Works Association (AWWA) specifications for granular activated carbon if used in the treatment of potable water (AWWA B604-74).

(*l*) Be maintained in a clean and sanitary condition, free from dirt and vermin.

(m) Use a state approved and regulated public water supply or private water source.

(n) Be located in an area that can be maintained in a clean condition and in a manner that avoids insect and rodent harborage.

(o) Be equipped with monitoring devices designed to shut down the labeled purified water delivery system if treatment of water by the machine does not result in a total dissolved solids content of less than 10 milligrams per liter in the purified water. Alternatively, machines shall be monitored daily at startup and manually shutdown whenever the total dissolved solids content exceeds 10 milligrams per liter in the purified water.

111095. It shall be unlawful to operate a bottled plant water plant, water-vending machine, retail water facility, or private water source in violation of the minimum health standards of this article.

111100. It is unlawful for any person to operate a water vending machine in this state that does not satisfy the minimum standards prescribed by this article for the design, construction, and sanitation of water-vending machines.

111105. The department, upon the request of a local health officer, may authorize the local health officer to implement and enforce those provisions of this article that relate to water-vending machines, retail water facilities, and water haulers under the terms and conditions specified by the department.

111110. No water-vending machine shall be used in this state that does not at least satisfy the minimum standards adopted by the department.

111115. The department shall require that each water-vending machine, retail water treatment plant, water hauler vehicle and facility, and private water source be maintained in a clean and sanitary condition at all times.

111120. (a) No person shall operate a water-bottling plant, a private water source, or be a bottled water distributor in this state except pursuant to a license issued by the department. If a person has a valid water-bottling plant license issued by the department, additional license fees for a private water source operator, a retail water facility, a water hauler, or a bottled water distributor based and operating at the same address, shall not be required.

(b) No person shall own or operate a water-vending machine or a retail water facility or be a water hauler, except pursuant to a license issued by the department or to a permit issued by a local health department.

(c) It shall be unlawful for any person to bottle, collect, treat, hold, distribute, haul, vend, or sell bottled water, vended water, operate a retail water facility, or operate a private water source without the license as required by this article. Any bottled water or vended water dispensed by a retail water facility or a private water source that is not licensed in compliance with this article is misbranded and may be embargoed pursuant to subdivision (e) of Section 111120.

(d) It shall be unlawful for a water bottler, distributor, vendor, retail water facility operator, or private water source operator to sell or otherwise distribute water that is adulterated, as defined in Section 110445, 110545, 110560, or 110565, or that is misbranded as defined in Article 6 (commencing with Section 110660) of Chapter 5.

(e) For the purposes of enforcing this section, water may be embargoed pursuant to Section 111860 in its immediate container, well, spring, spring vault, holding tank, water hauling vehicle, retail water treatment system, spigot, or pipe if there is reasonable cause to believe that it is adulterated.

(f) Any retail water facility, water vendor, or water hauler that violates this article may be subjected to the same penalty and enforcement procedure provided for violation of this article by a water bottling facility.

111125. No bottled water produced in an out-of-state bottling plant shall be sold or distributed within this state unless either the out-of-state bottler or the distributor shall have first obtained a bottler's or distributor's license.

111130. (a) The department shall charge and collect a fee for each license application submitted in accordance with the fee schedule in Table 1, that shall be an amount reasonably necessary to produce sufficient revenue to enforce this article. The fees collected shall be adjusted annually as required by Section 100425. New applicants for a water bottling plant license shall pay Category 2 fees for the first license year.

(b) The water-bottling plant and bottled water distributor categories shall be determined by dividing by 52 the number of gallons produced or shipped into California during the previous year. If the result is an average of 5,000 gallons or less per week, the firm is Category 1. If the average exceeds 5,000 gallons per week, the firm is Category 2.

Table 1

License Fees

License Class	Annual Fee
Water–Bottling Plant	
Category 1	$310
Category 2	875
Water–Vending Machine	10.25
Water Hauler	310
Retail Water Facility	310
Private Water Source Operator	310
Bottled Water Distributor	310

(c) The owners or operators of each water-bottling plant, retail water facility, private water source, each water hauler in California and bottlers or distributors of water bottled out-of-state shall make application for a license on forms provided by the department. Applications and license fees shall be submitted for each calendar year.

(d) Each water-vending machine owner or operator shall make application each calendar year for a license for all machines on forms provided by the department. A decal or seal provided by the department indicating a license fee has been paid shall be affixed in a prominent place to each water-vending machine in service.

111135. The department may deny any license application or revoke or suspend any license issued for cause. The department shall inform the person of any denial, revocation, or suspension in writing, stating with particularity reasons for the denial, revocation, or suspension.

''Cause,'' as used in this section, means a violation of any provision of this chapter or any regulation adopted pursuant thereto.

111140. The department shall charge and collect a fee for each department evaluation required to issue a new license for a water-vending machine model or a retail water facility to determine compliance with standards established by this article. The fee shall be three hundred dollars ($300) and shall be adjusted annually as required by Section 100425.

111145. (a) The department shall require each bottler, distributor, or vendor of bottled water, each owner or operator of any water-vending machine, each water hauler, each retail water facility operator, each private water source operator, and each applicant for a license, to test for all substances necessary to establish conformance to standards adopted pursuant to Section 111080 at the times and frequencies the department may reasonably establish.

(b) Each product dispensed by a water-vending machine or a retail water facility shall be sampled and analyzed for coliform bacteria at least once every six months. The analysis shall be submitted to the department indicating whether the water is pure and wholesome. Analysis of vended water or water from retail water facilities shall be submitted to the local health officers if the local health officers are authorized by the department pursuant to subdivision (b) of Section 111105.

(c) Purified waters from retail water facilities shall be analyzed by the operator for dissolved solids by conductivity measurement not less frequently than once every seven days.

(d) Purified water from vending machines shall be analyzed by the operator for the dissolved solids by conductivity measurement each time the vending machine is serviced.

111150. (a) All sources of bottled water, vended water, and water dispensed by a retail water facility shall be monitored annually for the presence of volatile organic compounds of potential public health concern, as specified by the United States Environmental Protection Agency in Tables 2 and 14 contained in Volume 50 of the Federal Register on pages 46904, 46923, and 46924 on November 13, 1985, or as reasonably specified by the department as a condition of licensure.

(b) In lieu of source water monitoring required by this section, a water bottler, water vendor, or a retail water facility may document that the source monitoring required by this section is conducted by another entity approved by the department, or may comply with the treatment requirements of subdivision (c).

(c) Detection in the source water of a volatile organic compound, except trihalomethanes, for which source monitoring is required pursuant to this section shall be followed immediately by a program of periodic monitoring by the water bottler, water vendor, or retail water facility to confirm the presence or absence in the source water of the volatile organic compound. If the volatile organic compound is confirmed to be present in the source water it shall be treated using granular activated carbon treatment or an equivalent treatment operated in accordance with good manufacturing practices as provided in Section 129.80 of Title 21 of the Code of Federal Regulations until the time that the concentration of the volatile organic compound does not exceed either one part per billion, or any United States Environmental Protection Agency or United States Food and Drug Administration level for drinking water, or a maximum contaminant level established by the department for bottled water.

(d) The department may exempt any water bottler, water vendor, or retail water facility from the monitoring requirements of this section for any source based on a showing satisfactory to the department that the source (1) does not contain the volatile organic compound for which monitoring is required and (2) is not vulnerable to contamination by the volatile organic compound because for surface water sources the compounds are not applied, manufactured, stored, disposed or shipped upstream, and for groundwater sources, the compounds are not applied, manufactured, stored, disposed, or shipped in the groundwater recharge basin.

111155. Notwithstanding any other provisions of this article, the department may require any bottler, distributor, or vendor of bottled water, any owner or operator of a water-vending machine, any water hauler, any retail water facility operator, any private water source operator, or any applicant for a license to test and submit results to the department for any substance, including organic chemical contaminants, at any time that the department believes the substance may be present in the water source and threaten the public health.

111160. (a) Upon a determination by the department that a particular water source is subject to potential contamination, the department shall notify the bottler, distributor, or vendor of bottled water, the owner and operator of any water-vending machine, any water hauler, any retail water facility operator, or any private water source operator of the specific contaminants or class of contaminants that pose a potential health risk.

(b) Within 90 days after notification by the department, the bottler, distributor, vendor of bottled water, the owner and operator of any water-vending machine, any water hauler, any retail water facility operator, or any private water source operator shall conduct

an analysis of the water source and submit the results of the analysis to the department.

(c) If evidence of contamination is found, the department may, by order, require the bottler, distributor, vendor of bottled water, or the owner and operator of any water-vending machine, any water hauler, any retail water facility operator, or any private water source operator to conduct a source and product water analysis for the contaminants of concern in accordance with conditions specified by the department. The water analysis shall be conducted and reported on an annual basis, unless the department finds that reasonable action requires either more frequent or less frequent analysis.

(d) The department may, by order, require the bottler, distributor, vendor of bottled water, the owner and operator of any water-vending machine, any water hauler, any retail water facility operator, or any private water source operator to reduce or eliminate the concentration of any chemical that the department determines may have an adverse effect on public health. Until an enforceable standard has been established for a chemical that may have an adverse effect on human health, the department may require treatment techniques to reduce the concentration of the contaminants that require treatment, in the department's judgment, to prevent known or anticipated adverse effects on the health of persons. The treatment system shall be designed to meet criteria designated by the department or by an independent authority approved by the department.

(e) The department may grant variances from the requirements of subdivision (d), if the bottler, distributor, vendor of bottled water, the owner and operator of any water-vending machine, any water hauler, any retail water facility operator, or any private water source operator demonstrates either of the following:

(1) That the prescribed treatment technique is not necessary to protect the health of consumers because its water source is not subject to, nor is it likely to be subject to, significant chemical contamination.

(2) An alternative treatment technique is at least as efficient in lowering the level of contaminants to be controlled.

111165. All testing of bottled water, bottled water sources, water distributed by water haulers, water from retail water facility, and water from vending machines shall be done by laboratories approved by the department, laboratories certified by the United States Environmental Protection Agency, laboratories certified by the primary enforcement authority in states that have been granted primacy by the United States Environmental Protection Agency, or laboratories certified (accredited) by a third-party organization acceptable to a primacy state.

111170. (a) Labeling and advertising of bottled water and vended water shall conform with this section and Chapter 4

(commencing with Section 110290) and Part 101 of Title 21 of the Code of Federal Regulations.

(b) Each container of bottled water sold in this state, each water-vending machine, and each container provided by retail water facilities located in this state shall be clearly labeled in an easily readable format. Retail water facilities that do not provide labeled containers shall post, in a location readily visible to consumers, a sign conveying required label information.

(c) Water-vending machines, retail water facilities, and private water sources that sell water at retail shall display in a position clearly visible to customers the following information:

(1) The name and address of the operator.

(2) The fact that the water is obtained from an approved public water supply or licensed private water source.

(3) A statement describing the treatment process used.

(4) If no treatment process is utilized a statement to that effect.

(5) A telephone number that may be called for further information, service, or complaints.

(d) Bottled water may be labeled ''drinking water,'' notwithstanding the source or characteristics of the water, only if it is processed pursuant to the Food and Drug Administration Good Manufacturing Practices contained in Section 103.35 and Parts 110 and 129 of Title 21 of the Code of Federal Regulations, Sections 12235 to 12285, inclusive, of Title 17 of the California Code of Regulations, and any other requirements established by the department pursuant to Sections 111145, 111150, and 111155. Any vended water and any water from a retail water facility may be labeled ''drinking water,'' notwithstanding the source or characteristics of the water, only if it is processed pursuant to Article 10 (commencing with Section 114200) of Chapter 4 of Part 7 and any other requirements established by the department pursuant to Sections 111145, 111150, and 111155.

111175. (a) In addition to the requirements of Section 111170, if a bottler, distributor, water hauler, retail water facility operator, or vending machine operator provides information in the labeling or advertising stating or implying that this water is of a specific water type (for example, ''spring water'') or treated in a specific manner (for example, ''purified''), the type or treatment shall be clearly labeled in an easily readable format. In order to be so labeled, the source or treatment shall conform to the following criteria:

(1) ''Artesian well water'' means water from a well tapping an aquifer in which the water level will stand above the bottom of the confining bed of the aquifer, and in which the hydraulic pressure of the water in the aquifer is greater than the force of gravity. Artesian well water shall not be altered by the addition or deletion of minerals or by blending it with water from a nonartesian well water source,

except that artesian well water may be filtered and shall be treated with ozone or an equivalent disinfection process.

(2) ‘‘Fluoridated water’’ means water containing naturally occurring or added fluoride. The label shall specify whether fluoride is naturally occurring or is added. Any water that meets the designation of this paragraph shall contain not less than 1.0 milligrams per liter fluoridization and otherwise comply with the Food and Drug Administration quality standards set forth in Section 103.35(d)(2) of Title 21 of the Code of Federal Regulations.

(3) ‘‘Mineral water’’ means bottled water or vended water containing more than 500 milligrams per liter of total dissolved solids and originating entirely from an underground source, that may be a well, artesian well, or spring. Bottled or vended mineral water may be derived from a natural orifice or from a bore hole adjacent to the natural orifice. If it is derived from a natural orifice or from a bore hole adjacent to the natural orifice, the water shall be from the same underground stratum and be of the same quality and composition as the water derived from the natural orifice without external force. Mineral water may not be altered by the addition or deletion of minerals or by blending it with water from a nonmineral water source, except that mineral water may be filtered and shall be treated with ozone or an equivalent disinfection process approved by the department and shall be treated to reduce the concentrations of any naturally occurring substance that exceeds the bottled water safety standards established by the department. Mineral water may be collected and transported by pipes, tunnels, trucks, or similar devices. Any water that meets the criteria of this paragraph may also be labeled ‘‘natural mineral water.’’

(A) Mineral water that contains carbon dioxide as it emerges from the source and is bottled directly with its entrapped gas, or from which the gas is mechanically separated and later reintroduced into the water at the time of bottling shall be labeled ‘‘naturally carbonated’’ or ‘‘naturally sparkling.’’

(B) Mineral water that contains carbon dioxide, other than that naturally occurring in the source product, shall be labeled with the words ‘‘carbonation added’’ or ‘‘carbon dioxide added’’ when the carbonation is obtained from a natural or manufactured source.

(4) ‘‘Mineralized water’’ means bottled or vended water that meets the requirements of ‘‘mineral water’’ except that the water contains added minerals.

(5) ‘‘Natural water’’ means bottled or vended spring, artesian well, or well water that is unmodified by mineral addition or deletion, except ‘‘natural water’’ may be filtered and shall be sanitized with ozone or an equivalent disinfection process and treated to reduce the concentration of any substance that exceeds safety standards established by the department.

(6) ‘‘Naturally sparkling water’’ means bottled water or vended water with a carbon dioxide content from the same source as the water. ‘‘Sparkling,’’ ‘‘carbonated,’’ or ‘‘carbonation added’’ means bottled water or vended water that contains carbon dioxide.

(7) ‘‘Purified water’’ means water produced by distillation, deionization, reverse osmosis, or other method meeting the definition of purified water in the 21st edition of the United States Pharmacopeia. Water that meets the designation of this paragraph, and is vaporized, then condensed, may be labeled ‘‘distilled water.’’

(8) ‘‘Spring water’’ means water that issues by natural forces out of the earth at a particular place. Bottled or vended spring water may be derived from the natural orifice or from a bore hole adjacent to the natural orifice. If it is derived from the natural orifice by external force or from a bore hole adjacent to the natural orifice, the water shall be from the same underground stratum and be of the same quality and composition as the water derived from the natural orifice without external force. Spring water may not be altered by the addition or deletion of minerals or by blending it with water from a nonspring water source, except that spring water may be filtered and shall be treated with ozone or an equivalent disinfection process. Spring water may be collected and transported by pipes, tunnels, trucks, or similar devices.

(9) ‘‘Well water’’ means water from a hole bored into the ground that taps the water of an aquifer, except that well water may be filtered and shall be treated with ozone or an equivalent disinfection process. Well water may not be altered by the addition or deletion of minerals or by blending it with water from a nonwell water source.

(10) Notwithstanding any other provision of this section, water from a public water system that is unprocessed by the bottler or vendor shall be labeled as ‘‘unprocessed public drinking water.’’

111180. Except as provided in Section 111080, any bottled water or vended water, the quality of which is below the quality required by this article, shall be labeled with a statement of substandard quality, as prescribed by Section 103.35 of Title 21 of the Code of Federal Regulations.

111185. Any bottler, distributor, vendor of bottled water, or owner or operator of any water-vending machine or retail water facility, whose corporate name or trademark contains the words ‘‘spring’’ or ‘‘springs,’’ or any derivative of either of these words, or ‘‘well,’’ ‘‘artesian well,’’ or ‘‘natural’’ shall label each bottle or vending machine with the source of the water in typeface at least equal to the size of the typeface of the corporate name or trademark, if the source of the bottled or vended water is different from the source stated in the corporate name or trademark. Retail water facilities that do not provide labeled containers shall post, in a location readily visible to consumers, a sign conveying required label information.

111190. (a) A bottled water, as defined in Section 111170, with natural or added carbonation, may be prepared with added flavors, extracts, essences, or fruit juice concentrates derived from a spice or fruit and comprising less than 1 percent by weight of the final product. The final product shall contain no sweeteners, or additives other than the flavors, extracts, essences, or fruit juice concentrates and carbon dioxide and shall be designated on labels and in advertising as follows:

(1) The common or usual name of the characterizing flavor shall accompany the designation of the bottled water product type as defined in subdivision (b) of Section 111170.

(2) The product may be designated as ''natural'' only if it meets the requirements for the designation as defined in paragraphs (5) and (6) of subdivision (b) of Section 111170, and naturally derived flavors, extracts, or essences are used.

(b) Products labeled pursuant to this section shall comply with all other provisions of this article. Products with one type or one source of bottled water that are labeled pursuant to this section shall not be blended with water that is not bottled water or that is of another bottled water type.

111195. The department, prior to issuing a license, shall review all labels prepared pursuant to this article, and may require any changes in order to comply with this article.

Article 13. Hamburger and Imitation Hamburger

111200. As used in this article, the following definitions shall apply:

(a) ''Hamburger'' means chopped fresh or frozen beef, or a combination of both fresh or frozen beef, with or without the addition of beef fat as such, and with or without the addition of seasoning. Hamburger shall not contain more than 30-percent fat, and shall not contain added water, binders, or extenders. Beef cheek meat (trimmed beef cheeks) may be used in the preparation of hamburger to the extent of 25 percent, and if in excess of natural proportions, its presence shall be declared on the label in the ingredient statement, if any, and otherwise contiguous to the name of the product.

(b) ''Imitation hamburger'' means chopped fresh or frozen beef, or a combination of both fresh or frozen beef, with or without the addition of beef fat as such, and with or without the addition of seasoning. Imitation hamburger may contain binders and extenders, with or without the addition of partially defatted beef tissue, without added water or with added water only in amounts that the products' characteristics are essentially that of a meat pattie.

(c) ''Restaurant'' means restaurants, itinerant restaurants, vehicles, vending machines, or institutions including hospitals, schools, asylums, eleemosynaries, and all other places where food is

served to the public for consumption on the premises of sale that are not included within the definitions of the terms restaurants, itinerant restaurants, vehicles, and vending machines.

111205. (a) If imitation hamburger is sold or served in restaurant a list of ingredients thereof shall appear on the menu, or, if there is no menu, the information shall be posted as state department shall by regulations require. No list of ingredients, however, shall be required for imitation hamburger that contains not more than 10 percent added protein and water, and that does not contain other binders or extenders.

(b) No restaurant shall use the terms ''hamburger,'' ''burger,'' or any other cognate thereof in any advertisement, or menu to refer to any imitation hamburger. A restaurant selling or serving imitation hamburger may refer to the product as imitation hamburger or by any other term that accurately informs the customer of the nature of the food product that he or she is sold or served.

111210. It is unlawful and constitutes misbranding for any person to advertise, offer for sale, sell, or serve as hamburger or imitation hamburger in any restaurant any product that does not come within the definitions of those terms contained in Section 111200. It is unlawful and constitutes misbranding for any person to violate any provision of this article or any regulation adopted pursuant thereto.

111215. It is the public policy of this state to require restaurants selling hamburger and imitation hamburger to accurately inform the consumer public of the contents of foods.

111220. This article shall be enforced by the same persons and in the same manner as provided in Article 7 (commencing with Section 28690) of Chapter 11 of Division 22.

CHAPTER 6. DRUGS AND DEVICES

Article 1. General Provisions

111225. As used in this chapter, with respect to a drug or drug ingredient, ''established name'' means either of the following:

(a) The name designated pursuant to Section 508 of the federal act (21 U.S.C. Sec. 358).

(b) If there is no such name and the drug or ingredient is an article recognized in an official compendium, then the official title in the compendium is the established name.

If neither subdivision (a) or (b) of this section applies, the common or usual name, if any, of the drug or of the ingredient is the established name. When an article is recognized in the United States Pharmacopoeia and in the Homeopathic Pharmacopoeia under different official titles, the official title used in the United States Pharmacopoeia shall apply unless it is labeled and offered for sale as a homeopathic drug. If it is labeled and offered for sale as a

homeopathic drug, the official title used in the Homeopathic Pharmacopoeia shall apply.

111230. Any drug represented in its labeling or advertisement as an antiseptic shall be considered to be represented as a germicide, except in the case of a drug that is purported to be or represented as, an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder, or other use involving prolonged contact with the body.

111235. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States, it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homeopathic drug. If it is labeled and offered for sale as a homeopathic drug, it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia.

111240. Any added poisonous or deleterious substance, or color additive, shall be considered unsafe for use with respect to any drug or device unless there is in effect a regulation adopted pursuant to Section 110090 that prescribes its use in or on drugs or devices.

111245. The department may establish performance standards for devices, that shall be designed to provide reasonable assurance of safe and effective performance and, where appropriate, requiring the use and prescribing the form and content of labeling for the proper installation, maintenance, operation, or use of the device. However, if a performance standard is established for a device pursuant to Section 514 of the federal act (21 U.S.C. Sec. 360d) or Section 521 of the federal act (21 U.S.C. Sec. 360k), it shall be the performance standard of this state for device.

Article 2. Adulterated Drugs or Devices

111250. Any drug or device is adulterated if it consists, in whole or in part, of any filthy, putrid, or decomposed substance.

111255. Any drug or device is adulterated if it has been produced, prepared, packed, or held under conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health.

111260. Any drug or device is adulterated if the methods, facilities, or controls used for its manufacture, processing, packing, or holding do not conform to, or are not operated or administered in conformity with current good manufacturing practice to assure that the drug or device meets the requirements of this part as to safety and has the identity and strength, and meets the quality and purity characteristics that it purports or is represented to possess.

111265. Any drug or device is adulterated if it is packaged and its container is composed, in whole or in part, of any poisonous or

deleterious substance that may render the contents injurious to health.

111270. Any drug or device is adulterated if it bears or contains for the purpose of coloring only a color additive that is unsafe within the meaning of Section 111240.

111275. Any drug or device is adulterated if it is a color additive, the intended use of which in or on drugs or devices is for the purpose of coloring only, and it is unsafe within the meaning of Section 111240.

111280. Any drug is adulterated if it purports to be, or is represented as, a drug that is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standards set forth in the compendium. Such determination as to strength, quality, or purity shall be made in accordance with the tests or methods of assay set forth in the compendium, or in the absence of or inadequacy of the tests or methods of assay, those prescribed under authority of this part. No drug defined in an official compendium shall be deemed to be adulterated under this section because it differs from the standard of strength, quality, or purity set forth in the compendium, if its difference in strength, quality, or purity from the standard is plainly stated on the label.

111285. Any drug or device is adulterated if its strength differs from, or its purity or quality is below, that which it is represented to possess.

111290. Any drug or device is adulterated if any substance has been mixed or packed with it so as to reduce its quality or strength or if any substance has been substituted, wholly or in part, for the drug or device.

111295. It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any drug or device that is adulterated.

111300. It is unlawful for any person to adulterate any drug or device.

111305. It is unlawful for any person to receive in commerce any drug or device that is adulterated or to deliver or proffer for delivery any drug or device.

111310. While any regulation described in Section 110090 relating to any color additive is in effect, any drug or device that bears or contains the color additive in accordance with the regulation shall not be considered adulterated.

111315. Any drug or device intended for export shall not be deemed to be adulterated under this part if it satisfies all of the following requirements:

(a) It accords to the specifications of the foreign purchaser.

(b) It is not in conflict with the laws of the importing country.

(c) It is labeled on the outside of the shipping package to show that it is intended for export.

If the article is sold or offered for sale in domestic commerce, this section shall not exempt it from any of the provisions of this part.

111320. Any device is adulterated that fails to meet the applicable performance standard, if any, as provided in Section 111245.

111325. A drug or device is deemed adulterated under the laws of this state if it is subject to regulations issued by the United States Food and Drug Administration as set forth in Parts 200, 211, 314, and 800 of Volume 21 of the Code of Federal Regulations, as amended, relating to tamper-resistant packaging, but is not in compliance therewith.

Article 3. Misbranded Drugs or Devices

111330. Any drug or device is misbranded if its labeling is false or misleading in any particular.

111335. Any drug or device is misbranded if its labeling or packaging does not conform to the requirements of Chapter 4 (commencing with Section 110290).

111340. Any drug or device is misbranded unless it bears a label containing all of the following information:

(a) The name and place of business of the manufacturer, packer, or distributor.

(b) An accurate statement of the quantity of the contents in terms of weight, measure, or numerical count.

Reasonable variations from the requirements of subdivision (b) shall be permitted. Requirements for placement and prominence of the information and exemptions as to small packages shall be established in accordance with regulations adopted pursuant to Section 110380.

111345. Any drug or device is misbranded if any word, statement, or other information required by or under this part to appear on the label or labeling is not prominently placed on the label or labeling with conspicuousness, as compared with other words, statements, designs, or devices in the labeling, and in terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

111350. Any drug is misbranded if it is for use by man and contains any quantity of the narcotic or hypnotic substances alpha-eucaine, barbituric acid, beta-eucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marijuana, morphine, opium, paraldehyde, peyote, or sulfonmethane; or any chemical derivative of those substances, that derivative, after investigation, has been found to be and designated as habit forming, by regulations adopted by the department, unless its label bears the name and quantity or proportion of the substance or derivative and in juxtaposition therewith the statement, ‘‘Warning—may be habit forming.’’

Regulations designating habit-forming drugs issued pursuant to Section 502(d) of the federal act (21 U.S.C. Sec. 352(d)) are the regulations designating habit-forming drugs in this state. However,

the department may, by regulation, designate habit-forming drugs whether or not these habit-forming drugs are in accordance with the regulations adopted under the federal act.

111355. (a) Any drug is misbranded unless its label bears, to the exclusion of any other nonproprietary name except the applicable, systematic chemical name or the chemical formula, all of the following information:

(1) The established name of the drug, if any.

(2) If it is fabricated from two or more ingredients, the established name and quantity of each active ingredient, including the kind and quantity or proportion of any alcohol, and also including, whether active or not, the established name and quantity or proportion of any bromides, ether, chloroform, acetanilide, acetophenetidin, antipyrine, atropine, hyoscine, hyoscyamine, codeine, arsenic, digitalis, digitalis glycosides, mercury, ouabain, strophanthin, strychnine, barbituric acid, or any derivative or preparation of any substances contained therein.

(b) The requirement for stating the quantity of the active ingredients of any drug, including the quantity or proportion of any alcohol, and also including, whether active or not, the quantity or proportion of any bromides, ether, chloroform, acetanilide, acetophenetidin, antipyrine, atropine, hyoscine, hyoscyamine, codeine, arsenic, digitalis, digitalis glycosides, mercury, ouabain, strophanthin, strychnine, barbituric acid, or any derivative or preparation of any substances contained therein, shall apply to all drugs, including prescription drugs and nonprescription drugs. However, the requirement for declaration of quantity shall not apply to nonprescription drugs that are also cosmetics, as defined in Section 201(i) of the federal Food, Drug, and Cosmetic Act (21 U.S.C. Sec. 321(i)) and that are labeled in compliance with federal labeling requirements concerning declaration of ingredients including active ingredients and also the quantity and proportion of any alcohol, except that the quantity or proportion of the following ingredients, whether active or not, shall be declared: bromides, ether, chloroform, acetanilide, acetophenetidin, antipyrine, atropine, hyoscine, hyoscyamine, codeine, arsenic, digitalis, digitalis glycosides, mercury, ouabain, strophanthin, strychnine, barbituric acid, or any derivative or preparation of any substances contained therein. The department may exempt any nonprescription drug from the requirement of stating the quantity of the active ingredients, other than those specifically named in this subdivision, upon a showing by the applicant through evidence satisfactory to the department that the granting of the exemption will not endanger the public health. For any prescription drug the established name of the drug or ingredient, as the case may be, on the label and on any labeling on which a name for the drug or ingredient is used shall be printed

prominently and in type at least half as large as that used thereon for any proprietary name or designation for the drug or ingredient.

The changes made in this section by Chapter 943 of the Statutes of 1978 shall not apply to any drug shipped by a manufacturer or packer to a retailer or wholesaler before January 1, 1980. Any such drugs so shipped shall comply with this section on and after January 1, 1981.

111360. Any drug subject to Section 111470 is misbranded unless the manufacturer, packer, or distributor of the drug includes, in all advertisements and other descriptive matter issued or caused to be issued by the manufacturer, packer, or distributor with respect to that drug, a true statement of all of the following:

(a) The established name, printed prominently and in a type at least half as large as that used for any proprietary name of the drug.

(b) The formula showing quantitatively each ingredient of the drug to the extent required for labels under Section 111355.

(c) The name and place of business of the manufacturer that produced the finished dosage form of the drug, as prescribed by regulations issued by the department. This subdivision applies only to advertisements or descriptive matter issued for drugs manufactured in finished dosage form on or after April 1, 1973.

(d) Such other information, in brief summary relating to side effects, contraindications, and effectiveness as shall be required by regulations promulgated by the department.

Regulations relating to side effects, contraindications, and effectiveness issued pursuant to Section 502(n) of the federal act (21 U.S.C. Sec. 352(n)) are the regulations establishing information requirements relating to side effects, contraindications and effectiveness in this state. The department may, by regulation, make other requirements relating to side effects, contraindications, and effectiveness whether or not in accordance with the regulations adopted under the federal act.

111365. Any drug subject to Section 111470 is misbranded unless the established name of the prescription drug or prescription drug ingredient is printed on the label prominently and in type at least half as large as that used for the proprietary name or designation on the label, labeling, or advertising.

The department may, by regulation, establish exemptions from the requirements of this section when compliance with this section is not considered necessary for the protection of health and safety.

111375. Any drug or device is misbranded unless its labeling bears all of the following information:

(a) Adequate directions for use.

(b) Such adequate warnings against use in pathological conditions or by children where its use may be dangerous to health.

(c) Adequate warning against unsafe dosage or methods or duration of administration or application.

Warnings shall be in a manner and form as are necessary for the protection of users.

If the department determines that any requirement of subdivision (a), as applied to any drug or device, is not necessary for the protection of the public health, the department may adopt regulations exempting the drug or device from these requirements.

Any drug or device exempted under Section 502(f) of the federal act (21 U.S.C. Sec. 352(f)) is exempt from the requirement of this section. The department, however, may adopt any regulation including a drug or device within, or excluding a drug or device from the requirements of this section, whether or not the inclusion or exclusion of the drug or device is in accord with the federal act.

111380. Any drug is misbranded if it purports to be a drug that is recognized in an official compendium and it is not packaged and labeled as prescribed in the official compendium. The method of packaging, however, may be modified with the consent of the department.

111385. Any drug or device is misbranded if the department determines that the drug or device is liable to deterioration, unless it is packaged in that form and manner and its label bears a statement of the precautions, as the department, by regulation, may require as necessary for the protection of public health. Such regulations shall not be established for any drug or device recognized in an official compendium, unless the department has informed the appropriate body, charged with the revision of the official compendium, of the need for that packaging or labeling requirements and that body has not prescribed the requirements in a reasonable length of time.

111390. Any drug or device is misbranded if its container is so made, formed, or filled as to be misleading.

111395. Any drug is misbranded in any of the following cases:

(a) It is an imitation of another drug.

(b) It is offered for sale under the name of another drug.

(c) The contents of the original package have been, wholly or partly, removed and replaced with other material in the package.

111400. Any drug or device is misbranded if it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in its labeling.

111405. Any drug is misbranded if it is, or purports to be, or is represented as, a drug composed wholly or partly of insulin, unless both of the following requirements are satisfied:

(a) It is from a batch to which a certificate or release has been issued pursuant to Section 506 (21 U.S.C. Sec. 356) of the federal act.

(b) The certificate or release is in effect with respect to the drug.

111410. Any drug is misbranded if it is, purports to be, or is represented as a drug composed, wholly or partly, of any antibiotic drug, or any derivative thereof, unless both of the following requirements are satisfied:

(a) It is from a batch to which a certificate or release has been issued pursuant to Section 507 of the federal act (21 U.S.C. Sec. 357).

(b) The certificate or release is in effect with respect to that drug. This section shall not, however, apply to any drug or class of drugs exempted by regulations adopted pursuant to Section 507(c) or 507(d) of the federal act (21 U.S.C. Sec. 357(c) or 357(d)).

111415. Any drug is misbranded if it is a color additive, intended for use in or on drugs for the purpose of coloring only and its packaging and labeling fail to conform to the packaging and labeling requirements adopted pursuant to Section 110090.

111420. A drug or device is misbranded if a trademark, trade name, or other identifying mark, imprint, or device of another person, or any likeness of the trademark, trade name, or other identifying mark, imprint, or device of another person, has been placed on the drug or device, or upon its container.

111425. A drug or device is misbranded if it was manufactured in this state in an establishment not duly licensed as provided in this part.

111430. A drug or device is misbranded if it was manufactured in an establishment not duly registered with the Secretary of Health, Education, and Welfare of the United States.

111435. Any drug is misbranded if its packaging or labeling is in violation of an applicable regulation issued pursuant to Section 108685 or 108700.

111440. It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any drug or device that is misbranded.

111445. It is unlawful for any person to misbrand any drug or device.

111450. It is unlawful for any person to receive in commerce any drug or device that is misbranded or to deliver or proffer for delivery any drug or device.

111455. It is unlawful for any person to alter, mutilate, destroy, obliterate, or remove the label or any part of the labeling of any drug or device if the act results in the drug or device being misbranded.

111460. Any drug or device intended for export shall not be deemed to be misbranded under this part if it satisfies all of the following requirements:

(a) It accords to the specifications of the foreign purchaser.

(b) It is not in conflict with the laws of the importing country.

(c) It is labeled on the outside of the shipping package to show that it is intended for export.

If the article is sold or offered for sale in domestic commerce, this section shall not exempt it from any of the provisions of this part.

111465. A drug or device is deemed misbranded under the laws of this state if it is subject to regulations issued by the United States Food and Drug Administration relating to tamper-resistant packaging, as set forth in Parts 200, 211, 314, and 800 of Volume 21 of

the Code of Federal Regulations, as amended, but is not in compliance therewith.

111470. The following drugs or devices, that are intended for use by man, shall be sold only upon a written prescription of a practitioner licensed by law to prescribe the drug or device, or upon an oral prescription of the licensee that is reduced promptly to writing and filed by the pharmacist, or by refilling the written or oral prescription if the refilling is authorized by the prescriber either in the original prescription or by oral order that is reduced promptly to writing and filed by the pharmacist:

(a) A habit forming drug to which Section 111350 applies.

(b) A drug or device that, because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer the drug or device.

(c) A drug or device for which adequate directions cannot be written for persons, who are not practitioners licensed by law to prescribe the drug or device, for safe and effective self-medication or treatment by those persons, who are not practitioners licensed by law to prescribe the drug or device.

(d) A drug or device that is limited by an effective application under Section 505 of the federal act (21 U.S.C. Sec. 355) or Section 111550 to use under the professional supervision of a practitioner licensed by law to administer the drug or device.

If any prescription for the drug does not indicate the number of times it may be refilled, if any, the prescription may not be refilled unless the pharmacist obtains a new order from the practitioner.

111475. The act of selling a drug or device contrary to Section 111470 shall be deemed to be an act that results in the drug or device being misbranded while held for sale.

111480. Any drug or device sold by filling or refilling a written or oral prescription of a practitioner licensed to prescribe the drug or device shall be exempt from the labeling requirements of Sections 111335, 111340, 111350, 111355, 111360, 111365, 111375, 111380, 111385, 111395, 111415, and 111420, if the drug or device bears a label displaying all the following:

(a) Except where the prescriber orders otherwise, either the manufacturer’s trade name of the drug, or the generic name and the name of the manufacturer. Commonly used abbreviations may be used. Preparations containing two or more active ingredients may be identified by the manufacturer’s trade name or the commonly used name or the principal active ingredients.

(b) The directions for the use of the drug or device.

(c) The name of the patient(s).

(d) The name of the prescriber.

(e) The date of issue.

(f) The name, address of the furnisher, and prescription number or other means of identifying the prescription.

(g) The strength of the drug or drugs dispensed.

(h) The quantity of the drug or drugs dispensed.

(i) The expiration date of the effectiveness of the drug or device if the information is included on the original label of the manufacturer of the drug or device.

If a pharmacist dispenses a prescribed drug by means of a unit dose medication system, as defined by administrative regulation, for a patient in a skilled nursing, intermediate care or other health care facility, the requirements of this section will be satisfied if the unit dose medication system contains the aforementioned information or the information is otherwise readily available at the time of drug administration.

The exemption shall not apply to any drug or device dispensed in the course of the conduct of a business of dispensing drugs or devices pursuant to diagnosis by mail, or to a drug or device dispensed in violation of Section 111470.

111485. The department may, by regulation, remove any drug or device subject to Sections 111350 and 111550 from the requirements of Section 111470, when the requirements are not necessary for the protection of the public health. Any drug removed from the prescription requirements of the federal act by regulations adopted pursuant to the federal act is removed from the requirements of Section 111470. The department may, however, by regulation, continue the applicability of Section 111470 for any drug or device, or make these sections inapplicable to any drug or device, whether or not the inclusion or exclusion of the drug or device is in accordance with the regulations adopted pursuant to the federal act.

111490. A drug or device that is subject to Section 111470 is misbranded if at any time prior to dispensing, its label fails to bear the statement ''Caution: federal law prohibits dispensing without prescription,'' or ''Caution: state law prohibits dispensing without prescription,'' or ''Caution: federal law restricts this device to sale by or on the order of a ____,'' the blank to be filled in with the designation of the practitioner licensed to use or order use of the device. A drug or device to which Section 111470 does not apply is misbranded if at any time prior to dispensing its label bears the caution statement quoted in the preceding sentence.

111495. Nothing in this article shall be construed to relieve any person from any requirement prescribed by or under authority of law with respect to drugs now included or that may hereafter be included within the classification stated in Division 10 (commencing with Section 11000) or in the applicable federal law relating to controlled substances.

111500. A physician, dentist, podiatrist, or veterinarian may personally furnish his or her own patient with drugs as are necessary

in the treatment of the condition for which he or she attends the patient provided that the drug is properly labeled to show all the information required in Section 111480 except the prescription number.

111505. For purposes of Section 111510, the following definitions shall apply:

(a) ‘‘Distributor’’ means any corporation, person, or other entity, not engaged in the manufacture of a legend drug product, who distributes for resale and distribution a legend drug product under the label of the corporation, person, or entity.

(b) ‘‘Legend drug’’ means any controlled substance subject to the Federal Controlled Substances Act (Title II, P.L. 91-513) or subject to the Uniform Controlled Substances Act, Division 10 (commencing with Section 11000), and any drug described in Section 4211 of the Business and Professions Code or Section 111470.

(c) ‘‘Solid dosage forms’’ means capsules or tablets intended for oral administration.

(d) ‘‘Code imprint’’ means a series of letters or numbers assigned by the manufacturer or distributor to a specific drug, or marks or monograms unique to the manufacturer, distributor, or both. The National Drug Code may be used as a code imprint.

111510. (a) No legend drug in solid dosage form may be manufactured or distributed for sale in this state unless it is clearly marked or imprinted with a code imprint identifying the drug and the manufacturer or distributor of the drug. Manufacturers or distributors who only repack an already finished dosage form of a legend drug shall not have the responsibility to do the imprint.

(b) On or before July 1, 1982, manufacturers or distributors of legend drugs, depending on whether the manufacturer’s or distributor’s code imprint will appear on the surface of the solid dosage form, shall provide to the department a list of their legend drugs and the intended code imprints. The department shall provide for the distribution of the information required to be submitted under this subdivision to all poison control centers in the state. Manufacturers, distributors, and the department shall provide to any licensed health care provider, upon request, lists of legend drugs and code imprints provided to the department under this section, but may charge a reasonable fee to cover copying and postage costs. Updated lists shall be provided to the department annually or as changes or revisions occur.

(c) The department may grant exemptions from the requirements of this section upon application of a manufacturer or distributor indicating size or other characteristics that render the product impractical for the imprinting required by this section.

(d) A legend drug that does not meet the requirements is misbranded.

(e) It is the intent of the Legislature that all legend drugs having solid dosage forms be imprinted regardless of by whom they are distributed.

(f) This section shall apply to all legend drugs sold in California on or after January 1, 1983.

(g) Pharmacists, pharmacies, and licensed wholesalers shall only be liable for knowing and willful violations of this section, except that no liability shall accrue if the pharmacist acts pursuant to Section 4229.5 of the Business and Professions Code.

(h) The provisions of subdivisions (a) to (g), inclusive, shall not apply to any of the following:

(1) Drugs purchased by a pharmacy, pharmacist, or licensed wholesaler prior to January 1, 1983, and held in stock for resale.

(2) Drugs that are the subject of an investigation pursuant to Section 111590 or 111595.

(3) Drugs that are manufactured by or upon the order of a practitioner licensed by law to prescribe or administer drugs and that are to be used solely by the patient for whom prescribed.

Article 4. Experimental Use of Drugs

111515. As used in this article, ‘‘experimental drug’’ means any of the following:

A drug intended for investigational use under Section 111595.

111520. No person shall prescribe or knowingly administer an experimental drug to another person in violation of this article.

111525. Prior to prescribing or administering an experimental drug, consent to the use of the drug shall be obtained in the method and manner specified in Chapter 1.3 (commencing with Section 24170) of Division 20.

111530. (a) Notwithstanding the provisions of Section 24175, if the subject is a minor, consent shall be provided by a parent or guardian of the subject and shall also be provided by the subject if the subject is seven years of age or older.

(b) Consent given pursuant to this section shall only be for the prescribing or administering of an experimental drug that is related to maintaining or improving the health of the subject or related to obtaining information about a pathological condition of the subject.

111535. Consent given pursuant to Section 111525 may be revoked at any time by either verbal or written communication to the practitioner supervising the administration of the experimental drug.

111540. Prior to administering an experimental drug, the experimental activity as a whole, including the consent procedures required by Section 111525, shall be reviewed and approved by a committee for the protection of human subjects that is acceptable, as determined by the department. A committee for the protection of

human subjects that operates under a general or special assurance approved by the federal Department of Health, Education, and Welfare pursuant to Part 46 of Title 45 of the Code of Federal Regulations shall be an acceptable committee for purposes of this section. A copy of the consent procedures approved by a committee for the protection of human subjects shall be filed with the department prior to the commencement of the experiment.

111545. A person having an ownership interest in a skilled nursing facility or intermediate care facility, as those terms are defined in Section 1250, may not prescribe an experimental drug for a patient in the facility.

Article 5. New Drugs or Devices

111550. No person shall sell, deliver, or give away any new drug or new device unless it satisfies either of the following:

(a) It is a new drug, and a new drug application has been approved for it and that approval has not been withdrawn, terminated, or suspended under Section 505 of the federal act (21 U.S.C. Sec. 355); or it is a new device for which a premarket approval application has been approved, and that approval has not been withdrawn, terminated, or suspended under Section 515 of the federal act (21 U.S.C. Sec. 360e).

(b) The department has approved a new drug or device application for that new drug or new device and that approval has not been withdrawn, terminated, or suspended. Any person who files a new drug or device application with the department shall submit, as part of the application, all of the following information:

(1) Full reports of investigations that have been made to show whether or not the new drug or device is safe for use and whether the new drug or device is effective in use under the conditions prescribed, recommended, or suggested in the labeling or advertising of the new drug or device.

(2) A full list of the articles used as components of the new drug or device.

(3) A full statement of the composition of the new drug or device.

(4) A full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of the new drug or in the case of a new device, a full statement of its composition, properties, and construction and the principles of its operation.

(5) Samples of the new drug or device and of the articles used as components of the drug or device as the department may require.

(6) Specimens of the labeling and advertisements proposed to be used for the new drug or device.

111555. Within 180 days after the filing of an application provided for in Section 111550, or an additional period as shall be agreed upon

by the department and the applicant, the department shall do either of the following:

(a) Approve the application, if it finds that none of the grounds for denying approval specified in Section 111550 apply.

(b) Give the applicant written notice for an opportunity for a hearing before the department on the question of whether the application is approvable. If the applicant elects to accept the opportunity for hearing by written request within 30 days after the notice, the hearing shall commence not more than 90 days after the expiration of the 30 days unless the department and the applicant otherwise agree. Any such hearing shall thereafter be conducted on an expedited basis and the department's order thereon shall be issued within 90 days after the date fixed by the department for filing final briefs.

111560. The department shall issue an order refusing to approve an application if, after written notice to the applicant and after giving him or her an opportunity for a hearing, the department makes any of the following findings:

(a) That the reports of investigation, that are required to be submitted to the department pursuant to Section 111550, do not include adequate tests by all methods reasonably applicable to show whether or not the new drug or device is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling and advertisement of the new drug or device.

(b) That the results of the tests submitted pursuant to Section 111550 to show whether or not the new drug or device is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling and advertisement of the new drug or device show that the drug or device is unsafe for use under these conditions or do not show that the new drug or device is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling and advertisement.

(c) That the methods, facilities, and controls used in the manufacture, processing, or packing of the new drug or device are inadequate to preserve its identity, strength, quality, purity, composition, or other characteristics.

(d) That upon the basis of information submitted as part of the application, or upon the basis of any other information before it with respect to the new drug or device, that the department has insufficient information to determine whether the drug or device is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling and advertisement.

(e) That evaluated on the basis of the information submitted as part of the application and any other information before it with respect to the new drug or device, that there is a lack of substantial evidence that the new drug or device will have the effect it purports or is represented to have under the conditions of use prescribed,

recommended, or suggested in the proposed labeling or advertisement of the new drug or device.

(f) That based on an evaluation by the department of all material facts, that the proposed labeling or advertising of the new drug or device is false or misleading in any particular.

111565. An order pursuant to Section 111560 refusing approval of a new drug application or a new device application shall be revoked whenever the department finds that the facts justify the action.

111570. In the case of any new drug or device for which an approval of an application filed pursuant to Section 111550 is in effect, the applicant shall establish and maintain records, and make reports to the department, of data relating to clinical experience and other data or information, received or otherwise obtained by the applicant with respect to the new drug or device, as the department may by general regulation, or by order with respect to the application, prescribe. Any regulation or order issued pursuant to this section or pursuant to Section 111595 shall have due regard for the professional ethics of the medical profession and the interest of patients and shall provide, where the department determines that it is reasonably necessary, for the examination upon request, by the persons to whom the regulation or order is applicable, of similar information received or otherwise obtained by the department. Every person required pursuant to this section to maintain records, and every person in charge or in custody of the records, shall, upon request of an authorized agent of the department, permit the agent at all reasonable time to have access to, and copy and verify, the records.

111575. The department shall issue an order withdrawing approval of an application concerning any new drug or device if, after giving written notice to the applicant and an opportunity for a hearing, the department makes any of the following findings:

(a) That clinical or other experience, tests, or other scientific data show that the new drug or device is unsafe for use under the conditions of use upon the basis of which the application was approved.

(b) That new evidence of clinical experience, not contained in the application or not available to the department until after the application was approved, or tests by new methods, or tests by methods not deemed reasonably applicable when the application was approved, evaluated together with the evidence available to the department when the application was approved, shows that the new drug or device is not shown to be safe for use under the conditions of use upon the basis of which the application was approved.

(c) On the basis of new information with respect to the new drug or device, evaluated together with the evidence available to the department when the application was approved, that there is a lack of substantial evidence that the new drug or device will have the effect it purports or is represented to have, under the conditions of

use prescribed, recommended, or suggested in the labeling or advertising of the new drug or device.

(d) That the application contains any untrue statement of a material fact.

(e) That the applicant has failed to establish a system for maintaining required records, or has repeatedly or deliberately failed to maintain the records or to make required reports, or the applicant has refused to permit access to, or copying or verification of, the records.

(f) That on the basis of new information before the department, evaluated together with the evidence before it when the application was approved, the methods used in, or the facilities and controls used for, the manufacture, processing, and packing of the new drug or device are inadequate to assure and preserve its identity, strength, quality, purity, composition, and characteristics as determined by qualified experts selected by the department, and were not made adequate within a reasonable time after receipt of written notice from the department specifying the matter complained of.

(g) That on the basis of new information before it, evaluated together with the evidence before it when the application was approved, the labeling or advertisement of the new drug or device, based on an evaluation of all material facts, is false or misleading in any particular and is not corrected within a reasonable time after receipt of written notice from the department specifying the matter complained of.

111580. When the department finds that there is an imminent hazard to the public health, it may suspend the approval for the application immediately.

111585. An order pursuant to Section 111575 or 111580 withdrawing approval of an application concerning any new drug or device shall be revoked whenever the department finds that the facts justify the action.

111590. Section 111550 does not apply to a drug or device intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs or devices if the investigation is conducted in accordance with the requirements of Section 505(i) of the federal act (21 U.S.C. Sec. 355(i)) or Section 520(g) thereof (21 U.S.C. Secs. 352 and 360) and the regulations adopted pursuant to the federal act.

111595. Section 111550 does not apply to any drug or device intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety and effectiveness of drugs or devices if all the following conditions are complied with:

(a) The submission to the department, before any clinical testing of a drug or device is undertaken, of reports, by the manufacturer or the sponsor of the investigation of the drug or device, of preclinical

tests including tests on animals, of the drug or device adequate to justify the proposed clinical testing.

(b) The manufacturer or the sponsor of the investigation of a drug or a device proposed to be distributed to investigators for clinical testing obtaining a signed, notarized agreement from each of the investigators that patients to whom the drug or device is administered will be under his or her personal supervision, or under the supervision of investigators responsible to him or her, and that he or she will not supply the drug or device to any other investigator, or to clinics, for administration to human beings.

(c) The establishment and maintenance of the records, and the making of the reports to the department, by the manufacturer or the sponsor of the investigation of the drug or device, of data, including but not limited to, analytical reports by investigators, obtained as a result of the investigational use of the drug or device, as the department finds will enable it to evaluate the safety and effectiveness of the drug or device in the event of the filing of an application pursuant to Section 111550.

(d) The manufacturer, or the sponsor of the investigation, require experts using the drugs or devices for investigational purposes to certify to the manufacturer or sponsor that they will comply with the requirements of Article 4 (commencing with Section 111515).

(e) Any other conditions as the department shall adopt as regulations necessary for the protection of the public health. The federal regulations adopted pursuant to Section 505(i) of the federal act (21 U.S.C. Sec. 355(i)) or Section 520(g) thereof (21 U.S.C. Secs. 352 and 360) shall be the regulations for exemptions from Section 111550 in this state. However, the department may prescribe, by regulation, any condition for exemption from Section 111550 whether or not the condition is in accordance with regulations adopted under the federal act.

111600. (a) In making determinations on requests for approval of AIDS-related drugs, as defined in subdivision (b), in accordance with Section 111550, or for exemptions from these requirements, for purposes of investigations of these drugs, pursuant to Section 111595, the department shall employ persons to conduct reviews of requests for drug marketing approval for AIDS-related drugs, or exemptions from the approval requirements as specified in that section. The AIDS Vaccine Research and Development Advisory Committee shall review and advise the department in its actions under this section.

Where necessary, the department shall enter into contracts with appropriate and qualified persons or entities for the review of these requests, including persons with significant experience in conducting or reviewing clinical trials of drugs or physicians with significant experience in treating AIDS patients.

No person may contract with the department for the review of a request under this subdivision if the person has a financial interest or a conflict of interest involving the drug being evaluated.

(b) ''AIDS-related drug'' means either of the following:

(1) A vaccine to protect against human immunodeficiency virus (HIV) infection.

(2) Antiviral agent, immune modulator, or other agent to be administered to persons who have been infected with HIV, to counteract the effects of this infection, or any drug to treat opportunistic infections associated with AIDS.

(c) The department, not later than July 1, 1988, and annually thereafter, shall report to the Legislature on the activities conducted pursuant to this section.

(d) The immunities provided for in Sections 818.4 and 821.6 of the Government Code shall apply whenever the department grants approval pursuant to Section 111550 or an exemption from the approval requirements pursuant to Section 111595, for an AIDS-related drug.

111605. (a) In making determinations on requests for approval of AIDS-related drugs, as defined in subdivision (b), in accordance with Section 111550, or for exemptions from these requirements, for purposes of investigations of these drugs, pursuant to Section 111595, the department shall employ persons to conduct reviews of requests for drug marketing approval for AIDS-related drugs, or exemptions from the approval requirements as specified in that section. The AIDS Vaccine Research and Development Advisory Committee shall review and advise the department in its actions under this section.

Where necessary, the department shall enter into contracts with appropriate and qualified persons or entities for the review of these requests, including persons with significant experience in conducting or reviewing clinical trials of drugs or physicians with significant experience in treating AIDS patients.

No person may contract with the department for the review of a request under this subdivision if the person has a financial interest or a conflict of interest involving the drug being evaluated.

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(1) A vaccine to protect against human immunodeficiency virus (HIV) infection.

(2) Antiviral agent, immune modulator, or other agent to be administered to persons who have been infected with HIV, to counteract the effects of this infection, or any drug to treat opportunistic infections associated with AIDS.

(c) The immunities provided for in Sections 818.4 and 821.6 of the Government Code shall apply whenever the department grants approval pursuant to Section 111550 or an exemption from the

approval requirements pursuant to Section 111595, for an AIDS-related drug.

111610. Section 111550 does not apply to any of the following:

(a) A drug or device that is sold in this state, or introduced into interstate commerce, at any time prior to the enactment of the federal act, if its labeling and advertising contained the same representations concerning the conditions of its use.

(b) Any drug that is licensed under the Public Health Service Act of July 1, 1944 (58 Stats. 682, as amended; 42 U.S.C. Sec. 201 et seq.) or under the eighth paragraph of the heading of Bureau of Animal Industry of the act of March 4, 1913 (37 Stat. 832–833; 21 U.S.C. Sec. 151 et seq.), commonly known as the ''Virus-Serum-Toxin Act.''

(c) Any antibiotic drug that is subject to Section 111445.

Article 6. Licenses

111615. No person shall manufacture any drug or device in this state unless he or she has a valid license from the department. The license is valid for one calendar year from the date of issue, unless it is revoked. The license is not transferable.

The department may require any manufacturer, wholesaler, or importer of any prescription ophthalmic device in this state to obtain a license.

111620. A separate license is required for each place of manufacture.

111625. A license application shall be completed annually and accompanied by an application fee as prescribed in Section 111630. This fee is not refundable if the license is refused.

111630. The department shall by regulation establish the application form and set the fee for licensure and renewal of a license. The penalty for failure to apply for renewal of a license within 30 days after its expiration is ten dollars ($10) and shall be added to the renewal fee and be paid by the applicant before the renewal license may be issued. All moneys collected as fees shall be expended when appropriated by the Legislature in the carrying out of the provisions of this part and the regulations adopted pursuant to this part.

Any person licensed pursuant to this section shall immediately notify the department of any change in the information reported in the license application.

111635. Prior to issuing or renewing a license required by Section 111615, the department shall inspect each place of business to determine ownership, adequacy of facilities, and personnel qualifications.

111640. The department shall make investigations or inspections authorized by Article 2 (commencing with Section 110410) of Chapter 2 as it deems necessary to carry out this chapter.

111645. Any violation of any provision of this part or any regulation adopted pursuant to this part shall be grounds for denying a license or for suspending or revoking a license. Proceedings for the denial, suspension, or revocation of a license shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted in that chapter.

111650. Drug manufacturers who have obtained a license or who are applying for a license pursuant to this article shall submit to the California State Board of Pharmacy information as the Board of Pharmacy deems reasonably necessary to carry out its drug distribution responsibilities including, but not limited to, information on drug inventories or restricted dangerous drugs. Failure of any manufacturer to report the information to the Board of Pharmacy in a timely fashion shall be grounds for the department to deny, suspend, or revoke the manufacturer's license.

The California State Board of Pharmacy may adopt regulations that are reasonably necessary to implement this section.

111655. The licensing provisions of this chapter shall not apply to any of the following:

(a) Any pharmacy that maintains establishments in conformance with provisions of the Pharmacy Law, Chapter 9 (commencing with Section 4000) of Division 2 of the Business and Professions Code, regulating the practice of pharmacy, and that is regularly engaged in dispensing prescription drugs or devices, upon prescriptions of any person licensed to administer the drugs or devices to patients under the care of the person in the course of his or her professional practice, and that does not manufacture, prepare, propagate, compound, or process drugs or devices for sale other than in the regular course of his or her business of dispensing or selling drugs or devices at retail.

(b) Any pharmacy that solely engages in providing drugs or devices to a person licensed by law to administer the drug or device for his or her use in the course of his or her professional practice.

(c) Any pharmacy that solely provides drugs or devices to another pharmacy in order to meet a temporary inventory shortage.

(d) Any person who is licensed by law to prescribe or administer drugs or devices and who manufactures, prepares, propagates, compounds, or processes drugs or devices solely for use in the course of his or her professional practice.

(e) Any person who manufactures, prepares, propagates, compounds, or processes any drug or device solely for use in nonclinical research, teaching, or chemical analysis and not for sale.

(f) Any wholesaler, as defined in Section 4038 of the Business and Professions Code.

(g) Any such other class of persons as the department may by regulation exempt from the application of this article upon a finding

that licensing by a class of persons in accordance with this article is not necessary for the protection of the public health.

(h) Any registered dispensing optician licensed pursuant to the provisions of Chapter 5.5 (commencing with Section 2550) of Division 2 of the Business and Professions Code, who is regularly engaged in dispensing or selling prescription lenses and frames, and not engaged in the manufacture, preparation, processing or assembling of lenses or frames for sale other than in the regular course of his or her business of dispensing or selling lenses or frames at retail.

CHAPTER 7. COSMETICS

Article 1. General Provisions and Definitions

111660. As used in this chapter, ''hair dye'' does not include any eyelash dye or eyebrow dye.

111665. Any color additive shall be considered unsafe for use with respect to any cosmetic unless there is in effect a regulation adopted pursuant to Section 110090 that prescribes its use in cosmetics.

Article 2. Adulterated Cosmetics

111670. A cosmetic is adulterated if it bears or contains any poisonous or deleterious substance that may render it injurious to users under the conditions of use prescribed in the labeling or advertisement of the cosmetic, or under conditions of use as are customary or usual.

111675. Section 111670 shall not apply to coal tar hair dye, that is conspicuously labeled as follows:

''Caution—this product contains ingredients that may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness.''

The labeling shall also bear adequate directions for such preliminary testing.

111680. Any cosmetic is adulterated if it consists in whole or in part of any filthy, putrid, or decomposed substance.

111685. Any cosmetic is adulterated if it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

111690. Any cosmetic is adulterated if its container is composed, in whole or in part, of any poisonous or deleterious substance that may render the contents injurious to health.

111695. Any cosmetic is adulterated if it is not a hair dye and it is, or it bears or contains, a color additive that is unsafe within the meaning of Section 111665.

111700. It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any cosmetic that is adulterated.

111705. It is unlawful for any person to adulterate any cosmetic.

111710. It is unlawful for any person to receive in commerce any cosmetic that is adulterated or to deliver or proffer for delivery any such cosmetic.

111715. While any regulation relating to any color additive referred to in Section 111665 is in effect, any cosmetic that bears or contains a color additive in accordance with these regulations shall not be considered adulterated.

111720. Any cosmetic intended for export shall not be deemed to be adulterated under this part if it satisfies all of the following requirements:

(a) It accords to the specifications of the foreign purchaser.

(b) It is not in conflict with the laws of the importing country.

(c) It is labeled on the outside of the shipping package to show that it is intended for export.

If the article is sold or offered for sale in domestic commerce, this section shall not exempt it from any of the provisions of this part.

111725. A cosmetic is deemed adulterated under the laws of this state if it is subject to regulations issued by the United States Food and Drug Administration relating to tamper-resistant packaging, as set forth in Part 700 of Volume 21 of the Code of Federal Regulations, as amended, but is not in compliance therewith.

Article 3. Misbranded Cosmetics

111730. Any cosmetic is misbranded if its labeling is false or misleading in any particular.

111735. Any cosmetic is misbranded if its labeling or packaging does not conform to the requirements of Chapter 4 (commencing with Section 110290).

111740. Any cosmetic is misbranded if it is in package form and it does not bear a label containing all of the following information:

(a) The name and place of business of the manufacturer, packer, or distributor.

(b) An accurate statement of the quantity of the contents in terms of weight, measure, or numerical count.

Reasonable variations shall be permitted from the requirements of subdivision (b) of this section. Requirements for placement and prominence of the information and exemptions as to small packages shall be established by regulations adopted pursuant to Section 110380.

111745. A cosmetic is misbranded if any word, statement, or other information required pursuant to this part to appear on the label or labeling is not prominently placed upon the label or labeling with conspicuousness, as compared with other words, statements, designs, or devices, in the labeling, and in terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

111750. Any cosmetic is misbranded if its container is so made, formed, or filled as to be misleading.

111755. A cosmetic is misbranded if it is a color additive, unless its packaging and labeling are in conformity with the packaging and labeling requirements applicable to color additives prescribed under the provisions of Section 110090. This section does not apply to packages of color additives that, with respect to their use for cosmetics, are marketed and intended for use only in or on hair dyes.

111760. Any cosmetic is misbranded if its packaging or labeling is in violation of an applicable regulation issued pursuant to Section 108685 or 108700.

111765. It is unlawful for any person to manufacture, or sell any cosmetic that is misbranded.

111770. It is unlawful for any person to misbrand any cosmetic.

111775. It is unlawful for any person to receive in commerce any cosmetic that is misbranded, or to deliver or proffer for delivery any cosmetic.

111780. It is unlawful for any person to alter, mutilate, destroy, obliterate, or remove the label or any part of the labeling of any cosmetic if the act results in the cosmetic being misbranded, while held for sale.

111785. Any cosmetic intended for export shall not be deemed to be misbranded under this part if it satisfies all of the following requirements:

(a) It accords to the specifications of the foreign purchaser.

(b) It is not in conflict with the laws of the country to which it is intended for export.

(c) It is labeled on the outside of the shipping package to show that it is intended for export.

If the article is sold or offered for sale in domestic commerce, this section shall not exempt it from any of the provisions of this part.

111790. A cosmetic is deemed misbranded under the laws of this state if it is subject to regulations issued by the United States Food and Drug Administration relating to tamper-resistant packaging, as set forth in Part 700 of Volume 21 of the Code of Federal Regulations, as amended, but is not in compliance therewith.

Article 4. Voluntary Registration

111795. (a) Any person who manufactures a cosmetic in this state may register with the department. Any registration issued under this article shall be valid for one calendar year from the date of issue, unless it is suspended or revoked. The registration shall not be transferable.

(b) A separate registration shall be required for each place of manufacture.

111800. A registration application form provided by the department shall be completed annually and accompanied by an application fee of three hundred fifty dollars ($350). This fee shall not be returnable if the registration is denied. The fee amount shall be adjusted annually pursuant to Section 100425. All fees collected pursuant to this section shall be deposited into the Export Document Program Fund established by Section 110240.

111805. Any person registered pursuant to this article shall immediately notify the department of any change in the information reported in the registration application.

111810. (a) Prior to issuing a registration under Section 111795, the department shall inspect each place of business to determine ownership, adequacy of facilities, personnel qualifications, and compliance with this part. The department shall annually inspect each registrant.

(b) The department shall provide to each registrant a validated copy of the completed registration application form, sent to the mailing address shown on the form, as evidence of valid registration.

111815. The department shall make any investigations or inspections authorized by Article 2 (commencing with Section 110410) of Chapter 2 as it deems necessary to carry out this article.

111820. Any violation of this part or any regulation adopted pursuant to this part shall be grounds for denying a registration or for suspending or revoking a registration. Proceedings for the denial, suspension, or revocation of the registration shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted in that chapter.

CHAPTER 8. PENALTIES AND REMEDIES

Article 1. Penalties

111825. Any person who violates any provision of this part or any regulation adopted pursuant to this part shall, if convicted, be subject to imprisonment for not more than one year in the county jail or a fine of not more than one thousand dollars ($1,000), or both the imprisonment and fine. If the violation is committed after a previous

conviction under this section that has become final, or if the violation is committed with intent to defraud or mislead, the person shall be subject to imprisonment for not more than one year in the county jail, imprisonment in state prison, or a fine of not more than ten thousand dollars ($10,000), or both the imprisonment and fine.

111830. Upon conviction of any violation of this part, or any regulation adopted pursuant to this part, the court may require, as a condition of probation under Section 1203.1 of the Penal Code, that the defendant pay to the department the reasonable costs incurred by the department in investigating and prosecuting the action, including, but not limited to, the costs of storage and testing. This payment shall be in addition to any other costs that a court is authorized to require a defendant to pay under Section 1203.1 of the Penal Code.

111835. One-half of all fines collected by any court or judge for any violation of any provision of this part shall be paid into the State Treasury to the credit of the General Fund.

Article 2. Proceedings

111840. The Attorney General, any district attorney, or any city attorney to whom the department reports any violation of this part shall begin appropriate proceedings in the proper court.

111845. The department is not required to institute proceedings under this part for minor violations of this part, if the department believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

111850. When the state asserts a violation of this part, the state need not negative any exemption or exception from the requirements of this part in any pleading or in any trial, hearing, or other proceeding. The burden of proof with respect to any exemption or exception rests upon the person claiming its benefit.

111855. (a) If any person violates any provision of this part, or any regulation adopted pursuant to this part, the department may assess a civil penalty against that person as provided by this section.

(b) The penalty may be in an amount not to exceed one thousand dollars ($1,000) per day. Each day a violation continues shall be considered a separate violation.

(c) If, after examination of a possible violation and the facts surrounding that possible violation, the department concludes that a violation has occurred, the department may issue a complaint to the person charged with the violation. The complaint shall allege the acts or failures to act that constitute the basis for the violation and the amount of the penalty. The complaint shall be served by personal service or by certified mail and shall inform the person so served of the right to a hearing.

(d) Any person served with a complaint pursuant to subdivision (c) of this section may, within 20 days after service of the complaint, request a hearing by filing with the department a notice of defense. A notice of defense is deemed to have been filed within the 20-day period if it is postmarked within the 20-day period. If a hearing is requested by the person, it shall be conducted within 90 days after the receipt by the department of the notice of defense. If no notice of defense is filed within 20 days after service of the complaint, the department shall issue an order setting the penalty as proposed in the complaint unless the department and the person have entered into a settlement agreement, in which case the department shall issue an order setting the penalty in the amount specified in the settlement agreement. When the person has not filed a notice of defense or where the department and the person have entered into a settlement agreement, the order shall not be subject to review by any court or agency.

(e) Any hearing required under this section shall be conducted by a departmental hearing officer appointed by the director. The department shall adopt regulations establishing a hearing process to review complaints. Until the department adopts these regulations, all hearings shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that hearings shall be conducted by a departmental hearing officer appointed by the director. The department shall have all the powers granted in that chapter.

(f) Orders setting civil penalties under this section shall become effective and final upon issuance thereof, and payment shall be made within 30 days of issuance. A copy of the order shall be served by personal service or by certified mail upon the person served with the complaint.

(g) Within 30 days after service of a copy of a decision issued by the director, any person so served may file with the superior court a petition for writ of mandate for review of the decision. Any person who fails to file the petition within this 30-day period may not challenge the reasonableness or validity of the decision or order of the director in any judicial proceeding brought to enforce the decision or order or for other remedies. Section 1094.5 of the Code of Civil Procedure shall govern any proceedings conducted pursuant to this subdivision. In all proceedings pursuant to this subdivision, the court shall uphold the decision of the director if the decision is based upon substantial evidence in the whole record. The filing of a petition for writ of mandate shall not stay any corrective action required pursuant to this part or the accrual of any penalties assessed pursuant to this section. This subdivision does not prohibit the court from granting any appropriate relief within its jurisdiction.

(h) The remedies under this section are in addition to, and do not supersede, or limit, any and all other remedies, civil or criminal.

Article 3. Seizure and Embargo

111860. Whenever an authorized agent of the department finds, or has probable cause to believe, that any food, drug, device, or cosmetic is adulterated, misbranded, or falsely advertised within the meaning of this part, or the sale of any food, drug, device, or cosmetic would be in violation of this part, that agent shall affix to the food, drug, device, cosmetic, or component thereof, a tag or other appropriate marking. He or she shall give notice that the food, drug, device, or cosmetic is, or is suspected of being, adulterated, misbranded, falsely advertised, or the sale of which would be in violation of this part and has been embargoed, and that no person shall remove or dispose of the food, drug, device, or cosmetic by sale or otherwise until permission for removal or disposal is given by an authorized agent of the department or the court.

111865. It is unlawful for any person to remove, sell, or dispose of a detained or embargoed food, drug, device, or cosmetic without permission of an authorized agent of the department or the court.

111870. When an authorized agent of the department has found that a food, drug, device, or cosmetic that is embargoed, is not adulterated, misbranded, falsely advertised, or the sale of which is not otherwise in violation of this part, that agent shall remove the tag or other marking.

111875. When an authorized agent of the department finds, or has reasonable cause to believe, that the embargo will be violated, that agent may remove the embargoed food, drug, device, or cosmetic to a place of safekeeping.

111880. When a food, drug, device, or cosmetic is alleged to be adulterated, misbranded, falsely advertised, or the sale of which is otherwise in violation of this part, the department shall commence proceedings in the superior court or lower court in whose jurisdiction the food, drug, device, or cosmetic is located, for condemnation of the article.

111885. If the court finds that an embargoed food, drug, device, or cosmetic is adulterated, misbranded, falsely advertised, or the sale of which is otherwise in violation of this part, the food, drug, device, or cosmetic shall, after entry of the judgment, be destroyed at the expense of the claimant or owner, under the supervision of an authorized agent of the department. All court costs and fees and all reasonable costs incurred by the department in investigating and prosecuting the action, including, but not limited to, the costs of storage and testing, shall be taxed against the claimant or owner of the food, drug, device, or cosmetic or his or her agent. When the adulteration or misbranding can be corrected by proper labeling or processing of the food, drug, device, or cosmetic, or when the false advertisement can be corrected and when all provisions of this part can be complied with, then, after entry of the judgment and after

costs, fees, and expenses have been paid and a good and sufficient bond, conditioned that the food, drug, device, or cosmetic will be brought into compliance, the court may, by order, direct that the food, drug, device, or cosmetic be delivered to the claimant or owner to be brought into compliance by labeling, processing, or other means under the supervision of an authorized agent of the department. The expense of the supervision shall be paid by the claimant or owner. The bond shall be discharged when the court finds that the food, drug, device, or cosmetic is no longer held for sale in violation of this part and that all of the expenses of supervision have been paid.

111890. Whenever an authorized agent of the department finds any meat, meat products, seafood, poultry, vegetable, fruit, or other food that is unsound, or that contains any filthy, decomposed, or putrid substance, or that may be poisonous or deleterious to health, or otherwise unsafe, that agent may declare the food to be a nuisance and the department, or its authorized agent, shall condemn or destroy it, or render it unsalable as human food by decharacterization.

111895. Any superior or lower court of this state may condemn any food, drug, device, or cosmetic under provisions of this part. In the absence of such an order, the food, drug, device, or cosmetic may be destroyed under the supervision of an authorized agent of the department who has the written consent of the owner, his or her attorney, or authorized representative.

Article 4. Injunctions

111900. The Attorney General or any district attorney, on behalf of the department, may bring an action in superior court and the court shall have jurisdiction upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of this part. Any proceeding under the provisions of this section shall conform to the requirements of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the department shall not be required to allege facts necessary to show, or tending to show, lack of adequate remedy at law, or to show, or tending to show, irreparable damage or loss.

111905. In addition to the injunctive relief provided in Section 111900, or as a nonpunitive alternative to Section 111915, the court, after finding any person has violated this part, shall award to the department all reasonable costs incurred by the department in investigating and prosecuting the action, including, but not limited to, the costs of storage and testing, as determined by the court. The award shall be paid to the department by the person found by the court to have violated this part.

111910. (a) Notwithstanding the provisions of Section 111900 or any other provision of law, any person may bring an action in superior court pursuant to this section and the court shall have jurisdiction upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of Article 7 (commencing with Section 110810) of Chapter 5. Any proceeding under this section shall conform to the requirements of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the person shall not be required to allege facts necessary to show, or tending to show, lack of adequate remedy at law, or to show, or tending to show, irreparable damage or loss, or to show, or tending to show, unique or special individual injury or damages.

(b) In addition to the injunctive relief provided in subdivision (a), the court may award to that person, organization, or entity reasonable attorney's fees as determined by the court.

(c) This section shall not be construed to limit or alter the powers of the department and its authorized agents to bring an action to enforce this chapter pursuant to Section 111900 or any other provision of law.

111915. In addition to injunctive relief, the court may impose as a civil penalty, damages in the maximum sum of one thousand dollars ($1,000) for each day the violation is continued. Damages shall be paid one-half to this state and one-half to the county in which the action is brought if brought by the Attorney General, or entirely to the county if brought by a district attorney.

PART 6. WHOLESALE FOOD

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES

111940. (a) If any person violates any provision of Chapter 4 (commencing with Section 111950), Chapter 5 (commencing with Section 112150), Chapter 6 (commencing with Section 112350), Chapter 7 (commencing with Section 112500), Chapter 8 (commencing with Section 112650), Chapter 10 (commencing with Section 113025), or Article 3 (commencing with Section 113250) of Chapter 11, or Chapter 4 (commencing with Section 108100) of Part 3, or any regulation adopted pursuant to these provisions, the department may assess a civil penalty against that person as provided by this section.

(b) The penalty may be in an amount not to exceed one thousand dollars ($1,000) per day. Each day a violation continues shall be considered a separate violation.

(c) If, after examination of a possible violation and the facts surrounding that possible violation, the department concludes that a violation has occurred, the department may issue a complaint to the person charged with the violation. The complaint shall allege the acts or failures to act that constitute the basis for the violation and the amount of the penalty. The complaint shall be served by personal service or by certified mail and shall inform the person so served of the right to a hearing.

(d) Any person served with a complaint pursuant to subdivision (c) of this section may, within 20 days after service of the complaint, request a hearing by filing with the department a notice of defense. A notice of defense is deemed to have been filed within the 20-day period if it is postmarked within the 20-day period. If a hearing is requested by the person, it shall be conducted within 90 days after the receipt by the department of the notice of defense. If no notice of defense is filed within 20 days after service of the complaint, the department shall issue an order setting the penalty as proposed in the complaint unless the department and the person have entered into a settlement agreement, in that case the department shall issue an order setting the penalty in the amount specified in the settlement agreement. When the person has not filed a notice of defense or where the department and the person have entered into a settlement agreement, the order shall not be subject to review by any court or agency.

(e) Any hearing required under this section shall be conducted by a departmental hearing officer appointed by the director. The department shall adopt regulations establishing a hearing process to review complaints. Until the department adopts these regulations, all hearings shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that hearings shall be conducted by a departmental hearing officer appointed by the director. The department shall have all the powers granted in that chapter.

(f) Orders setting civil penalties under this section shall become effective and final upon issuance thereof, and payment shall be made within 30 days of issuance. A copy of the order shall be served by personal service or by certified mail upon the person served with the complaint.

(g) Within 30 days after service of a copy of a decision issued by the director, any person so served may file with the superior court a petition for writ of mandate for review of the decision. Any person who fails to file the petition within this 30-day period may not challenge the reasonableness or validity of the decision or order of the director in any judicial proceeding brought to enforce the

decision or order or for other remedies. Section 1094.5 of the Code of Civil Procedure shall govern any proceedings conducted pursuant to this subdivision. In all proceedings pursuant to this subdivision, the court shall uphold the decision of the director if the decision is based upon substantial evidence in the whole record. The filing of a petition for writ of mandate shall not stay any corrective action required pursuant to the Miscellaneous Food, Food Facility, and Hazardous Substances Act (Section 27) or the accrual of any penalties assessed pursuant to this section. This subdivision does not prohibit the court from granting any appropriate relief within its jurisdiction.

(h) The remedies under this section are in addition to, and do not supersede, or limit, any and all other remedies, civil or criminal.

111945. In addition to injunctive relief, the court may impose as a civil penalty, damages up to a maximum amount of one thousand dollars ($1,000) for each day the violation is continued. Damages shall be paid one-half to the State Treasury, and one-half to the county where the action is brought.

CHAPTER 4. WHOLESALE FOOD PROCESSORS

Article 1. Food Processing Establishments

111950. ''Food,'' as used in this chapter, includes all articles used for food, drink, confectionery, or condiment, whether simple or compound, and all substances and ingredients used in the preparation thereof.

111955. ''Food processing establishment,'' as used in this chapter, shall mean any room, building or place or portion thereof, maintained, used or operated for the purpose of commercially storing, packaging, making, cooking, mixing, processing, bottling, canning, packing, slaughtering or otherwise preparing or handling food except restaurants.

111960. Every food processing establishment shall be properly lighted, drained, plumbed, and ventilated; and shall be conducted with strict regard to the influence of lighting, drainage, plumbing, and ventilation upon the health of persons therein employed, and upon the purity and wholesomeness of the food therein produced, prepared for sale, manufactured, packed, stored, kept, handled, sold, or distributed.

111965. The floors, side walls, ceiling, furniture, receptacles, utensils, implements, and machinery of every food processing establishment shall at no time be kept in an unclean, unhealthful, or unsanitary condition.

Any of the following is deemed to be ''an unclean, unhealthful, or unsanitary condition'':

(a) If food in the process of manufacture, preparation, packing, storing, sale, or distribution is not securely protected from flies, dust, or dirt, and from all other foreign or injurious contamination.

(b) If refuse, dirt, and waste products subject to decomposition and fermentation incident to the manufacture, preparation, packing, storing, selling, and distributing of food, are not removed daily.

(c) If all trucks, trays, boxes, baskets, buckets, other receptacles, chutes, platforms, racks, tables, shelves, knives, saws, cleavers, and all other utensils, receptacles, and machinery used in moving, handling, cutting, chopping, mixing, canning, and all other processes employed in the preparation of food are not thoroughly cleaned daily.

(d) If the clothing of employees is unclean or if they dress, undress, or leave or store their clothing in the place where the food is produced, prepared, manufactured, packed, sold or distributed.

111970. No live animal or fowl shall be kept or allowed in any establishment where food is prepared, manufactured, kept, stored, offered for sale or sold unless the establishment is exclusively devoted to the slaughter, processing and/or sale of the animal or fowl. This section does not apply to dogs used by uniformed employees of private patrol operators and operators of a private patrol service who are licensed pursuant to Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code, while those employees are acting within the course and scope of their employment as private patrolmen.

The state department may adopt regulations as it determines are reasonably necessary under this section for the protection of the public health and safety.

111975. The side walls and ceilings of every bakery, confectionery, hotel, or restaurant kitchen shall be well plastered or ceiled with metal or lumber, or shall be oil painted or kept well lime washed, or otherwise kept in a good sanitary condition.

111980. All interior woodwork of every bakery, confectionery, hotel, or restaurant kitchen shall be kept well oiled or painted with oil paint, and shall be kept washed clean with soap and water, or otherwise kept in a good sanitary condition.

111985. Every building, room, basement, or cellar occupied or used for the preparation, manufacture, packing, storage, sale, or distribution of food shall have an impermeable floor, made of cement, or of tile laid in cement, brick, wood, or other suitable, nonabsorbent material that can be flushed and washed clean with water.

111990. Where practicable, the doors, windows, and other openings of every food producing or distributing establishment shall be fitted with stationary or self-closing screen doors and wire window screens, of not coarser than 14 mesh wire gauze.

111995. Every building, room, basement, or cellar occupied or used for the production, preparation, manufacture, packing, canning, sale, or distribution of food shall have convenient toilet or

toilet-rooms, separate and apart from the room or rooms where the process of production, preparation, manufacture, packing, canning, selling, or distributing is conducted.

112000. The floors of toilet-rooms shall be made of cement, or of tile laid in cement, wood, brick, or other nonabsorbent material, and shall be washed and scoured daily.

112005. The toilets shall be furnished with separate ventilating pipes or flues discharging either into soil pipes or on the outside of the building in which they are situated.

112010. Lavatories and washrooms shall be adjacent to toilet-rooms and shall be supplied with soap, running water, and towels, and shall be maintained in a clean and sanitary condition.

112015. Employees and others who handle the material from which food is prepared or the finished product shall before beginning work and immediately after visiting a toilet or lavatory, wash their hands and arms thoroughly in clean water.

112020. No employee or other person shall sit or lie upon any table, bench, trough, shelf, or other equipment that is intended for use in connection with any food manufacturing process.

112025. No employee or other person shall expectorate or discharge any substance from his or her nose or mouth on the floor or interior side wall of any building, room basement, or cellar where the production, preparation, manufacture, packing, storing, or sale of any food is conducted.

112030. No person shall, nor shall any person be allowed to, reside or sleep in any room of a bake-shop, public diningroom, hotel or restaurant kitchen, confectionery, or other place where food is prepared, produced, manufactured, served, or sold.

112035. No employer shall require or permit any person to work, in a food processing establishment or vehicle used for the production, preparation, manufacture, sale, or transportation of food if the person is infected with any contagious, infectious, or communicable disease that can be transmitted by the food involved.

112040. The department, its inspectors and agents, and all local health officers and inspectors may at all times enter any building, room, basement, cellar, or other place occupied or used, or suspected of being occupied or used, for the production, preparation, manufacture, storage, sale, or distribution of food, and inspect the premises and all utensils, implements, receptacles, fixtures, furniture, and machinery used.

112045. If upon inspection any building, room, basement, cellar, or other place, or any vehicle, employer, employee, or other person is found to be in violation of or violating any of the provisions of this article, or if the production, preparation, manufacture, packing, storing, sale, or distribution of food is being conducted in a manner detrimental to the health of the employees or to the character or quality of the food being produced, prepared, manufactured, packed,

stored, sold, distributed, or conveyed, the person making the inspection shall at once make a written report of the violation to the district attorney of the county, who shall prosecute the violator. He or she shall make a like report to the department. The department, from time to time, may publish the reports in its monthly bulletin.

112050. Every building, room, basement, cellar, or other place or thing kept, maintained, or operated in violation of this article, and all food produced, prepared, manufactured, packed, stored, kept, sold, distributed, or transported in violation of this article, is a public nuisance dangerous to health. Any such nuisance may be abated or enjoined in an action brought for that purpose by the local or state department or may be summarily abated in the manner provided by law for the summary abatement of public nuisances dangerous to health.

112055. The sections contained in this article are to be known as the California Food Sanitation Act.

Article 2. Food Containers

112060. ''Bottle,'' as employed in this article, includes any bottle or any glass or crockery food container, other than one not previously used, that is used or sold for use in the manufacture, production, preparation, compounding, blending, or packing for sale of any food, drug, or liquor.

112065. This article is not applicable to containers subject to Division 15 (commencing with Section 32501) of the Food and Agricultural Code.

112070. The provisions of this article in reference to sterilization procedures and methods in cleaning bottles, as in this article defined, shall apply to all persons cleaning previously used bottles who are engaged in the business of packaging food, drugs, or liquors and to all persons maintaining a place of business for the cleaning and resale of the bottles sold for and to be used for packing a food, drug or liquor.

The sale for use of any such bottle by any person not licensed by the board as herein provided, when the use intended by purchaser is to package for sale a food, drug or liquor produced or packaged by the purchaser is unlawful, except in the case of a sale to a purchaser for export out of this state or who is engaged in the business of packaging food, drugs, or liquors at a fixed place of business in this state and is equipped to cleanse and sterilize bottles as in this article provided.

112075. The department shall issue a license to an applicant therefor upon the receipt of the evidence as the department may require showing that the applicant is properly equipped for the cleansing and sterilization of bottles as provided in this article, or at its option upon the recommendation of a city, county or city and county health officer. This license is nontransferable.

The license provisions of this article shall not apply to food, drug or liquor manufacturers or packers who buy bottles for their own use and purposes, but do apply to any other person, firm or corporation engaged in the business of cleaning, sterilizing and reselling bottles to manufacturers or packers except as hereinabove provided.

112080. An establishment is deemed properly equipped for the cleansing and sterilization of bottles if it maintains and employs the following standards:

(a) Cleanses and sterilizes bottles by first soaking them in a hot caustic solution of not less than 120 degrees F. for a period of not less than five minutes which temperature shall be indicated by a thermometer. The solution shall contain not less than $2^1/_2$ percent of caustic soda expressed in terms of sodium hydrates.

(b) Changes the cleansing solution frequently so as to prevent its becoming foul and insanitary.

(c) Thoroughly rinses the bottles after the soaking.

112085. All bottles shall be cleansed and sterilized as specified in Section 112080, and shall be kept free from rust or contamination.

112090. A licensee shall issue a certificate of sterilization with each shipment of bottles to a purchaser, stating that the licensee has cleansed and sterilized the bottles in the manner required by this article.

112095. If any licensee fails to maintain his or her equipment and to cleanse or sterilize any bottle in the manner required by this article, and issues a certificate knowing its contents to be untrue the state department may revoke or suspend his or her license after a hearing. The proceedings for the revocation or suspension of a license shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the state department shall have all the powers granted therein.

112100. Any purchaser of a bottle who shows a certificate of sterilization signed by a licensed seller thereof complies sufficiently with this article.

112105. Nothing in this article prohibits the sale for use of any uncleansed or unsterilized bottle to a purchaser who is licensed under this article.

112110. Food containers manufactured from second-hand tin plate and intended for the packing of hermetically sealed canned food products intended to be used for human consumption shall not be so used unless the tin plate from which they are manufactured has, prior to their manufacture, been cleansed and sterilized by thorough immersion in boiling water, and then dried on hot rolls or by the use of heated air.

The board may inspect any place where the containers are manufactured for the purpose of enforcing this section.

112115. The provisions of this article with the exception of the licensing provisions may be enforced by any local enforcement division, which shall be construed to mean the local health department, headed by the duly appointed, qualified and acting health officer of any county, city or city and county. The territory may include one or more counties, cities, or cities and counties.

112120. A nonalcoholic soft drink, whether or not carbonated, shall be deemed to be misbranded if in a bottle or other closed container unless the name and address of the bottler or distributor thereof appears on the container by being molded, printed, or otherwise labeled thereon, or the name and address is shown on the crown or cap of the container if the container is a permanently and distinctively branded bottle. The beverage shall not be deemed to be misbranded under this section if in a bottle or other closed container on which is molded, printed or otherwise labeled the product name, trademark or brand of the distributor or bottler thereof and if a sworn affidavit has been filed with the department stating the name, trademark, or brand of the beverage, a full and complete description of each territory or area of the state in which the beverage is to be distributed, and the names and addresses of the persons as are responsible for the Miscellaneous Food, Food Facility, and Hazardous Substances Act (Section 27) in the bottling and distribution of the beverage in each territory or area of the state in which the beverage is distributed. Nothing in this section shall be deemed to exempt any bottler or distributor of a beverage or beverages from any provision of Part 5 (commencing with Section 109875).

Article 3. Closed Containers

112125. Except when sold in bulk for manufacturing purposes, it is unlawful to sell or otherwise dispose of at retail jams, jellies, preserves, marmalades, peanut butter, horse-radish, mayonnaise, or salad dressings other than in closed containers approved by the department, when the department determines that any other method of sale or disposition of any such food or food product is conducive to its contamination by flies, insects, dust, dirt, or foreign material of any kind whatsoever.

Article 4. Violations

112130. Any person, whether as principal or agent, employer or employee, who violates any of the provisions of this chapter is guilty of a misdemeanor punishable upon conviction by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than six months, or by both the fine and imprisonment. Each day’s violation is a separate and distinct offense.

CHAPTER 5. SANITARY CONTROL OF SHELLFISH

Article 1. Declaration of Policy and Definitions

112150. The Legislature finds and declares that the public health interest requires that the people of this state be protected from adulterated shellfish grown and harvested in state waters for sale to the public and for introduction into interstate commerce. This protection is a matter of statewide concern and the purpose of this chapter is to establish uniform sanitation standards for the growing waters, harvesting, shucking, packing, repacking, and handling of shellfish and shellstock intended for human consumption.

112155. Unless the context otherwise requires, the definitions set forth in this article govern the construction of this chapter.

(a) ''Shellfish'' means native or nonnative bivalve mollusks, which include oysters, rock scallops, clams, and mussels, either fresh or frozen, and either shucked or in the shell.

(b) ''Shellstock'' means shellfish which remain in their shells.

(c) ''Growing area'' means any offshore ocean, coastal estuarine, or freshwater area that may be classified by the department for natural shellfish growth or artificial shellfish propagation and includes open seawater systems.

(d) ''Approved area'' means a shellfish-growing area not adversely affected by sewage or other wastes.

(e) ''Conditionally approved area'' means a shellfish-growing area that may be occasionally affected by sewage or other wastes.

(f) ''Prohibited area'' means a shellfish-growing area not certified because of its proximity to a waste discharge or because the area is influenced by other detrimental environmental factors.

(g) ''Restricted area'' means a shellfish-growing area subjected to a limited degree of pollution which makes it unsafe to harvest shellfish for direct marketing but where harvesting for relaying or depuration may be permitted.

(h) ''Other wastes'' means wastes, such as, but not limited to, animal, industrial, radiological, and agricultural wastes which would render shellfish unsafe or unfit for human consumption.

(i) ''Department'' means the State Department of Health Services.

(j) ''Director'' means the State Director of Health Services.

(k) ''Person'' includes any individual, partnership, corporation, limited liability company, and association.

(*l*) ''Closed area'' means an area that the shellfish taken therefrom have been declared to be unsafe or unfit for human consumption.

Article 2. General Requirements

112160. (a) The director may declare any area within the jurisdiction of this state to be a closed area if it is determined that shellfish taken from the growing area may be unsafe or unfit for human consumption.

(b) The director shall close to the taking of shellfish for a period deemed advisable any waters to which shellfish from a closed area may have been transferred.

(c) The director shall establish by order the areas that he or she declares unsafe or unfit for shellfish harvesting and shall modify or revoke the order in accordance with the results of chemical, toxicologic, and bacteriological surveys conducted by the department. The director shall file the order in the office of the department, and shall furnish copies of the orders describing closed areas to the Department of Fish and Game, the State Water Resources Control Board, and to any interested person without charge.

(d) Prior to the director's declaration that shellfish-growing waters may be unsafe and shellfish grown in these waters may not be taken for human consumption, the department shall do all of the following:

(1) Give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subject and issues involved, and the time when, the place where, and the manner in which, interested persons may present their views thereon.

(2) Afford all interested persons reasonable opportunity to submit data, views, or arguments orally or in writing. The department shall consider fully all written and oral submissions respecting the proposed action.

(e) If the department finds that the shellfish harvested from an area is unsafe or unfit for human consumption and states in writing its reasons for that finding, it may proceed without prior notice or hearing to take emergency action. The action may be effective for a period of not longer than 30 days, during which time the department shall initiate the procedures contained in subdivision (d).

112165. (a) The department shall adopt regulations regarding all of the following:

(1) The classification and minimum requirements for growing and harvesting areas, for relaying and depuration procedures, and for aquaculture facilities that are used for the cultivation and production of shellfish.

(2) Specifications for plant facilities and for the harvesting, transporting, storing, handling, packing, and repacking of shellfish.

(3) Fees.

(b) The department may adopt any regulations that it determines are necessary to interpret and enforce the provisions of this chapter. The regulations shall be adopted by the department in the manner prescribed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(c) The regulations shall conform, so far as possible, to the standards that are adopted by the National Shellfish Sanitation Program that pertain to the evaluation of shellfish-growing areas and handling facilities, but shall provide for regulating other wastes or contaminants not covered by the National Shellfish Sanitation Program that would render shellfish unsafe or unfit for human consumption.

112170. (a) The director, or the director's duly authorized agent, shall conduct sanitary surveys of any shellfish growing water as deemed necessary to assure each of the following:

(1) Any shellfish grown in the water is safe as an article of food and meets bacteriological, chemical, and toxicologic standards as prescribed by regulation.

(2) Any shellfish grown in prohibited or restricted areas is either relayed to or depurated in approved water for a period of time as necessary to meet bacteriological, chemical, and toxicologic standards, as prescribed by regulation.

(3) For good cause shown, a shellfish grower or harvester may request the resurvey of restricted or unapproved growing water, and the director, or the director's duly authorized agent, shall conduct the sanitary resurvey.

(b) If it is found that the shellfish and growing water are in compliance with the regulations promulgated under this chapter, the director shall issue a certificate attesting to the compliance to the lawful grower or harvester of the shellfish.

112175. It is unlawful for any person to engage in commercial shellfish cultivation or the harvesting for human consumption of shellfish from naturally occurring populations, except as provided for in Sections 5670, 7850, 8500, and 15101 of the Fish and Game Code and in regulations adopted by the department pursuant to this chapter, with regard to growing areas, relaying and depuration procedures, and aquaculture facilities.

112180. The director, or the director's duly authorized agent, may, at any reasonable hour of the day, do any of the following:

(a) Enter and inspect any facility or area used for cultivation, production, depuration, processing, transporting, or sale of shellfish.

(b) Obtain samples of water and shellfish. Upon request, split samples shall be given to the person from whose property the samples were obtained.

(c) Inspect all shellfish plants and the practices followed in the handling and packaging of shellfish. If it is found that the operator is

complying with the regulations promulgated under this chapter, the director shall issue a certificate attesting to the compliance.

(d) Cause a reinspection to be made at any time and may revoke the certificate upon refusal of the operator to permit an inspection or free access at all reasonable hours, or upon a finding that the plant is not being operated in compliance with the regulations promulgated under this chapter.

(e) No revocation, suspension, annulment, or withdrawal of any certificate is lawful unless, prior to the institution of department proceedings, the department gave notice by mail, to the certificate holder, of facts or conduct that warrants the intended action, and the certificate holder was given an opportunity to show compliance with all lawful requirements for the retention of the certificate, pursuant to Section 112265. This section does not preclude the department from taking immediate action in accordance with subdivision (e) of Section 112160.

112185. It is unlawful for any person to take, sell, offer, or hold for sale any shellfish from an area declared by the director to be unsuitable for harvesting for human consumption, without complying with all regulations adopted by the department to ensure that the shellfish have been purified.

The intent of this section is not to prohibit the transplanting of shellfish from restricted or prohibited growing areas, if permission for the transplanting is first obtained from the Department of Fish and Game pursuant to Section 237 of Title 14 of the California Code of Regulations.

112190. It is unlawful for any person to sell, offer, or hold for sale any shellstock or shucked shellfish that has not been harvested from a growing area which has been certified by the department or that has not been purified in accordance with Section 112170.

112195. It is unlawful for any person to sell, offer, or hold for sale any shellstock or shucked shellfish that has not been handled and packaged in accordance with specifications under this chapter, and regulations adopted pursuant to this chapter.

112200. It is unlawful for any person to sell, offer, or hold for sale any shellfish where the facilities for packaging and handling of the shellfish do not comply with regulations adopted by the department under this chapter.

112205. It is unlawful for any person to operate a shellfish plant engaged in the handling and packaging of shellfish, either shucked or in the shell, without a valid certificate issued by the department for each plant or place of business.

112210. It is unlawful for any person to sell, offer, or hold for sale any shellstock or shucked shellfish without a label that bears a valid certificate number and is in compliance with Chapter 4 (commencing with Section 110290) of Part 5.

112215. It is unlawful for any person to sell, offer, or hold for sale any shellfish not in a container bearing a valid certificate number from a state or a nation whose shellfish certification program conforms to the then current Manual of Recommended Practice for Sanitary Control of the Shellfish Industry, issued by the United States Public Health Service.

112220. The provisions of Sections 112210 and 112215, with respect to labeling requirements, shall not apply to any of the following:

(a) Shellstock held in dry storage under refrigerated conditions not for shipment or sale.

(b) Shellstock sold on premises when the sale is the ultimate point of sale.

112225. Any shellfish that are held or offered for sale at retail or for human consumption, and that have not been handled and packaged in accordance with the specifications fixed by the department under this chapter, or that are not in a certified container as provided in Sections 112210 and 112215, or that are otherwise found by the director to be unfit for human consumption, are subject to immediate condemnation, seizure, and confiscation by the director or the director's duly authorized agent. The shellfish shall be held, destroyed, or otherwise disposed of as directed by the director.

112230. The director may suspend or revoke any certificate issued pursuant to this chapter for any violation of this chapter or the regulations adopted pursuant thereto.

Article 3. Fees

112235. The department shall charge and collect a fee for each certificate issued. The amount of the fee shall be established by regulation.

Article 4. Penalties

112240. Any person who willfully violates any provision of this chapter, or any regulation adopted pursuant to this chapter, is guilty of a misdemeanor and shall, if convicted, be subject to imprisonment for not more than six months in the county jail or a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), or both. If the violation is committed after a previous conviction under this section that has become final, or if the violation is committed with the intent to defraud or mislead, the person shall be subject to imprisonment for not more than one year in the county jail or a fine of not more than one thousand dollars ($1,000), or both.

112245. One-half of all fines collected by any court or judge for any violation of any provision of this chapter shall be paid into the State Treasury to the credit of the General Fund.

Article 5. Proceedings

112250. (a) The Attorney General, any district attorney, or any city attorney to whom the department reports any violation of this chapter shall begin appropriate proceedings in the proper court.

(b) Before any alleged violation of this chapter is reported to the Attorney General, a district attorney, or a city attorney for the institution of a criminal proceeding, the person against whom this proceeding is contemplated may be given appropriate notice and an opportunity to show cause why he or she should not be prosecuted and to present additional facts that may mitigate the action. The showing may be presented either orally or in writing, in person, or by attorney.

112255. The department is not required to institute proceedings under this chapter for minor violations of this chapter, if the department believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning.

112260. When the state asserts a violation of this chapter, the state need not negate any exemption or exception from the requirements of this chapter in any pleading, or in any trial, hearing, or other proceeding. The burden of proof with respect to any exemption or exception rests upon the person claiming its benefits.

112265. (a) Except to the extent otherwise provided in Section 112160 and subdivision (e) of Section 112180, or when a violation is asserted pursuant to Section 112240, when the department asserts a violation of this chapter, all affected persons shall be afforded an opportunity for an administrative hearing after 20 days notice.

(b) The notice shall include all of the following:

(1) A statement of the time, place, and nature of the hearing.

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(3) A reference to the particular sections of the statutes, regulations, and rules involved.

(4) A short and plain statement of the matters asserted.

(c) Opportunity shall be afforded all persons to respond and present evidence on the issues involved.

(d) Hearings authorized or required by this chapter shall be conducted by the department or any agent as the department may designate for that purpose.

(e) Oral proceedings or any part thereof shall be transcribed at the request of any person. The person requesting the transcription shall bear the cost of the transcript.

(f) Final decisions or orders adverse to any person shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, that shall be separately stated. Persons shall be notified either personally or by mail of any decision or order.

112270. In lieu of administrative proceedings pursuant to Section 112265, the department may proceed under Section 119940.

112275. A person who has exhausted all administrative remedies available within the department and who is aggrieved by a final decision or order is entitled to judicial review pursuant to this chapter.

112280. All regulations applicable to this chapter, and currently in effect at the time this chapter takes effect, shall remain in effect until the department adopts regulations pursuant to Section 112165.

CHAPTER 6. COLD STORAGE

Article 1. Definitions and General Provisions

112350. Unless the context otherwise requires, the definitions set forth in this article govern the construction of this chapter.

112355. ''Cold storage'' means a place artificially refrigerated to a temperature above zero of 45 degrees Fahrenheit or below. It does not include any place where food that is privately owned and not held for resale is stored inside of lockers or compartments that are not more than 25 cubic feet in capacity, and which lockers or compartments are leased to private individuals for their exclusive use.

112360. ''Cold stored'' means the keeping of articles of food in cold storage for a period exceeding ten days.

112365. ''Article of food'' means any article of food used for human consumption. It includes fresh meat and fresh meat products (except in process of manufacture), fresh and dried fruit or vegetables, fish, shellfish, game, poultry, eggs, butter, and cheese, but not malt beverages.

112370. ''Storer'' means a person who offers articles of food for cold storage.

112375. This chapter does not apply to any cold storage or refrigerating plant or warehouse that is maintained or operated by a restaurant, hotel, exclusively wholesale or retail establishment, cannery, winery, brewery, or other food processing place that is used for the storage of food and which place is owned by or is for the exclusive use of the occupant owner or maintainer thereof, and said food is not stored for other persons.

112380. The term ''locker plant'' as used in this chapter shall mean any building or portion thereof that is artificially cooled to or below a temperature above zero of 45 degrees Fahrenheit and used exclusively for the storage of any article of food for the sole use of the storer, and that article or articles of food are not for resale.

If any article or articles of food stored in locker plants are for resale and/or to be used for manufacturing purposes, said locker plant is

subject to the license provisions of this chapter and all sections thereof.

Article 2. Licenses

112385. Any person desiring to operate a cold storage or refrigerating warehouse for storing articles of food shall make application in writing to the board for a license for that purpose, stating the location of his or her plant or plants. For the purpose of securing the proper enforcement of this chapter, those buildings or structures that are served by a central refrigerating plant shall be considered as one cold storage or refrigerating warehouse or plant, and subject to one license.

112390. On receipt of the application the board shall examine into the sanitary condition of the plant.

112395. If it finds the plant to be in a sanitary condition and otherwise properly equipped for the business of cold storage, the state department, upon the payment of the license fee specified in this chapter, shall issue a license authorizing the applicant to operate a cold storage or refrigerating warehouse for a period of not more than one year.

112400. No person, firm, or corporation shall engage in the operation of a cold storage or refrigerating warehouse for storing articles of food without having obtained from the state department a license for each such place of business. This license is nontransferable.

112405. Each application for a license under this chapter shall be accompanied by a fee of fifty dollars ($50). Each license issued under this chapter shall expire on December 31st of each calendar year. License fees of fifty dollars ($50) are due on the first of January of each year. The fee for licenses initially issued after January 1st of each year shall not be prorated.

112410. The director shall keep a full and correct account of all fees received under this chapter. At least once each month he or she shall deposit all the fees with the Treasurer for credit to the General Fund.

Article 3. Licensee Regulations

112415. If any place or portion of a place for which a license is issued is deemed by the department to be in an unsanitary condition, the department shall give written notification to the licensee of the condition, stating in particular the matters found to be unsanitary.

112420. Upon failure of the licensee to correct the situation within a designated time the department shall prohibit the licensee from using the place or specified portion until such time as it is restored to a sanitary condition.

112425. Every licensee shall keep an accurate record of receipts and withdrawals of articles of food, and the department shall have free access to these records at any time.

112430. When requested by the department or an agent thereof, any licensee shall within a reasonable time submit a report setting forth in itemized particulars the quantity of food products held by him or her in cold storage.

Article 4. General Regulations

112435. No storer shall place in cold storage any article of food whose keeping qualities have been impaired by disease, taint, or deterioration, or that has not been slaughtered, handled, and prepared for storage in accordance with food laws pertaining thereto and the regulations as may be prescribed by the state department for the sanitary preparation of food products for cold storage.

112440. Any article of food intended for use other than human consumption shall, before being cold stored, be marked by the owner in accordance with forms prescribed by the department in a way as to indicate plainly that the article is not to be sold for human food.

112445. Each separate lot of food, when deposited in cold storage, shall be marked plainly with the lot number covering that particular lot of articles of food indicated and recorded on the records maintained on the premises.

112450. The department shall inspect and supervise all cold storage or refrigerating warehouses, and make the inspection of the entry of articles of food therein as it deems necessary to secure the proper enforcement of this chapter.

112455. The department and its duly authorized employees shall be permitted access to cold storage or refrigerating warehouses at all reasonable times for purposes of inspection and enforcing this chapter.

112460. The department may also appoint at the salary as it may designate, any person it deems qualified to make any inspection required by this chapter.

112465. No person shall keep any article of food in cold storage for more than twelve calendar months, except with the consent of the board. Thirty days prior to the expiration of the 12-month period, the licensee shall send notice to the board advising them of this fact. Duplicate notice shall be sent to the owner of the food.

112470. The department shall, upon application, grant permission to extend the period of storage beyond 12 months for a particular consignment of goods, if the goods in question are found, upon examination, to be in proper condition for further storage at the end of 12 months. The length of time for which further storage is allowed shall be specified in the order granting the permission.

112475. For the purpose of determining whether or not food locker plants come under the provisions of this chapter, the operators or owners of all such frozen food locker plants shall make available, upon request to any agent of the department, the names and addresses of any and all persons, firms, or corporations renting, leasing, or occupying the lockers or compartments.

112480. Unless otherwise permitted by this article, it is unlawful to represent or advertise as fresh goods articles of food that have been placed in cold storage. This section shall not apply to vegetables, fruit or other foods sold as ''fresh frozen'' and so labeled, when stored at or below zero degrees Fahrenheit, or to eggs held in cold storage for 30 days or less.

112485. It is unlawful to return to cold storage any article of food that has once been released from such storage and placed on the market for sale to consumers. However, nothing in this section prevents the transfer of goods from one cold storage or refrigerating warehouse to another, if the transfer is not made for the purpose of evading any provision of this chapter.

112490. The department may make regulations to secure the proper enforcement of this chapter, including regulations with respect to the sanitary preparation of articles of food for cold storage, the use of marks, tags, or labels, and the display of signs.

Article 5. Violations

112495. Any person violating any of the provisions of this chapter, or any rule or regulation issued pursuant to this chapter, shall upon conviction be punished for the first offense by a fine not exceeding one thousand dollars ($1,000) or by imprisonment for not more than 90 days, or by both. The punishment for a second offense is the same, except that the maximum fine is two thousand dollars ($2,000).

CHAPTER 7. FROZEN FOODS

112500. When used in this chapter, unless the context otherwise requires:

(a) ''Food'' means any article used by man for food, drink, confectionery or condiment, or which enters into the composition thereof, whether simple, blended, mixed or compounded.

(b) ''Locker'' means the individual sections or compartments of a capacity of not to exceed 25 cubic feet in the locker room of a frozen food locker plant.

(c) ''Frozen food locker plant'' means an establishment in which space in the individual lockers is rented, leased, or loaned to individuals, firms, or corporations, for the storage of food for their own use and which is artificially cooled for the purpose of preserving

the food. The term includes service locker plant, storage locker plant, and branch locker plant.

(d) ‘‘Service locker plant’’ means a frozen food locker plant in which patrons’ foods are prepared or packaged by the operator of the plant before the foods are placed in the lockers for storage.

(e) ‘‘Storage locker plant’’ means a frozen food locker plant, the operator of which does not prepare or package the foods of patrons.

(f) ‘‘Branch locker plant’’ means a frozen food locker plant in any location or establishment artificially cooled in which space in individual lockers is rented, leased, or loaned to individuals, firms, or corporations for the storage of food for their own use after preparation for storage in a central or parent plant.

(g) ‘‘Frozen’’ means food frozen in a room or compartment in which the temperature is plus 5 degrees Fahrenheit or lower.

(h) ‘‘Temperature’’ means the average air temperature in refrigerated rooms.

(i) ‘‘Department’’ means the State Department of Health Services.

(j) ‘‘Operator’’ means any person, firm or corporation operating or maintaining a frozen food locker plant.

(k) ‘‘Processor’’ means an establishment in which, for compensation directly or indirectly, meat or meat products are cut, wrapped, or frozen to be delivered for frozen storage by the ultimate consumer.

112505. No person hereafter shall engage within this State in the business of operating any frozen food locker plant without having applied for and obtained from the director of the department a license for each such place of business. Applications for the license shall be made in writing to the director of the department, on the forms and with the pertinent information as he or she may deem necessary. These licenses shall be granted promptly as a matter of right unless conditions exist that are grounds for denial of a license, as hereinafter set forth.

112510. The annual license fee for a frozen food locker plant shall be twenty-five dollars ($25). Such fees shall be paid into the General Fund.

112515. Upon receipt of the application for a license accompanied by the required fee, the department shall promptly inspect the plant to be licensed and shall issue a license; provided, the plant, its equipment, facilities and its surrounding premises, and its operations comply with this chapter and regulations pertaining to this chapter. The department shall inspect all frozen food locker plants licensed under this chapter, whenever the department considers the inspection necessary. The department and its representatives shall have access to the plants at all reasonable times for the purpose of making inspections.

112520. The license issued hereunder shall be in a form as the department shall prescribe and shall be under the seal of the department and shall set forth the name of the licensee, the location for which the license is issued, the period of the license and other information as the department may determine. Licenses shall be for a term of one calendar year and shall be renewed annually. The license is nontransferable. The original license or a certified copy thereof shall be conspicuously displayed by the licensee in the locker plant for which the license is issued.

112525. The floors, walls and ceilings of frozen food locker plants shall be of a construction and finish that they can be conveniently maintained in a clean and sanitary condition. The lockers in any plant shall be so constructed as to protect the contents from contamination, deterioration or injury. Lockers with perforated bottoms shall be provided with a suitable unperforated liner or tray.

112530. Any frozen food locker plant using a toxic gas refrigerant shall have at least one gas mask of a type approved by the department and shall keep the same where it will be readily accessible.

112535. All rooms of a frozen food locker plant shall at all times be maintained in a clean and sanitary condition. All equipment and utensils shall be cleaned when put into use and shall be thoroughly cleaned after each day's use and shall be so stored or protected as not to become contaminated. Lockers shall be thoroughly cleaned before they are leased or put into the possession of any patron. The premises and surroundings of the plants shall be maintained in a clean and sanitary condition. The food stored shall be protected from filth, flies, dust, dirt, insects, vermin and any other contamination and from any unclean or filthy practice in the handling thereof or caring therefor. No food shall be stored in a condition or in a manner as to cause injury to or deterioration of articles of food in adjacent lockers.

112540. Frozen food locker plants shall have an ample water supply readily available and the water that comes in contact with any food product or the equipment shall be uncontaminated. Such plants shall be provided with adequate toilet facilities so located as to be readily accessible to employees and equipped with adequate washing fixtures or have such fixtures or facilities convenient thereto and shall be supplied with running water, single soap and single towel service. The doors of all toilet rooms shall be full length and self-closing and no toilet room shall open directly into any room in which foods are prepared, processed, chilled, frozen or stored. Toilet facilities and rooms shall be kept in a clean and sanitary condition.

112545. The director shall publish and declare reasonable regulations as are consistent with the enforcement of the provisions of this chapter providing for adequate cleanliness and sanitation to protect public health.

112550. The refrigeration system for a frozen food locker plant shall be equipped with reliable controls for the maintenance of

uniform temperatures as required in the various refrigerated rooms and shall be of adequate capacity to provide under extreme conditions of outside temperature and activity of the plant, the following temperatures in the several rooms, respectively:

(a) In pre-cool, chill, or aging rooms, temperatures shall be commensurate with good commercial practice.

(b) In locker rooms, temperature shall not exceed plus five (5) degrees Fahrenheit, with customary commercial variations.

The foregoing temperatures shall not be construed as prohibiting variations therefrom as may occur during short periods of time incidental to operating conditions beyond the control of the operator.

112555. Any processor, prior to delivery to the consumer, shall quick-freeze all meat or meat products in a blast-type freezing room at zero degrees Fahrenheit with one side of the package exposed to circulated air, or in a still-air-type freezing room at a minimum of minus 10 degrees Fahrenheit with one surface side of each package in direct contact with coils of a freezing plate. This section shall not apply to the sale of retail cuts of meat sold over the counter.

112560. Thermometers in good order shall be provided in all rooms held under low temperature at locations therein that will reflect true storage temperatures of foods in the rooms.

112565. No frozen food locker plant shall be licensed under this chapter unless the following facilities are provided:

Sufficient chill or aging room space, freezing facilities, locker room, and facilities for cutting, preparing, wrapping and packaging meats and meat products, except that storage locker plants and branch locker plants need install only locker room facilities as specified in Section 112550.

112570. A branch plant may be operated only in conjunction with a parent locker plant that shall have processing facilities sufficiently large for the locker plant and all branch plants.

112575. Storage of fish and game by patrons shall comply with federal and state fish and game laws. All pertinent abstracts of state and federal fish and game regulations shall be furnished by the department and shall be conspicuously displayed in the locker plant.

112580. Every operator of a frozen food locker plant, shall keep a record showing names and addresses of renters of lockers and the records shall be available for examination by the Director of Food and Agriculture or his or her representatives, or the department or its representatives, during business hours of the plants.

112585. Only food for human consumption, or clean, sanitary byproducts therefrom to be used for food, shall be stored in the frozen food locker plant. Each package of food wrapped and frozen for storage shall be labeled designating the product and identifying the processor.

112590. The person owning or operating a frozen food locker plant shall have a lien upon all property therein for all charges due

from the owner of the property. The lien may be secured and enforced in the same manner as warehousemen's liens are secured and enforced.

112595. Operators of frozen food locker plants operating solely as such shall not be construed to be warehousemen or public utilities, nor shall receipts or other instruments issued by those persons in the ordinary conduct of their locker business be construed to be warehouse receipts or subject to the laws applicable thereto.

112600. Cold storage or refrigerating warehouses subject to Chapter 6 (commencing with Section 112350) shall be exempt from the licensing provisions of this chapter.

112605. The licensing provisions of this chapter shall not apply to retail premises in which individual frozen food lockers are not rented, leased, loaned, or otherwise furnished to individuals, firms or corporations, or processors.

112610. The department, after notice and hearing, may revoke the license issued for any frozen food locker plant for failure to comply with the provisions of this chapter. The proceedings under this section shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted therein.

112615. In the event the director suspends or revokes any license, the licensee may obtain judicial review of the order by filing a petition for a writ of mandate in accordance with the Code of Civil Procedure in the superior court of the county in which the licensed premises are located within thirty (30) days from the date notice in writing of the director's order revoking or suspending the license has been served upon said licensee.

112620. The liability of the owner or operator of lockers for loss of goods in lockers or in the owner's or operator's care shall be limited to negligence of the owner or operator or his or her employee.

112625. Upon the signed petition of at least 25 owners or operators of frozen food locker plants licensed under this chapter, the director shall within 10 days after receipt of said petition, cause to be held at places and at times as he or she may provide, a public hearing for the purpose of gathering facts and data for the revision, correction or amendment of any rule or regulation issued pertaining to this chapter.

112630. This chapter shall be known as the ''Frozen Food Locker Plant Act of 1951.''

112635. Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for a term not exceeding six months, or by both the fine and imprisonment.

CHAPTER 8. CANNERIES

Article 1. Definitions and Scope

112650. ''State board,'' or ''State Board of Public Health,'' as used in this chapter, means the State Department of Health Services.

112655. ''Meat or meat products'' as used in this chapter, means any meat or meat product or poultry or poultry product that is not subject to the inspection of the Bureau of Meat Inspection or the Bureau of Poultry Inspection of the Department of Food and Agriculture, or of the Meat Inspection Division or Poultry Division of the United States Department of Agriculture, or of an approved municipal inspection department or establishment.

112660. ''Food product,'' as used in this chapter, includes any fish or fish product, meat or meat product, or any other food product.

112665. The operation of noncommercial canning centers by community canning centers, schools, churches, other organizations, or housewives who pack hermetically sealed canned food products for their own consumption and do not sell the canned food, is exempt from the licensing provisions of this chapter.

112670. In lieu of a license, a permit to operate a canning center shall be issued without cost by the department upon the submission of evidence as the department requires to show that the persons operating the center are qualified and that the center is properly equipped and meets all other provisions of this chapter.

112675. Food products that do not require the use of a pressure cooker but necessitate acidulation and pH determinations come within this chapter.

112680. No act that is unlawful under Part 5 (commencing with Section 109875), relating to the adulterating, mislabeling, misbranding, false advertising, and sale of foods, is lawful by reason of this chapter.

Article 2. Cannery Inspection Board

112685. There is in the state government a Cannery Inspection Board consisting of the following six members:

(a) The director of the state department, who shall act as chairman.

(b) One man appointed by the director who shall have had at the time of his or her appointment at least 10 years experience in or with canning technology and has a degree in chemistry, bacteriology or medicine.

(c) Four men appointed by the state department who are experienced, have substantial investments and are actively engaged in the canning industry at the time of their appointment.

One of the four appointive members shall be engaged in the canning of animal food.

112690. Each appointed member holds office for a term of one year or until his or her successor is appointed.

112695. Members of the board serve without compensation. The board shall meet at least quarterly.

112700. The Cannery Inspection Board shall, subject to the approval of the department, estimate the cost of the separate inspection and laboratory control required to be made for each food product subject to this chapter.

112705. The estimate shall be made prior to the opening of the canning season for each product having a canning season of less than three consecutive months, and prior to each quarter for each product having a canning season of more than three consecutive months.

112710. For the purpose of prorating the estimated cost of inspection and laboratory control, the Cannery Inspection Board, subject to the approval of the department, shall estimate the number of cases to be packed, the number of tons to be packed, or the number of man-hours necessary to be employed, whichever in its discretion is most equitable as a basis of proration.

112715. Based on the estimates required by the last three sections, the Cannery Inspection Board, subject to the approval of the department, shall determine the probable cost of inspection and laboratory control per thousand cases, per ton, or per man-hour, whichever in its discretion is most equitable.

112720. The cost of laboratory control and research on products subject to this chapter shall be prorated by the Cannery Inspection Board in the same manner as the costs of inspection are prorated by it.

112725. If the delegation of discretion to determine whether the case, ton, or man-hour basis is most equitable as a basis of prorating the cost of inspection and laboratory control is held invalid as an unlawful delegation of legislative power, the invalidity shall not affect the validity of the remaining portions of this chapter. The Legislature hereby declares that if it had known that the delegation of the discretion would be declared invalid as an unlawful delegation of legislative power, it would have designated the man-hour basis of proration as the most equitable basis of proration. In the event of an invalidity, the cost of inspection and laboratory control shall be prorated on the man-hour basis.

Article 3. Proration of Costs

112730. At the end of each quarter, or at the close of any canning season that does not exceed three consecutive months, the state department shall determine the actual cost of inspection and laboratory control of each separate food product for the preceding

quarter or preceding canning season, and shall prorate the cost to each person licensed under this chapter on the basis of cases packed, tons packed, or number of man-hours necessary to be employed, whichever has been determined by the Cannery Inspection Board, with the approval of the state department, to be most equitable.

112735. In making any separate inspection and laboratory control for any food product, the state department shall not spend more than the amount estimated by the Cannery Inspection Board as the cost of the inspection without the approval of the Cannery Inspection Board.

112740. In making estimates, determinations, assessments, and prorations under this article and Article 2 (commencing with Section 112685), the Cannery Inspection Board and the state department may include as a part of the cost of inspection a reasonable charge for standby services of inspectors.

112745. In lieu of all other procedures in this article and Article 2 (commencing with Section 112685), each person licensed under this chapter may be assessed at an estimated annual hourly rate set by the Cannery Inspection Board with the approval of the department and of the State Director of Finance. The annual rate shall be set for each industry group based on the estimated cost.

Article 4. Licenses and Licensees

112750. It is unlawful for any person to engage in the noncommercial canning of salmon, or in the commercial canning of any fish or fish product, meat or meat product, or any other food product for the use of man or animal, the sterilization of which in the opinion of the department requires the use of a pressure cooker or a retort, without first obtaining a license from the department.

112755. The department shall issue an annual license, that is nontransferable, to any person on the receipt of fifty dollars ($50) per plant, and evidence as the board may require to show that (1) the applicant is properly equipped with a retort or pressure cooker that has recording thermometers, indicating thermometers, and pressure gauges to carry out regulations as the department may adopt for the sterilization of food products for the canning of which a license is sought and (2) the applicant is in compliance with the sanitary regulations of the department. The applicant shall be deemed to be in compliance with the sanitary regulations unless the applicant has been given written notice by the department not less than 60 days prior to the expiration of the existing license that the cannery does not comply with the sanitary regulations, and the applicant has subsequently failed to bring the cannery into compliance therewith.

112760. Any person who has been denied the annual license provided in this chapter may obtain a hearing by the department by mailing a written request therefor to the department. The

department shall give the applicant at least 10 days notice of the hearing and shall hold such hearing within 30 days of the receipt of the request.

112765. In addition to the annual license fee, the department shall demand from each licensee a cash deposit for the payment of his or her pro rata share of the estimated cost of inspection and laboratory control as the department may deem necessary.

112770. If the deposit made by any licensee is insufficient to meet the actual cost of an inspection and laboratory control of any product determined by the department, the latter shall demand from the licensee, and the licensee shall immediately pay to the department, in addition to the license fee payable by the licensee, the difference between the deposit and his or her pro rata share of the actual cost of the inspection and laboratory control.

112775. If at the end of the calendar year, or at the end of any canning season of less than three consecutive months the deposit made by any licensee under this chapter is greater than the actual cost prorated to the licensee, the difference shall be refunded if requested by the licensee in accordance with law. If the difference is not so refunded, it shall be credited toward the required deposit for the next calendar year or canning season.

112780. No food product subject to the inspection required by this chapter shall be shipped by the licensee who packed it until the licensee has either paid his or her pro rata share of the estimated cost of inspection or has furnished the department a cash deposit for the payment of his or her pro rata share of the cost.

112785. The department may after notice and opportunity for hearing suspend or revoke a license issued under this chapter for any of the following causes:

(a) Nonpayment of the pro rata share of the cost of inspection and laboratory control, or failure to comply with a demand for a cash deposit or other security by the holder of the license.

(b) Noncompliance with any of the regulations of the department.

(c) Operation of an insanitary cannery after due notice by registered mail has been received.

(d) Inadequate ratproofing of a cannery throughout.

(e) Willful packing of any canned food commodity that has been rejected by an agent of the department.

(f) Packing of any canned food commodity subject to this chapter without notifying the department before packing.

112790. After conviction for a violation of Part 5 (commencing with Section 109875), the license of the person convicted may be suspended for a period of from 1 to 30 days.

112795. Proceedings for the suspension and revocation of licenses shall be conducted in accordance with Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code; and the department has all the powers granted therein.

Article 5. General Provisions

112800. No person shall permit another to operate a steam-controlled retort used in the commercial canning industry for the sterilization of food products, unless the latter first obtains a permit from the department. The department may pass upon and determine the qualifications of the applicant with a view to the preservation of the public health.

Any permit granted is revocable by the department whenever in its judgment the public health requires such action.

112805. It is unlawful for any person to place upon the label of any bottle, can, jar, carton, case, box, barrel, or any other receptacle, vessel, or container of whatever material or nature that may be used by a packer, manufacturer, producer, jobber, or dealer for enclosing any canned food product, fish or fish product, or meat or meat product, any statement relative to the product having been inspected, unless the statement has been approved in writing by the department.

Approval of a statement is revocable at any time by the department upon written notice.

112810. Any food product packed in violation of this chapter may be quarantined by the department until a laboratory examination has established that the product meets the requirements of this chapter.

112815. Any person who packs any food product that has been quarantined by the department shall pay the department all reasonable costs of any laboratory examination, determined by the Cannery Inspection Board, subject to the approval of the department, to be necessary to ascertain that the seized product was packed in violation of this chapter.

112820. The Division of Cannery Inspections has supervision over the inspection and examination of raw fish and fish products preparatory to canning.

The cost of the inspection and examination shall be determined and paid in the manner provided in Article 2 (commencing with Section 112685).

Article 6. Rules and Enforcement

112825. The department may make regulations as it deems necessary for the proper enforcement of this chapter, and the regulations shall have the force and effect of law.

112830. No rule or regulation or amendment thereto shall be adopted unless submitted by the department to the Cannery Inspection Board at least five days prior to the date of adoption.

112835. The state board shall enforce its regulations and the provisions of Part 5 (commencing with Section 109875), relating to the canning of food products, through the Chief of the Bureau of

Cannery Inspections and other employees as it deems necessary. The state board shall, so far as practicable, acquaint each licensee subject to this chapter with its regulations, and upon request therefor by any licensee shall furnish a copy of the regulations.

112840. The district attorney of the county in which any violation of this chapter occurs shall prosecute the person accused of the violation.

Article 7. Funds

112845. All money received by the department under this chapter shall be paid at least once each month to the Treasurer, and on order of the Controller, shall be deposited in the General Fund in the State Treasury.

112850. Notwithstanding Section 112845, the department and the Department of Finance may authorize the deposit in the Special Deposit Fund of cash deposits received by the department under the provisions of Section 112765; and in that event, upon the determination by the department that all or a part of any deposit is due the state for payment on account of the depositor's pro rata share of costs incurred by the state under this chapter, the amount so determined shall, on order of the State Controller, be transferred from the Special Deposit Fund to the General Fund.

All money deposited in the Special Deposit Fund under the provisions of this section shall be subject to the provisions of Article 2 (commencing with Section 16370) of Chapter 2 of Part 2 of Division 4 of Title 2 of the Government Code.

Article 8. Violations

112855. Any person who does not obtain a license required of him or her by this chapter, or who engages in canning operations after his or her license has been suspended or revoked, or who otherwise violates this chapter, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not exceeding six months.

CHAPTER 9. OLIVE OIL

112875. ''Olive oil,'' as used in this chapter, means the edible oil obtained from the fruit of the olive tree (olea europea L.).

112880. ''Imitation olive oil,'' as used in this chapter, means the mixture of any edible oil artificially colored or flavored to resemble olive oil.

112885. Unless a license so to do is first obtained from the department, it is unlawful for any person in this state to engage in the

packaging or manufacture of olive oil, or in the wholesale distribution of olive oil where his or her name and address will appear upon olive oil containers of one pint capacity or larger, as the distributor and his or her name will appear upon the containers as the only California addressee.

112890. On receipt of an application showing that the applicant is properly equipped to package or manufacture olive oil, or is a wholesale distributor of olive oil whose name and address will appear upon olive oil containers as distributor and whose name also will appear upon those containers as the only California addressee, the department shall, free of charge, issue the applicant a license, not transferable, but good until revoked, to package, manufacture, or distribute olive oil as the case may be.

The department may revoke or suspend the license after a hearing. The proceedings for the revocation or suspension of a license shall be in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted in that chapter.

112895. It is unlawful to manufacture, sell, offer for sale, give away, or to possess imitation olive oil in the state.

This section does not prohibit the blending of olive oil with other edible oils, if the blend is not labeled as olive oil or imitation olive oil, is clearly labeled as a blended vegetable oil, and if the contents and proportions of the blend are prominently displayed on the label.

112900. The use of any artificial color or flavor in the manufacture or blending of olive oil is prohibited.

112905. It is unlawful to prepare, express, mix, or blend olive pomace or meats with any bland fixed oil other than olive oil.

112910. All records of those licensed under the provisions of this chapter that concern the amounts of olive oil produced, purchased, or produced and purchased, or the sale, distribution, or sale and distribution of any olive oil, shall be open to inspection upon demand of any agent of the department.

112915. It is unlawful to reuse any olive oil container, can, or drum for repacking any fixed oil intended to be used for food purposes, except on the premises of the processor.

112920. All olive oil for technical purposes shall be denatured with an odoriferous substance so as to render it unfit for food purposes.

112925. It is unlawful to sell or offer for sale olive oil containing more than 5 percent free fatty acid without first denaturing the oil and making it unfit for human consumption.

112930. The department shall enforce this chapter.

112935. Any person violating any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail for not exceeding one year, or by both fine and imprisonment.

CHAPTER 10. PROCESSED PET FOODS

Article 1. Definitions

113025. ‘‘Processed pet food’’ means a food for pets that has been prepared by heating, drying, semidrying, canning, or by a method of treatment prescribed by regulation of the department. The term includes, special diet, health foods, supplements, treats and candy for pets, but does not include fresh or frozen pet foods subject to the control of the Department of Food and Agriculture of this state.

113030. ‘‘Pet’’ means any household animal including but not limited to cats or dogs and other carnivores whether or not for exhibition.

113035. ‘‘Pet food ingredients’’ means each of the constituent materials making up a processed pet food. Pet food ingredients of animal or poultry origin shall be only from animals or poultry slaughtered or processed in an approved or licensed establishment. Such animal or poultry ingredients condemned for human food but passed for animal food in an establishment inspected by the United States Department of Agriculture or the Department of Food and Agriculture of this state may be used for pet food, provided it is properly denatured or handled in accordance with this chapter and regulations of the department and the regulations of the Department of Food and Agriculture of this state so as to render the ingredients safe for pet food. Animals or poultry classified as ‘‘deads’’ are prohibited.

113040. Incubator reject eggs may not be used in food for human consumption but may be used for animal food or animal-food products.

113045. The term ‘‘advertisement’’ means all representations disseminated in any manner or by any means for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of processed pet food. An advertisement shall be deemed false if it is false or misleading in any particular.

113050. If an article is alleged to be misbranded because the labeling is misleading, or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account, among other things, not only misrepresentations made or suggested by statement, word, design, device, sound, or in any combination thereof, but also the extent to which the labeling or advertisement fails to reveal facts material in the light of representations or material with respect to consequences that may result from the use of the article to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement thereof or under conditions of use as are customary or usual.

113055. This chapter shall be known, and may be cited, as the Pure Pet Food Act of 1969.

Article 2. Licenses and Registration Certificates

113060. Every person who manufactures a processed pet food in California shall first obtain a license from, and every person who manufactures a processed pet food for import into California from another state shall first obtain a registration certificate from, the department. Each license or registration certificate is good for one calendar year from the date of issue and is nontransferable.

An application for a license or registration certificate shall be made on an application form provided by the department.

113065. A separate license shall be required for each processing plant located in California.

The annual license fee shall be one hundred dollars ($100). The annual registration fee shall be one hundred dollars ($100). The penalty for failure to apply for renewal of a license or registration certificate within 30 days after the expiration is thirty dollars ($30) and shall be added to the renewal fee and be paid by the applicant before the renewal license or registration certificate may be issued. All fees collected shall be expended as appropriated by the Legislature in the carrying out of the provisions of this chapter and the regulations adopted thereto.

The annual license fee for a pet food canner also licensed under Chapter 8 (commencing with Section 112650) is one hundred dollars ($100). No additional fee is payable by such a person for a license issued to him or her under that chapter.

113070. An annual license or registration certificate shall be issued only when the following provisions have been met:

(a) Inspection of the manufacturing facilities demonstrates that they are properly equipped and are operated in a sanitary manner.

(b) In the case of an out-of-state manufacturer, the application for a registration certificate is accompanied by a certificate issued by a federal, state, or local health agency certifying that the processed pet foods manufactured conform to the requirements of this chapter or the regulations adopted hereunder.

(c) The applicant submits to the department the label that would be attached to the container of each type of processed pet food and a complete list of the pet food ingredients thereof in their order of predominance by weight.

Article 3. Prohibited Acts and Penalties

113075. The following acts and the causing thereof within the State of California are hereby prohibited:

(a) The manufacture, sale, or delivery, holding or offering for sale of any pet food ingredient or processed pet food that is adulterated or misbranded.

(b) The adulteration or misbranding of any pet food ingredient or processed pet food.

(c) The dissemination of any false advertising.

(d) The refusal to permit entry or inspection, or to permit the taking of a sample.

(e) The removal, sale, or disposal of a detained or embargoed processed pet food without permission of an authorized agent or the court.

(f) The giving of a guaranty or undertaking that is false, except by a person who relied on a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the State of California from whom he or she received in good faith the pet food ingredient or the processed pet food.

(g) The receipt in commerce of any pet food ingredient or processed pet food that is adulterated, misbranded or falsely advertised and the delivery or proffered delivery thereof for pay or otherwise.

(h) Failure to obtain a license as required by this chapter.

(i) Use of any pet food ingredient that fails to conform to the standard of identity for the pet food ingredient as adopted pursuant to Section 113115.

113080. (a) Any person who violates any of the provisions of this chapter or the regulations promulgated under this chapter is subject to imprisonment for not more than six months or a fine of not more than one thousand dollars ($1,000), or both that imprisonment and fine; but if the violation is committed after a conviction of that person under this section has become final, or the violation is committed with intent to defraud or mislead, the person shall be subject to imprisonment for not more than one year, or a fine of not more than one thousand dollars ($1,000), or both imprisonment and fine.

(b) No person shall be subject to the penalties of subdivision (a) for having violated provisions of this chapter if he or she establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the State of California from whom he or she received in good faith the article, to the effect that the article conforms to all provisions of this chapter, designating this chapter.

If the guaranty is to the effect that the article is not in violation within the meaning of the federal act, as provided in Section 303 (c) of the federal act, it shall be sufficient for all the purposes of this chapter and have the same force and effect as though it referred to this chapter, unless at any time the standard for the article concerned under this chapter is higher than the standard for a like article under the federal act.

(c) No publisher, radio or television broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distributor, or seller of the article to which a false advertisement relates, shall be liable under this section for the dissemination of false advertisement, unless he or she has refused, on the request of the department, to furnish the department the name and post office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the State of California who caused him or her to disseminate the advertisement.

113085. In addition to other remedies herein provided, the department may bring an action in the superior court, and the court shall have jurisdiction upon hearing and for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of this chapter. Any proceeding under this section shall conform to the requirements of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the department shall not be required to allege facts necessary to show or tending to show lack of adequate remedy at law or to show or tending to show irreparable damage or loss.

Article 4. Adulteration

113090. A pet food ingredient or a processed pet food shall be deemed to be adulterated:

(a) If it bears or contains any poisonous or deleterious substance that may render it injurious to health; but in case the substance is not an added substance, the pet food shall not be considered adulterated under this subdivision if the quantity of the substance in pet food does not ordinarily render it injurious to health.

(b) If it bears or contains any added poisonous or deleterious substance, any food additive, any pesticide chemical, or any color additive that is unsafe within the meaning of the Federal Food, Drug and Cosmetic Act, or Part 5 (commencing with Section 109875), or Division 7 (commencing with Section 12501) of the Food and Agricultural Code.

(c) If it contains a pet food ingredient for which a standard of identity has been established and the pet food ingredient fails to meet that standard.

(d) If it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health.

(e) If its container is composed, in whole or in part, of any poisonous or deleterious substance that may render the contents injurious to health.

(f) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(g) If any substance has been substituted wholly or in part therefor.

(h) If damage or inferiority has been concealed in any manner.

(i) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight or reduce its quality or strength or make it appear better or of greater value than it is.

Article 5. Misbranding

113095. A pet food ingredient or processed pet food shall be deemed to be misbranded:

(a) If its labeling is false or misleading in any particular.

(b) If its container is so made, formed or filled as to be misleading.

(c) If in package form, unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure or numerical count.

Under clause (2) of subdivision (c), reasonable variation shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the department.

(d) If any word, statement or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with conspicuousness (as compared with other words, statements, designs or emblems, in the labeling) and in terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

113100. A pet food shall be deemed to be misbranded if it is not subject to Section 113105, unless its label bears (a) the common or usual name of the food, if any there be, and (b) in case it is fabricated from two or more ingredients, the common or usual name of each ingredient listed in descending order of predominance in the product. Spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings, without naming each.

113105. A processed pet food shall be deemed to be misbranded if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by Section 113115 unless (a) it conforms to the definition and standard, and (b) its label bears the name of the processed pet food specified in the definition and standard, and, insofar as may be required by regulations, the common names of optional pet food ingredients present in processed pet food. Spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings, without naming each.

113110. A processed pet food shall be deemed to be misbranded:

(a) If it purports to be or is represented for special dietary uses, unless its label bears information concerning its vitamin, mineral, and

other dietary properties as the department determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for those uses.

(b) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact. To the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the department.

Article 6. Administration

113115. When in the judgment of the department the action will promote honesty and fair dealing in the interest of the ultimate purchaser, the department may promulgate regulations establishing for any processed pet food or pet food ingredient any of the following:

(a) A reasonable definition and standard of identity.

(b) A reasonable standard of quality or fill of container.

(c) The method of treatment of products or ingredients to render them safe for pet feeding.

(d) Labeling information necessary to fully inform the purchaser thereof.

113120. This chapter shall be administered by the department in accordance with Part 5 (commencing with Section 109875).

CHAPTER 11. MISCELLANEOUS FOOD LAWS

Article 1. Dairy Product Safety

113150. (a) When there occurs, in the household of any dairy worker, milkman, milk dealer, milk distributor, creamery worker, or pasteurizing plant operator, a case or a suspected case of a milk transmitted disease listed pursuant to Section 120130, the sale or distribution of milk from those premises is prohibited unless written authorization for its sale or distribution is given by the health officer.

(b) A case or suspected case of any disease that occurs in the household of any of the above-mentioned persons, and that is known to be transmitted by milk, shall be reported immediately to the health officer.

113155. The department shall cooperate with the Department of Food and Agriculture in the inspection of any milk products plants associated with diseases reported pursuant to Section 120130. The Department of Food and Agriculture shall consult with the department prior to condemning milk or milk products that are determined to be contaminated based on a finding of illnesses listed pursuant to Section 120130.

Article 2. Beverage Containers

113200. As used in this chapter with the exception of Article 4 (commencing with Section 113300), unless the context requires otherwise:

(a) ''Beverage'' means beer or other malt beverages and mineral waters, soda water and similar carbonated soft drinks in liquid form and intended for human consumption.

(b) ''Beverage container'' means the individual, separate, sealed glass, metal or plastic bottle, can, jar or carton containing a beverage.

(c) ''Flip-top container'' means a metal beverage container so designed and constructed that a part of the container is severable in opening the containers.

(d) ''In this state'' means within the exterior limits of the State of California and includes all territory within these limits owned by or ceded to the United States of America.

(e) ''Non-flip-top container'' means a metal beverage container so designed and constructed that no part of the container is severable in opening the container.

113205. On and after January 1, 1979, no person shall sell or offer for sale in this state any metal beverage container so designed and constructed that a part of the container is severable in opening the container. Nothing in this section shall prohibit the sale in California of the containers for shipment out of state.

Any person who violates the provisions of this section is guilty of an infraction.

113210. The Secretary of the Resources Agency may extend permission to a manufacturer to sell flip-top containers for one or more periods of time for a total period not to exceed one year after January 1, 1979. The subsequent resale of these flip-top containers by other persons at wholesale or retail, empty or filled with beverages at any time subsequent to January 1, 1979, shall not be a violation of Section 113205.

In order to be eligible for an extension of permission to sell flip-top containers after January 1, 1979, a manufacturer shall file a request for extension by July 1, 1978, with the Secretary of the Resources Agency and shall accompany the request with a report that will indicate:

(a) The percentage of the total production of metal beverage containers made by the manufacturer in the calendar years of 1976 and 1977, and to May 31, 1978, that were non-flip-top containers manufactured for use within this state.

(b) The percentage of production of metal beverage containers the manufacturer shifted from flip-top containers to non-flip-top containers in the calendar years 1976 and 1977, and to May 31, 1978, for use within this state.

(c) The projected date when all production of metal beverage containers manufactured for use in this state will be non-flip-top containers.

(d) A general statement of the procedures the manufacturer is employing to effect the changeover to production of only non-flip-top containers for use within this state, and specific economic information regarding the manufacturer's planned investment in conversion to new equipment and techniques to effect the changeover to production of only non-flip-top containers for use within this state.

The secretary shall make public disclosure of all reports received.

113215. The Secretary of the Resources Agency shall conduct hearings upon the requests for extension prior to making decisions, so that members of the public and manufacturers may be heard, and shall receive evidence and make findings of fact. The secretary shall cause public notification of the time and place of the hearings 30 days prior to each hearing.

In order to grant an extension of permission to sell flip-top containers after January 1, 1979, the Secretary of the Resources Agency must make a determination that the manufacturer requesting the extension has made good faith efforts to comply with the act, but is unable to meet the time requirement for conversion, and that the manufacturer will suffer severe economic hardship as a direct result of the requirements of conversion.

If an extension is granted, the Secretary of the Resources Agency may require reports as often as he or she deems necessary, indicating the progress of the manufacturer toward compliance.

113220. There shall be no administrative appeal of the secretary's decision regarding a request for an extension. Judicial review of the decision of the Secretary of the Resources Agency on any request for an extension may be made by the manufacturer. In addition, any member of the public, without damages, at his or her own expense, has standing to bring an action for the purpose of inquiring into the validity of a decision of the secretary on the grounds of the abuse of discretion where the findings are unsupported by the evidence. This section shall not be construed to prohibit the use of any other remedy available under any other provision of law.

113225. (a) On and after July 1, 1981, or after a date one year after the determination by the State Solid Waste Management Board that degradable plastic connectors are commercially available, whichever date occurs later, no beverage shall be sold or offered for sale at retail in this state in beverage containers connected to each other with plastic rings or similar plastic devices that are not classified by the State Solid Waste Management Board as degradable, except as provided in subdivision (c).

(b) For the purposes of this section, ''degradable'' means all of the following:

(1) Degradation by biologic processes, photodegradation, chemodegradation, or degradation by other natural degrading processes.

(2) Degradation at a rate that is equal to, or greater than, the degradation by a process specified in paragraph (1) of other commercially available plastic devices.

(3) Degradation, that, as determined by the board, will not produce or result in a residue or byproduct that, during or after the process of degrading, would be a hazardous or extremely hazardous waste identified pursuant to Chapter 6.5 (commencing with Section 25100) of Division 20.

(c) This section shall not apply to plastic devices that the Solid Waste Management Board finds conform to either one of the following:

(1) Plastic devices that do not contain an enclosed hole or circle of more than $1^1/_2$ inches in diameter or that do not contain a hole.

(2) Plastic devices in which the ring is broken at the time the beverage container is removed from the ring.

(d) Any person who sells at wholesale or distributes to a retailer for sale at retail in this state a beverage in containers that are connected to each other in violation of the provisions of this section is guilty of an infraction and shall be punished by a fine not exceeding one thousand dollars ($1,000).

Article 3. Frozen Foods

113250. ''Low acid frozen food'' means a food that, by virtue of its low acid content, does not preclude the growth of Clostridium botulinum.

113255. Low acid frozen food shall be packaged in a container of distinctive appearance so as to indicate to the purchaser that the package is not ordinary canned goods of a nonperishable nature.

113260. The container shall bear a suitable legend to warn consumers that the product must be kept frozen until ready for use and that the contents should not be heated before opening.

113265. Low acid foods that are to be frozen and packaged in hermetically sealed metal containers, shall not be cooked in the container before freezing.

113270. The department shall enforce this chapter with the exception of Article 4 (commencing with Section 113300).

113275. The department may make regulations to secure the proper enforcement of this chapter, including regulations with respect to the sanitary preparation of articles of food for freezing, the use of containers, marks, tags, or labels, and the display of signs.

113280. Any person, firm, corporation, or agent violating any of the provisions of this chapter with the exception of Article 4 (commencing with Section 113300), or any rule or regulation issued

pursuant to this chapter with the exception of Article 4 (commencing with Section 113300), shall upon conviction be punished for the first offense by a fine not more than one thousand dollars ($1,000), or by imprisonment in the county jail for not more than six months, or by both.

Article 4. Food Crop Growing

113300. At the time stated in the notice the legislative body shall hear and consider all objections or protests, if any, to the imposition of the fees or charges as set forth in said notice and may continue the hearing from time to time.

113305. Upon the conclusion of the hearing, the legislative body may adopt, revise, change, reduce or modify the fees or charges or may overrule any or all objections and make its determination, which shall be final.

113310. The Legislature finds and declares that the people of the State of California have a primary interest in the sanitary conditions under which food crops are grown and harvested for human consumption and in the health and related sanitary conditions under which the workers are employed in the growing and harvesting of food crops.

The Legislature hereby finds and declares that the provision of sanitary and handwashing facilities for those employed in the growing and harvesting of food crops is necessary to the preservation of sanitation and health and that facilities are necessary to maintain the dignity of workers.

113315. For the purposes of this article ‘‘food crop’’ shall mean all fruits and vegetables intended for human consumption.

113320. For the purpose of this article ‘‘food crop growing and harvesting operation’’ shall mean any field activity or operation wherein a food crop is grown and harvested, where five or more employees are working as a crew, unit, or group for a period of two or more hours.

113325. Every employer shall provide or cause to be provided toilet and handwashing facilities for every food crop growing and harvesting operation.

113330. Employees shall use the toilet and handwashing facilities provided.

113335. Toilet facilities shall provide privacy and shall be so designed as to keep human excreta from contaminating the crop and to keep flies away from the excreta. Toilet paper shall be provided. Toilet facilities shall be maintained in a clean and sanitary condition.

113340. Handwashing facilities shall be such as to afford an opportunity to wash hands in clean water using soap or other suitable cleansing agent and to dispose of used wash water without nuisance or contamination of food crop.

113345. Toilet and handwashing facilities for food crop harvesting operations shall be provided at convenient locations. For the purpose of this article ‘‘convenient’’ means within a five-minute walk of place of work.

When, because of layout of access roads, ground terrain, or other physical conditions, it is not possible to comply with the foregoing requirement, toilet and handwashing facilities shall be located at the point of vehicular access closest to the workers.

113350. (a) Except as provided in Section 18930, the department, after consultation with the State Departments of Food and Agriculture and Industrial Relations, may make and adopt reasonable regulations in accordance with this article pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code and may adopt and submit building standards for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13. The regulations shall be at least as effective as those adopted pursuant to Section 6712 of the Labor Code.

(b) No part of this article shall be construed to abridge or limit in any manner the jurisdiction of the Division of Occupational Safety and Health pursuant to Division 5 (commencing with Section 6300) of the Labor Code.

113355. The primary responsibility for enforcement of this article shall be vested in the local health officers; county agricultural commissioners may participate in enforcement. The State Departments of Health Services, Industrial Relations, and Food and Agriculture may also enforce this article.

Any agency enforcing this article shall report any violation to all field offices of the Employment Development Department located in the county where the violation occurs. The report shall identify the employer responsible for the violation, the nature of the violation, and the location of the food crop growing and harvesting operation where the violation occurs. The Employment Development Department shall not refer persons for employment to any employer or food crop growing and harvesting operation identified in the report until the agency reporting the violation certifies that the violation has been corrected.

113360. Any person who knowingly and willfully violates any of the provisions of this article, or of the regulations adopted under this article, is guilty of a misdemeanor.

PART 7. RETAIL FOOD

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. RETAIL FOOD PRACTICES

Article 1. General Provisions

113700. This chapter shall be known and may be cited as the California Uniform Retail Food Facilities Law.

113705. The Legislature finds and declares that the public health interest requires that there be uniform statewide health and sanitation standards for retail food facilities to assure the people of this state that food will be pure, safe, and unadulterated. It is the intention of the Legislature to occupy the whole field of health and sanitation standards for these food facilities, and the standards set forth in this chapter and regulations adopted pursuant to its provisions shall be exclusive of all local health and sanitation standards relating to these facilities.

113710. The department shall adopt regulations to implement and administer this chapter.

113715. Nothing in this chapter shall prohibit a local governing body from adopting an evaluation or grading system for food facilities, from adopting an employee health certification or employee training program, from prohibiting any type of food facility, or from regulating the provision of patron toilet and handwashing facilities.

113720. In all laws and regulations, references to Chapter 6 (commencing with Section 28190), Chapter 11 (commencing with Section 28520), and Chapter 14 (commencing with Section 28800), of Division 22 of the Health and Safety Code, or to the California Bakery Sanitation Law, the California Restaurant Act, and the Retail Food Production and Marketing Establishments Law, shall mean this chapter or the California Uniform Retail Food Facilities Law.

113725. Primary responsibility for enforcement of this chapter shall be with local health agencies. Nothing in this chapter shall prevent the department from taking any necessary program or enforcement actions for the protection of the public health and safety.

Whenever the enforcement of the requirements of this chapter by any local enforcement agency is satisfactory to the department, the enforcement of this chapter shall not be duplicated by the department. The department may investigate to determine

satisfactory enforcement of this chapter by a local enforcement agency.

113730. Any construction, alteration, remodeling, or installation of equipment in a food establishment pursuant to this chapter shall be in accordance with applicable building codes and shall be approved by the enforcement officer.

Article 2. Definitions

113735. ''Adulterated'' means food that bears or contains any poisonous or deleterious substance that may render the food impure or injurious to health.

113740. ''Approved'' means acceptable to the department or health authority based on a determination of conformity with current public health principles, practices, and generally recognized industry standards.

113745. ''Certified farmers' market'' means a location certified by the county agricultural commissioner and operated as specified in Article 6.5 (commencing with Section 1392) of Title 3 of the California Code of Regulations.

113750. ''Commissary'' means a food establishment in which food, containers, equipment, or supplies are stored or handled for use in vehicles, mobile food preparation units, food carts, or vending machines.

113755. ''Employee'' means any person working in a food facility covered by this chapter.

113760. ''Enforcement agency'' means the department and all local health agencies.

113765. ''Enforcement officer'' means the director, agents, or sanitarians appointed by the Director of Health Services, and all local health officers, directors of environmental health, and their duly authorized registered sanitarians and sanitarian trainees.

113770. ''Equipment'' means all cooking units, hoods, cutting blocks, processing machines, tables, refrigerators, sinks, dish machines, steam tables, and other items used in a food facility.

113775. ''Food'' means any raw or processed substance, ice, beverage, or ingredient intended to be used as food, drink, confection, or condiment for human consumption.

113780. ''Food establishment'' means any room, building, or place, or portion thereof, maintained, used, or operated for the purpose of storing, preparing, serving, manufacturing, packaging, transporting, salvaging, or otherwise handling food at the retail level. ''Food establishment'' includes a restricted food service transient occupancy establishment, as defined in Section 113870.

''Food establishment'' does not include a commercial food processing establishment as defined in Section 111955, at the wholesale level, a vehicle, vending machine, satellite food

distribution facility, temporary food facility, open-air barbecue, certified farmers' market, stationary mobile food preparation unit, or mobile food preparation unit.

113785. (a) ''Food facility'' means all of the following:

(1) Any food establishment, vehicle, vending machine, produce stand, swap meet prepackaged food stand, temporary food facility, satellite food distribution facility, stationary mobile food preparation unit, and mobile food preparation unit.

(2) Any place used in conjunction with the operations described in paragraph (1), including, but not limited to, storage facilities for food-related utensils, equipment, and materials.

(3) A certified farmers' market, for purposes of permitting and enforcement.

(b) ''Food facility'' does not include any of the following:

(1) A cooperative arrangement wherein no permanent facilities are used for storing or handling food, or a private home, church, private club, or other nonprofit association that gives or sells food to its members and guests at occasional events, as defined in Section 113825, or a for-profit entity that gives or sells food at occasional events, as defined in Section 113825, for the benefit of a nonprofit association, if the for-profit entity receives no monetary benefit, other than that resulting from recognition for participating in the event.

(2) Premises set aside for winetasting, as that term is used in Section 23356.1 of the Business and Professions Code and in the regulations adopted pursuant to that section, if no food or beverage is offered for sale for onsite consumption.

113790. ''Food preparation'' means packaging, processing, assembling, portioning, or any operation that changes the form, flavor, or consistency of food, but does not include trimming of produce.

113795. ''Frozen food'' means a food maintained at a temperature at which all moisture therein is in a solid state, not to exceed O degrees Celsius (32 degrees Fahrenheit).

113800. ''Hearing Officer'' means a local health officer, a director of environmental health, or his or her designee.

113805. ''Hot dog'' means a whole cured, cooked sausage that is skinless or stuffed in a casing and that is also known as a frankfurter, frank, furter, wiener, red hot, vienna, bologna, garlic bologna, or knockwurst, and that may be served in a bun or roll.

113810. ''Impound'' means the legal control exercised by the enforcement officer over the use, sale, disposal, or removal of any food or equipment.

113815. ''Mobile food preparation unit'' means any vehicle or portable food service unit upon which food is prepared for service, sale, or distribution at retail. Mobile food preparation unit shall not include vehicles from which prepackaged food or approved

unpackaged food is sold or offered for sale as prescribed by Article 11 (commencing with Section 114250).

113820. ‘‘Multiservice utensil’’ means a utensil manufactured and approved for use more than one time.

113825. ‘‘Occasional event’’ means an event that occurs not more than three days in any 90-day period.

113830. ‘‘Open-air barbecue facility’’ means an unenclosed facility for barbecuing food, where the food is prepared out of doors by cooking directly over hot coals, heated lava, hot stones, gas flame, or other method approved by the state department, on equipment suitably designed and maintained for use out of doors, that is operated by a food establishment, stationary mobile food preparation unit, or temporary food facility.

113835. ‘‘Permit’’ means a written authorization to operate issued by a local enforcement officer.

113840. ‘‘Person’’ means any individual, firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, syndicate, city, county, or other political subdivision, or any other group or combination acting as a unit.

113845. ‘‘Potentially hazardous food’’ means food capable of supporting rapid and progressive growth of microorganisms that may cause food infections or food intoxications. ‘‘Potentially hazardous food’’ does not include edible shell eggs, foods that have a pH level of 4.6 or below, a water activity (Aw) value of 0.85 or less under standard conditions, or food products in hermetically sealed containers processed to prevent spoilage.

113850. ‘‘Produce’’ means any fruit or vegetable in its raw or natural state.

113855. ‘‘Produce stand’’ means a food establishment that sells, offers for sale, or gives away only produce or shell eggs, or both.

113860. ‘‘Refrigeration unit’’ means a mechanical unit that extracts heat from an area through liquification and evaporation of a fluid by a compressor, flame, or thermoelectric device. Refrigeration unit also includes a cold plate permanently connected to a compressor or any other unit approved by the department.

113865. ‘‘Remodeled’’ means construction, building, or repair to the food facility that requires a permit from the local building authority.

113870. ‘‘Restricted food service transient occupancy establishment’’ means an establishment of 20 guestrooms or less, that provides overnight transient occupancy accommodations, that serves food only to its registered guests, that serves only a breakfast or similar early morning meal, and with respect to which the price of the food is included in the price of the overnight transient occupancy accommodation. For purposes of this section, ‘‘restricted food service transient occupancy establishment’’ refers to an establishment as to which the predominant relationship between the

occupants thereof and the owner or operator of the establishment is that of innkeeper and guest. For purposes of this section, the existence of some other legal relationships as between some occupants and the owner or operator shall be immaterial.

113875. ‘‘Retail’’ means the storing, preparing, serving, manufacturing, packaging, transporting, salvaging, or otherwise handling food for dispensing or sale directly to the consumer.

113880. ‘‘Satellite food distribution facility’’ means either of the following:

(a) A location where only prepackaged, unit servings of food are distributed, that have been prepared or stored in an approved food facility operated by a school, governmental agency, or nonprofit organization.

(b) A stand, kiosk, cart, or other semi-permanent, remote, food-dispensing facility located within a defined and securable perimeter, including, but not limited to, an amusement park, stadium, arena, or enclosed shopping mall that operates a food establishment on the site.

113885. ‘‘Single service utensil’’ means a utensil that is manufactured and approved for use only once and that shall be discarded after use.

113890. ‘‘Stationary mobile food preparation unit’’ means a mobile food preparation unit that operates at a state, county, district, or citrus fair or any approved occasional event and that remains in a fixed position during food preparation and its hours of operation.

113895. ‘‘Temporary food facility’’ means a food facility operating out of temporary facilities approved by the enforcement officer at a fixed location for a period of time not to exceed 25 days in any 90-day period in conjunction with a single event or celebration.

113898. ‘‘Utensil’’ means any kitchenware, tableware, cutlery, glassware, container, implement, high chair tray, or other item with which food comes in contact during storage, transportation, display, preparation, serving, sale, or through use by an employee or consumer.

113900. ‘‘Vehicle’’ means any motorized or nonmotorized conveyance or portable food service unit upon which prepackaged food or approved unpackaged food is sold or offered for sale at retail. ‘‘Vehicle’’ does not include a mobile food preparation unit or a stationary mobile food preparation unit.

113903. ‘‘Vending machine’’ means any self-service device that, upon insertion of money or tokens, dispenses food without the necessity of replenishing the device between each vending operation. ‘‘Vending machine’’ does not include any device dispensing exclusively peanuts, nuts, popcorn, ballgum, or hard candy; prepackaged candy, cookies, crackers, or similar snacks and beverages that are not potentially hazardous as defined in Section 113845, and prepackaged ice.

113905. ‘‘Swap meet prepackaged food stand’’ means a food facility, other than a vehicle, operated at a swap meet, by a swap meet operator or its lessee, that offers for sale, or gives away, only prepackaged foods.

113908. ‘‘Prepackaged food’’ means any properly labeled processed food, prepackaged to prevent any direct human contact with the food product upon distribution from the manufacturer, and prepared at a facility approved by the enforcement agency.

113910. As used in this chapter, ‘‘swap meet’’ and ‘‘swap meet operator’’ shall have the meanings set forth in Section 21661 of the Business and Professions Code.

Article 3. Plan Review and Permits

113915. A person proposing to build or remodel a food facility shall submit complete plans and specifications to the local enforcement agency for review and approval pursuant to the requirements of this chapter. The plans shall be approved or rejected within 20 working days after receipt by the local enforcement agency and the applicant shall be notified of the decision. Unless the plans are approved or rejected within 20 working days, they shall be deemed approved. The building department shall not issue a building permit for a food facility until after it has received plan approval by the local enforcement officer.

113920. (a) A food facility shall not be open for business without a valid permit.

(b) A permit shall be issued by the local enforcement agency when investigation has determined that the proposed facility and its method of operation will conform to the requirements of this chapter. A permit, once issued, is nontransferable. A permit shall be valid only for the person, location, type of food sales, or distribution activity approved and, unless suspended or revoked for cause, for the time period indicated.

(c) Any fee for the permit and related services shall be determined by the local governing body. Fees shall be sufficient to cover the actual expenses of administering and enforcing this program, including the expenses of inspecting and impounding any utensil suspected of releasing lead or cadmium in violation of Section 108860 as authorized by Section 113930. All moneys collected as fees shall be expended in carrying out this chapter.

(d) A permit shall be posted in a conspicuous place in the food facility or in the office of a vending machine business.

Article 4. Enforcement and Inspection

113925. Enforcement officers are charged with the enforcement of this chapter and all regulations adopted pursuant to it.

An enforcement officer may enter, inspect, issue citations, and secure any sample, photographs, or other evidence from any food facility, or any facility suspected of being a food facility, for the purpose of enforcing this chapter. A written report of the inspection shall be made and a copy shall be supplied or mailed to the owner, manager, or operator of the food facility.

113930. (a) Based upon inspection findings or other evidence, an enforcement officer may do any of the following:

(1) Impound any food that is found to be, or suspected of being, contaminated or adulterated.

(2) Impound equipment or utensils that are found to be unsanitary or in such disrepair that food, equipment, or utensils may become contaminated or adulterated, and inspect, impound, or inspect and impound any utensil that is suspected of releasing lead or cadmium in violation of Section 108860. The enforcement officer may attach a tag to the food, equipment, or utensils that shall be removed only by the enforcement officer following verification that the condition has been corrected.

(b) No food, equipment, or utensils impounded pursuant to subdivision (a) shall be used unless the impoundment has been released.

(c) Within 30 days the enforcement agency that has impounded the food, equipment, or utensils pursuant to subdivision (a) shall commence proceedings to release the impounded materials or to seek administrative or legal remedy for its disposition.

113935. Any person who violates any provision of this chapter or regulation adopted pursuant to this chapter is guilty of a misdemeanor. Each offense shall be punished by a fine of not less than twenty-five dollars ($25) or more than one thousand dollars ($1,000) or by imprisonment in the county jail for a term not exceeding six months, or by both fine and imprisonment.

113940. The owner, manager, or operator of any food facility is responsible for any violation by an employee of any provision of this chapter or any regulation adopted pursuant to this chapter. Each day the violation occurs shall be a separate and distinct offense.

113945. A violation of any provision of this chapter or regulation adopted pursuant to this chapter relating to facilities held in common or shared by more than one food facility shall be deemed a violation for which the owner, manager, or operator of each food facility is responsible.

Article 5. Permit Suspension or Revocation

113950. Any permit may be suspended or revoked by a local enforcement officer for a violation of this chapter. Any food facility for which the permit has been suspended shall close and remain closed until the permit has been reinstated. Any food facility for

which the permit has been revoked shall close and remain closed until a new permit has been issued.

Whenever a local enforcement officer finds that a food facility is not in compliance with the requirements of this chapter, a written notice to comply shall be issued to the permittee. If the permittee fails to comply, the local enforcement officer shall issue to the permittee a notice setting forth the acts or omissions with which the permittee is charged, and informing him or her of a right to a hearing, if requested, to show cause why the permit should not be suspended or revoked. A written request for a hearing shall be made by the permittee within 15 calendar days after receipt of the notice. A failure to request a hearing within 15 calendar days after receipt of the notice shall be deemed a waiver of the right to a hearing. When circumstances warrant, the hearing officer may order a hearing at any reasonable time within this 15-day period to expedite the permit suspension or revocation process.

The hearing shall be held within 15 calendar days of the receipt of a request for a hearing. Upon written request of the permittee, the hearing officer may postpone any hearing date, if circumstances warrant the action.

113955. The hearing officer shall issue a written notice of decision to the permittee within five working days following the hearing. In the event of a suspension or revocation, the notice shall specify the acts or omissions with that the permittee is charged, and shall state the terms of the suspension or that the permit has been revoked.

113960. (a) If any immediate danger to the public health or safety is found, unless the danger is immediately corrected, an enforcement officer may temporarily suspend the permit and order the food facility immediately closed. Immediate danger to the public health and safety means any condition, based upon inspection findings or other evidence, that can cause food infection, food intoxication, disease transmission, or hazardous condition, including, but not limited to, unsafe food temperature, sewage contamination, nonpotable water supply, or an employee who is a carrier of a communicable disease.

(b) Whenever a permit is suspended as the result of an immediate danger to the public health or safety, the enforcement officer shall issue to the permittee a notice setting forth the acts or omissions with which the permittee is charged, specifying the pertinent code section, and informing the permittee of the right to a hearing.

(c) At any time within 15 calendar days after service of a notice pursuant to subdivision (b), the permittee may request in writing a hearing before a hearing officer to show cause why the permit suspension is not warranted. The hearing shall be held within 15 calendar days of the receipt of a request for a hearing. A failure to request a hearing within 15 calendar days shall be deemed a waiver of the right to a hearing.

113965. The enforcement agency may, after providing opportunity for a hearing, modify, suspend, or revoke a permit for serious or repeated violations of any of the requirements of this code or for interference in the performance of the duty of the enforcement officer.

113970. A permit may be reinstated or a new permit issued if the enforcement agency determines that conditions which prompted the suspension or revocation no longer exist.

Article 6. General Sanitation Requirements

113975. This article governs general sanitation requirements for food facilities as defined in this chapter.

113980. All food shall be manufactured, produced, prepared, compounded, packed, stored, transported, kept for sale, and served so as to be pure, free from contamination, adulteration, and spoilage; shall have been obtained from approved sources; shall otherwise be fully fit for human consumption; and shall conform to the applicable provisions of the Sherman Food, Drug, and Cosmetic Law (Part 5 (commencing with Section 109875)).

113985. Any food facility that serves or sells over the counter directly to the consumer an unlabeled or unpackaged food that is a confectionery that contains alcohol in excess of $^1/_2$ of 1 percent by weight shall provide written notice to the consumer of that fact. The notice shall be prominently displayed or be provided in some other manner, as determined by the department. The department shall adopt regulations to govern the notice required by this section in order to effectuate the purposes of this section.

Article 7. Sanitation Requirements for Food Facilities

113990. This article governs sanitation requirements for food facilities as defined in this chapter.

113995. All potentially hazardous food shall be held at or below 7 degrees Celsius (45 degrees Fahrenheit) or shall be kept at or above 60 degrees Celsius (140 degrees Fahrenheit) at all times. A thermometer accurate to plus or minus 1 degree Celsius (2 degrees Fahrenheit) shall be provided for each refrigeration unit, shall be located to indicate the air temperature in the warmest part of the unit and, except for vending machines, shall be affixed to be readily visible. Containers of potentially hazardous food displayed for service may be placed in an ice bed or held by a similar means that maintains the food at or below 7 degrees Celsius (45 degrees Fahrenheit). Except for vending machines, an accurate easily readable metal probe thermometer suitable for measuring the temperature of food shall be readily available on the premises.

114000. Raw duck, that otherwise would be readily perishable, shall be exempt from the provisions of Section 113995 for a period not to exceed two hours, if the duck will subsequently be cooked at or above a temperature of 177 degrees Celsius (350 degrees Fahrenheit) for at least 60 minutes.

(a) Whole Chinese-style roast duck shall be exempted from Section 113995 for a period not to exceed four hours after the duck is prepared, since the methods used to prepare these foods inhibit the growth of microorganisms that can cause food infections or food intoxications.

Nothing in this section shall be construed to supersede any provision of this chapter except the provisions specified in this section.

(b) For the purpose of this section, ''Chinese-style roast duck'' shall include, but is not limited to, Chinese-style barbecue duck, dry hung duck, and Peking duck. Chinese-style roast duck means duck that is prepared as follows:

(1) The abdominal cavity is cleaned.

(2) The duck is marinated.

(3) The cavity is closed prior to cooking.

(4) The duck is roasted at a temperature of 177 degrees Celsius (350 degrees Fahrenheit) or more for at least 60 minutes.

114005. The local enforcement agency may approve the use of legally obtained donated fish and game by nonprofit organizations authorized to serve meals to indigent persons.

''Fish,'' as used in this section, shall be defined as that term is used in Section 45 of the Fish and Game Code.

''Game,'' as used in this section, means any game bird, as defined in Section 3500 of the Fish and Game Code, or game mammal, as defined in Section 3950 of the Fish and Game Code.

114010. All food shall be prepared, stored, displayed, dispensed, placed, transported, sold, and served as to be protected from dirt, vermin, unnecessary handling, droplet contamination, overhead leakage, or other contamination.

114015. (a) (1) No unpackaged food that has been served to any person or returned from any eating area shall be served again or used in the preparation of other food.

(2) No food prepared or stored in a private home shall be used, stored, served, offered for sale, sold, or given away in a food facility.

(3) Except as provided in paragraph (4), a private home shall not be used for the purpose of giving away, selling, or handling food at retail, as defined in Section 113875.

(4) Nonperishable, prepackaged food may be given away, sold, or handled from a private home.

(b) Except as provided in subdivision (c) of Section 114080, every bakery product shall have a protective wrapping which shall bear a label which complies with the labeling requirements prescribed by

the Sherman Food, Drug, and Cosmetic Law (Part 5 (commencing with Section 109875)). Bakery products sold directly to a restaurant, catering service, retail bakery, or sold over the counter directly to the consumer by the manufacturer or bakery distributor shall be exempt from this subdivision. French style, hearth-baked, or hard-crusted loaves and rolls shall be considered properly wrapped if contained in an open-end bag of sufficient size to enclose the loaves or rolls.

114020. All employees preparing, serving, or handling food or utensils shall wear clean, washable outer garments, or other clean uniforms, and shall keep their hands clean. All employees shall wash their hands and arms with cleanser and warm water before commencing work, immediately after using toilet facilities, and at other times as are necessary to prevent contamination of food. Legible signs shall be posted in each toilet room directing attention to this requirement. All employees shall wear hairnets, caps, or other suitable coverings to confine all hair when required to prevent the contamination of food or utensils. Employees serving food shall use tongs or other implements, rather than their hands. No employee shall expectorate or use tobacco in any form in any area where food is prepared, served, or stored or utensils are cleaned or stored. No employee shall commit any act that may result in contamination or adulteration of any food, food contact surface, or utensil. The employer shall post and maintain ''No Smoking'' signs in food preparation, food storage, utensil cleaning, and utensil storage areas.

When information as to the possibility of disease transmission is presented to an enforcement officer, he or she shall investigate conditions and take appropriate action. The enforcement officer may, after investigation and for reasonable cause, require any or all of the following measures to be taken:

(a) The immediate exclusion of any employee from the affected food facility.

(b) The immediate closing of the food facility until, in the opinion of the enforcement officer, no further danger of disease outbreak exists. Any appeal of the closure shall be made in writing within five days to the applicable enforcement agency.

(c) A medical examination of any employee, with any laboratory examination that may be indicated. Should a medical examination be refused by an employee, the enforcement officer may require the immediate exclusion of the refusing employee from that or any other food facility until an acceptable medical or laboratory examination shows that the employee is not affected with a disease in a communicable form.

114025. No insecticide, rodenticide, or other poisonous substance shall be stored in any food preparation area, except in a separate enclosure provided for that purpose. All poisonous substances, detergents, bleaches, cleaning compounds, or any other injurious or poisonous material shall be specifically and plainly labeled as to

contents and hazardous use and shall be stored only in their original, labeled container. None of these products shall be used or stored in a manner that may cause contamination or adulteration of food, food contact surfaces, or utensils.

114030. A food facility shall at all times be so constructed, equipped, maintained, and operated as to prevent the entrance and harborage of animals, birds, and vermin, including, but not limited to, rodents and insects.

114035. Each food facility shall be provided with any facilities and equipment necessary to store or dispose of all waste material. All food waste and rubbish containing food waste shall be kept in leakproof and rodentproof containers and shall be contained so as to minimize odor and insect development by covering with close-fitting lids or placement in a disposable bag that is impervious to moisture and then sealed. Trash containers inside a food facility need not be covered during periods of operation. All food waste and rubbish shall be removed and disposed of in a sanitary manner as frequently as may be necessary to prevent the creation of a nuisance.

114040. The premises of each food facility shall be kept clean and free of litter, rubbish, and vermin.

114045. (a) Except as otherwise provided in subdivision (b), no live animal, bird, or fowl shall be kept or allowed in any food facility.

(b) Subdivision (a) does not prohibit the presence, in any room where food is served to the public, guests, or patrons, of a guide dog, signal dog, or service dog, as defined by Section 54.1 of the Civil Code, accompanied by a totally or partially blind person, deaf person, person whose hearing is impaired, or handicapped person, or dogs accompanied by persons licensed to train guide dogs for the blind pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code.

(c) Subdivision (a) does not apply to dogs under the control of uniformed law enforcement officers or of uniformed employees of private patrol operators and operators of a private patrol service who are licensed pursuant to Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code, while these employees are acting within the course and scope of their employment as private patrol persons.

(d) The persons and operators described in subdivisions (b) and (c) are liable for any damage done to the premises or facilities by the dog.

(e) The dogs described in subdivisions (b) and (c) shall be excluded from food preparation and utensil wash areas. Aquariums and aviaries shall be allowed if enclosed so as not to create a public health problem.

114050. All food facilities and all equipment, utensils, and facilities shall be kept clean, fully operative, and in good repair.

114055. Frozen food shall be kept frozen except as provided in Section 114085.

114060. (a) Manual sanitization shall be accomplished in the final sanitizing rinse by one of the following:

(1) Contact with a solution of 100 ppm available chlorine solution for 30 seconds.

(2) Contact with a solution of 25 ppm available iodine for one minute.

(3) Contact with a solution of 200 ppm quaternary ammonium for one minute.

(4) Contact with water of at least 82 degrees Celsius (180 degrees Fahrenheit) for 30 seconds.

(b) In-place sanitizing shall be as described in paragraph (1), (2), (3), or (4) of subdivision (a).

(c) Other methods may be used if approved by the department.

(d) Testing equipment and materials shall be provided to adequately measure the applicable sanitization method.

114065. All new and replacement equipment shall meet or be equivalent to applicable National Sanitation Foundation (NSF) standards or, in the absence of applicable NSF standards, be approved by the enforcement officer.

114070. Sulfites shall not be added to potentially hazardous foods.

Article 8. Sanitation Requirements for Food Establishments

114075. This article governs sanitation requirements for food establishments, as defined in this chapter.

114080. (a) Adequate and suitable space shall be provided for the storage of food. Except for large or bulky food containers, all food shall be stored at least 15 centimeters (6 inches) off the floor or under other conditions that are approved. Containers may be stored on dollies, racks, or pallets not meeting this height requirement, if these items are easily movable. All cartons, boxes, or other materials used in the packaging of any food shall be protected at all times from dirt, vermin, and other forms of contamination or adulteration. All returned or damaged food products and food product from which the label has been removed shall be separated and stored in a separate area and in a manner that will prevent adulteration of other foods and shall not contribute to a vermin problem. Bulk food not stored in original packaging shall be stored in containers identifying the food by common name.

(b) Unpackaged food may be displayed in bulk for customer self-service under the following conditions:

(1) Produce and food requiring further processing may be displayed on open counters or in containers.

(2) Salad bars, buffet-type food service, and other ready-to-eat food shall:

(A) Be shielded so as to intercept a direct line between the customer's mouth and the food being displayed, or shall be in a container that has a tight-fitting, securely attached lid, or may be dispensed from approved mechanical dispensers.

(B) Be stored so as to be protected from vermin or other contamination.

(C) When displayed in a self-service container, shall be provided with a utensil with a handle for dispensing the product.

(3) Except for salad bar and buffet-type food service, a label is conspicuously displayed in plain view of the customer and securely attached to each self-service container, or in clear relationship thereto, that contains all of the following:

(A) The common name of the product.

(B) A declaration of the ingredients used by their common or usual name in descending order of predominance by weight. The declaration shall be provided in writing to the food establishment by the manufacturer, packer, or distributor.

(3) Nonfood items shall be displayed and stored in an area separate from food.

(c) Unpackaged food may be displayed and sold in bulk in other than self-service containers if both of the following conditions are satisfied:

(1) The food is served by an employee of the food establishment directly to a consumer.

(2) The food is displayed in clean, sanitary, and covered or otherwise protected containers.

(d) If the director makes a specific finding that a disease is actually transmitted by the method of dispensing unpackaged foods, as prescribed by this section, the director may establish by regulation greater restrictions on the sale of that food than are required by this section. These regulations shall bear directly on the specific relationship between the disease actually transmitted and the dispensing methods permitted by this section.

114085. (a) All frozen food shall be kept at a temperature that will keep the food in the frozen state until ready for processing or preparation. No food that has been thawed shall be refrozen unless it has been cooked or processed.

(b) Potentially hazardous frozen foods shall be thawed only:

(1) In refrigeration units.

(2) Under potable running water of sufficient velocity to flush loose food particles into the sink drain.

(3) In a microwave oven.

(4) As part of the cooking process.

114090. (a) All utensils and equipment shall be scrapped, cleaned, or sanitized as circumstances require.

(b) All food establishments in which food is prepared or in which multiservice kitchen utensils are used shall have at least a

two-compartment metal sink with two integral metal drainboards. Additional drainage space may be provided that is not necessarily attached to the sink. The sink compartments and drainage facilities shall be large enough to accommodate the largest utensil or piece of equipment to be cleaned therein. A one-compartment sink that is in use on January 1, 1985, may be continued in use until replaced.

(c) All food establishments in which multiservice consumer utensils are used shall clean the utensils in one of the following ways:

(1) Handwashing of utensils using a three-compartment metal sink with dual integral metal drainboards where the utensils are first washed by hot water and a cleanser until they are clean, then rinsed in clear, hot water before being immersed in a final warm solution meeting the requirements of Section 114060.

(2) Machine washing of utensils in machines using a hot water or chemical sanitizing rinse shall conform to National Sanitation Foundation (NSF) standards, and shall be installed and operated in accordance with those standards. The machines shall be of a type, and shall be installed and operated as approved by the department. The velocity, quantity, and distribution of the washwater, type and concentration of detergent used therein, and the time the utensils are exposed to the water, shall be sufficient to clean the utensils. The quantity and pressure of rinse water and the time of exposure shall provide bactericidal effectiveness equivalent to that provided by compliance with NSF standards, or more restrictive standards if approved by the department. All new spray-type dish machines designed for hot water sanitizing shall be equipped with a self-sealing temperature and pressure test plug. The test plug shall be located immediately upstream of the rinse manifold in a horizontal position and on the machine exterior.

(3) A two-compartment metal sink, having metal drainboards, equipped for hot water sanitization, that is in use on January 1, 1985, may be continued in use until replaced.

(4) Other methods may be used after approval by the department.

(d) Hot and cold water under pressure shall be provided through a mixing valve to each sink compartment in all food establishments constructed on or after January 1, 1985.

(e) All utensil washing equipment, except undercounter dish machines, shall be provided with two integral metal drainboards of adequate size and construction. One drainboard shall be attached at the point of entry for soiled items and one shall be attached at the point of exit for cleaned and sanitized items. Where an undercounter dish machine is used, there shall be two metal drainboards, one for soiled utensils and one for clean utensils, located adjacent to the machine. The drainboards shall be sloped and drained to an approved waste receptor. This requirement may be satisfied by using the drainboards appurtenant to sinks as required in subdivision (b)

and paragraph (1) of subdivision (c), if the facilities are located adjacent to the machine.

(f) The handling of cleaned and soiled utensils, equipment, and kitchenware shall be undertaken in a manner that will preclude possible contamination of cleaned items with soiled items.

(g) All utensils, display cases, windows, counters, shelves, tables, refrigeration units, sinks, dishwashing machines, and other equipment or utensils used in the preparation, sale, service, and display of food shall be made of nontoxic, noncorrosive materials, shall be constructed, installed, and maintained to be easily cleaned, and shall be kept clean and in good repair.

(h) Utensils and equipment shall be handled and stored so as to be protected from contamination. Single-service utensils shall be obtained only in sanitary containers or approved sanitary dispensers, stored in a clean, dry place until used, handled in a sanitary manner, and used once only.

114095. An adequate, protected, pressurized, potable supply of hot water, at least 49 degrees Celsius (120 degrees Fahrenheit), and cold water shall be provided. The water supply shall be from a water system approved by the health officer or the state department. Any hose used for conveying potable water shall be constructed of nontoxic materials, shall be used for no other purpose, and shall be clearly labeled as to its use. The hose shall be stored and used so as to be kept free of contamination. The potable water supply shall be protected with a back flow or back siphonage protection device, as required by applicable plumbing codes.

114100. All plumbing and plumbing fixtures shall be installed in compliance with local plumbing ordinances, shall be maintained so as to prevent any contamination, and shall be kept clean, fully operative, and in good repair.

All liquid wastes shall be disposed of through the plumbing system that shall discharge into the public sewerage or into an approved private sewage disposal system.

All steam tables, ice machines and bins, food preparation sinks, display cases, and other similar equipment that discharge liquid waste shall have this waste conveyed by a closed system, such as by a tube or rigid pipe, to an approved sewer line and disposed therein by an indirect connection. Drainage from refrigeration units shall be conducted in a sanitary manner to a floor sink or other approved device by an indirect connection or to a properly installed and functioning evaporator. Indirect waste receptors shall be located to be readily accessible for inspection and cleaning. Dishwashing machines may be connected directly to the sewer immediately downstream from a floor drain or they may be drained through an approved indirect connection.

114105. In each food establishment, there shall be provided clean toilet facilities in good repair for use by employees. The number of

toilet facilities required shall be in accordance with local building and plumbing ordinances. Toilet facilities whose construction begins on or after January 1, 1985, and that are provided for use by patrons, shall be so situated that patrons do not pass through food preparation, food storage, or utensil washing areas. Toilet rooms shall be separated from other portions of the food establishment by well-fitting, self-closing doors or by other methods approved by the enforcement officer. Toilet rooms shall not be used for the storage of food, equipment, or supplies. Toilet tissue shall be provided in a permanently installed dispenser at each toilet.

114110. Amusement parks, stadiums, arenas, retail shopping centers, and similar premises, that include food facilities and toilet facilities within their boundaries, shall not be required to provide toilet facilities for employee use within each food establishment, as specified by Section 114105, if approved toilet facilities are located within 300 feet of each food establishment and are readily available for use by employees. Food establishments subject to this section shall be provided with handwashing facilities for employee use, as required by Section 114115.

114115. Handwashing facilities shall be provided within or adjacent to toilet rooms and shall be equipped with an adequate supply of hot and cold running water under pressure. Facilities constructed on or after January 1, 1985, shall have that water provided from a combination faucet, or water from a premixing faucet that supplies warm water for a minimum of 10 seconds while both hands are free for washing. The number of handwashing facilities required shall be in accordance with local building and plumbing ordinances. Handwashing cleanser and single-use sanitary towels or hot-air blowers shall be provided in dispensers at, or adjacent to, handwashing facilities. Food establishments beginning construction or extensive remodeling on or after January 1, 1985, shall provide facilities exclusively for handwashing within, or adjacent to, each kitchen.

114120. Clean toilet facilities, in good repair, shall be provided for patrons, guests, or invitees on property used in connection with, or in, each food establishment with more than 20,000 square feet of floor space.

For the purposes of this section, the gas pump area of a service station that is maintained in conjunction with a food establishment shall not be considered as property used in connection with the food establishment or be considered in determining the square footage of floorspace of the food establishment.

There shall be at least one separate toilet facility for men and one separate toilet facility for women. Toilet rooms shall be separated by well-fitted, self-closing doors that prevent passage of flies, dust, or odors.

Handwashing facilities, in good repair, shall be provided for patrons, guests, or invitees within or adjacent to toilet rooms and shall be equipped with hot and cold running water. Handwashing detergent or soap and sanitary towels or hot-air blowers shall be provided at handwashing facilities in permanently installed dispensing devices. Notwithstanding any other provision of law, other than Section 114125, a violation of this section shall be an infraction.

114125. The requirements of Section 114120 for restroom facilities that are accessible to patrons, guests, or invitees on the property may be satisfied by permitting access by those persons to the toilet and handwashing facilities that are required by other provisions of this chapter.

However, if the requirements of Section 114120 are satisfied by permitting access by those persons to the toilet and handwashing facilities that are required by other provisions of this chapter, a violation of these provisions shall be a misdemeanor punishable pursuant to Section 113935.

114130. Sections 114120 and 114125 apply only to food establishments as to which construction is commenced on or after July 1, 1984.

114135. A room, enclosure, or designated area, separated from toilets, food storage, food preparation areas, and utensil washing areas, shall be provided where employees may change and store clothes. No employee shall store clothing or personal effects in any other area on the premises.

114140. Ventilation shall be provided to remove gases, odors, steam, heat, grease, vapors, or smoke from the food establishment.

All areas shall have sufficient ventilation to facilitate proper food storage and to provide a reasonable condition of comfort for any employee, consistent with the job performed by the employee. On or after January 1, 1985, there shall be provided mechanical exhaust ventilation at or above all newly installed cooking equipment as required in Article 10.4 (commencing with Section 13670) of Title 17 of, and Chapter 4-20 (commencing with Section 4-2000) of Part 4 of Title 24 of, the California Administrative Code.

The provisions of this section shall not apply to cooking equipment when that equipment has been submitted to the department for evaluation, and it has found that the equipment does not produce toxic gases, smoke, grease, vapors, and heat when operated under conditions recommended by the manufacturer.

Toilet rooms shall be vented to the outside air by means of an openable, screened window, an air shaft, or a light-switch-activated exhaust fan, consistent with the requirements of local building codes.

114145. Each food establishment, except produce stands and swap meet prepackaged food stands, shall be fully enclosed in a building consisting of floors, walls, and overhead structure that meet

the minimum standards prescribed by this chapter. Food establishments that are not fully enclosed on all sides and that are in operation on January 1, 1985, shall not be required to meet the requirement for a fully enclosed structure pursuant to this section. This section shall not be construed to require the enclosure of dining areas or open-air barbecue facilities.

114150. (a) Except in sales areas of retail food establishments and as otherwise provided in subdivision (d), the floor surfaces in all areas in which food is prepared, packaged, or stored, where any utensil is washed, where refuse or garbage is stored, where janitorial facilities are located, and, except with respect to areas relating to guestroom accommodations and the private accommodations of owners and operators in restricted food service transient occupancy establishments, as defined in Section 113870, in all toilet and handwashing areas, and in employee change and storage areas shall be smooth and of durable construction and nonabsorbent material that is easily cleaned.

These floor surfaces shall be coved at the juncture of the floor and wall with a 10 millimeter ($^3/_8$ inch) minimum radius coving and shall extend up the wall at least 10 centimeters (4 inches) except in areas where food is stored only in unopened bottles, cans, cartons, sacks, or other original shipping containers.

(b) Upon new construction or extensive remodeling on or after January 1, 1985, floor drains shall be installed as follows:

(1) In floors that are water-flushed for cleaning.

(2) In areas where pressure spray methods for cleaning equipment are used.

Floor surfaces in areas pursuant to this subdivision shall be sloped 1:50 to the floor drains.

(c) Upon new construction or extensive remodeling on or after January 1, 1985, floor sinks, funnel drains, or equivalent devices shall be installed to receive discharges of water or other fluid waste from equipment.

(d) Except for dining and serving areas, the use of sawdust, wood shavings, peanut hulls, or similar materials is prohibited.

(e) This section shall not prohibit the use of approved dust-arresting floor sweeping and cleaning compounds during floor cleaning operations or the use of approved antislip floor finishes or materials in areas where necessary for safety reasons.

(f) Food establishments that are in operation on January 1, 1985, and in which sawdust is used as an absorbent in meat holding units may continue this use until the floor is replaced.

114155. The walls and ceilings of all rooms, except for bar areas, rooms where food is stored in unopened containers, and dining areas, shall be of a durable, smooth, nonabsorbent, washable surface. Walls and ceilings of food preparation and utensil washing areas and interior surfaces of walk-in refrigeration units shall also be

light-colored. Wall areas adjacent to bar sinks shall be smooth, nonabsorbent, and washable surface. Acoustical paneling may be utilized providing it is installed not less than 1.8 meters (6 feet) above the floor. Any perforations shall not penetrate the entire depth of the panel, shall not be greater than 3 millimeters ($^1/_8$ inch) in any dimension, and shall not comprise more than 25 percent of the exposed panel surface. The paneling shall otherwise meet the requirements of this section.

Conduits of all types shall be installed within walls as practicable. When otherwise installed, they shall be mounted or enclosed so as to facilitate cleaning.

114160. Adequate and suitable space shall be provided for the storage of clean linens, including apparel, towels, and cleaning cloths.

Soiled linens, apparel, towels, tablecloths, and cleaning cloths shall be kept in cleanable containers provided only for this purpose and shall not be reused until they have been laundered.

114165. (a) A room, area, or cabinet separated from any food preparation or storage area, or utensil washing or storage area, shall be provided for the storage of cleaning equipment and supplies, such as mops, buckets, brooms, cleansers, and waxes.

(b) Any food establishment constructed or extensively remodeled on or after January 1, 1985, shall be equipped with at least one of the following to be used exclusively for general cleaning purposes and for the disposal of mop bucket wastes and other liquid wastes:

(1) A one-compartment, nonporous janitorial sink.

(2) A slab, basin, or floor constructed of concrete or equivalent material, curbed and sloped to a drain. Such facilities shall be connected to approved sewerage and provided with hot and cold running water through a mixing valve and protected with a backflow protection device.

114170. In every room and area in which any food is prepared, manufactured, processed, or packaged, or in which utensils are cleaned, sufficient natural or artificial lighting shall be provided to produce an intensity of not less than 215 lux (20 footcandles) as measured 76 centimeters (30 inches) above the floor, except that the working surfaces on which alcoholic beverages are prepared or where utensils used in the preparation or service of alcoholic beverages are cleaned, shall be provided with at least 108 lux (10 footcandles) of light. Food and utensil storage rooms, refrigeration storage, and toilet and dressing rooms shall be provided with at least 108 lux (10 footcandles) of light. Light fixtures in areas where food is prepared or where open food is stored or where utensils are cleaned shall be of shatterproof construction or shall be protected with shatterproof shields and shall be readily cleanable.

During general cleanup activities, at least 215 lux (20 footcandles) of light, measured 76 centimeters (30 inches) above the floor, shall

be provided in the area being cleaned, including, but not limited to, areas where alcoholic beverages are prepared or served.

114175. No sleeping accommodations shall be maintained or kept in any room where food is prepared, stored, or sold. All living and sleeping quarters shall be separated from the food establishment. No door or other opening shall be permitted in the partition that separates the food establishment from the living or sleeping quarters.

114180. (a) The department shall adopt and approve first aid instructions designed and intended for use in removing food that may become stuck in a person's throat. These instructions shall be limited to first aid techniques not involving the use of any physical instrument or device inserted into the victim's mouth or throat.

(b) The department shall supply to the proprietor of every on-site eating establishment adopted and approved instructions pursuant to subdivision (a). The proprietor shall post the instructions in a conspicuous place or places, which may include an employee notice board, in order that the instructions may be consulted by anyone attempting to provide relief to a victim in a choking emergency.

(c) In the absence of other evidence of noncompliance with this section, the fact that the instructions were not posted as required by this section at the time of a choking emergency shall not in and of itself subject the proprietor or his or her employees or independent contractors to liability in any civil action for damages for personal injuries or wrongful death arising from a choking emergency.

(d) Nothing in this section shall impose any obligation on any person to remove, assist in removing, or attempt to remove food that has become stuck in another person's throat. In any action for damages for personal injuries or wrongful death, neither the proprietor nor any person who removes, assists in removing, or attempts to remove the food in accordance with instructions adopted by the department shall be liable for any civil damages as a result of any acts or omissions by the person in rendering emergency assistance.

Article 9. Open Air Barbecue Facilities

114185. This article governs sanitation requirements for open-air barbecue facilities as defined in this chapter.

114190. Notwithstanding the provisions of this chapter, neither the state department nor any city, county, or city and county shall require the enclosure of an open-air barbecue facility if the appropriate enforcement officer determines that the barbecue facility meets all of the following requirements:

(a) The facility is operated on the same premises as, in reasonable proximity to, and in conjunction with, a food establishment, temporary food facility, or stationary mobile food preparation unit.

(b) All food waste and rubbish containing food waste is handled in accordance with the requirements of Section 114035.

(c) The facility is operated in compliance with Articles 6 (commencing with Section 113975) and 7 (commencing with Section 113990), except for Sections 114030, 114045, and 114060.

(d) The multiservice utensils and equipment used in conjunction with the open-air barbecue facility are made of nontoxic materials, are constructed and maintained in a manner so they can be easily cleaned, and are kept clean and in good repair.

(e) Food and beverages served out of doors are dispensed from units approved by the enforcement officer. No other food may be prepared or stored in the out of doors, except for food cooked on the open-air barbecue unit.

(f) (1) Except as otherwise provided in paragraph (2), no live animals, birds, or fowl shall be kept or allowed in an area within 20 feet of any area where food or beverage is prepared, stored, kept, or served.

(2) Paragraph (1) does not prohibit the presence, in any area where food is served to the public, guests, or patrons, of a guide dog, signal dog, or service dog, as defined by Section 54.1 of the Civil Code, accompanied by a totally or partially blind person, deaf person, person whose hearing is impaired, or handicapped person, or dogs accompanied by persons licensed to train guide dogs for the blind pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code.

(3) Paragraph (1) does not apply to dogs under the control of uniformed law enforcement officers or of uniformed employees of private patrol operators and operators of a private patrol service who are licensed pursuant to Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code, while those employees are acting within the course and scope of their employment as private patrol persons.

(4) Those persons and operators described in paragraphs (2) and (3) are liable for any damage done to the premises or facilities by the dog.

(g) If the barbecue facility is a permanent structure, it is equipped with an impervious and easily cleaned floor surface that extends a minimum of five feet from the open-air barbecue facility on all open sides.

(h) The barbecue facility is located in an area reasonably protected from dust, as determined by the enforcement officer.

(i) The barbecue facility is not operated in, or out of, any motor vehicle or in any area or location that may constitute a fire hazard, as determined by the enforcement officer. For the purposes of this section, a motor vehicle does not include a stationary mobile food preparation unit, as defined in Section 113890.

(j) Sanitary facilities, including, but not limited to, toilet facilities and handwashing facilities shall be available for use within 200 feet of the barbecue facility and shall comply with all provisions of this chapter. Sanitary facilities that do not meet the requirements of this chapter shall not be located closer to the barbecue facility than the sanitary facilities required to be provided by this section.

114195. No air pollution control district or air quality management district shall require the enclosure of an open-air barbecue facility if the appropriate enforcement officer determines that the barbecue facility meets all requirements prescribed by Section 114190.

Article 10. Vending Machines

114200. This article governs sanitation requirements for vending machines as defined in this chapter.

114205. Each vending machine or machine location shall have posted in a prominent place a sign indicating the owner’s name, address, and telephone number.

114210. All food shall be stored and packaged in clean, protected containers, and handled, transported, and vended in a sanitary manner. Wet storage of packaged products is prohibited.

Potentially hazardous food shall be dispensed to the consumer in the original package into which it was placed at the commissary or processing plant. Bulk potentially hazardous food is prohibited.

114215. All food contact surfaces shall be cleaned and sanitized either in place in a machine so designed and approved or by removing from the machine and cleaning and sanitizing at an approved facility.

All food contact surfaces when removed from the machine after cleaning and sanitizing shall be protected from contamination before being returned to the machine.

A record of cleaning and sanitizing shall be maintained by the operator in each machine and shall be current for at least the past 30 days.

114220. Single-service containers that are used in machines dispensing products in bulk, shall be obtained in sanitary packages, shall be stored in a clean, dry place until used, and shall be handled in a sanitary manner. The containers shall be stored in the original package until introduced into the container magazine or dispenser of the vending machine. The containers stored within the vending machine shall be protected from manual contact, dirt, vermin, and other contamination.

114225. Each vending machine shall be located in a room, area, or space that shall minimize the potential for contamination of food. The floor area upon which vending machines are located shall be

smooth, of cleanable construction, and capable of withstanding repeated washing and scrubbing.

114230. Water used in vending machines shall be potable.

114235. While in transit to machine locations, food, single-service containers, and equipment shall be protected from dirt, vermin, and other contamination.

114240. On or after January 1, 1985, all vending machines shall be constructed in accordance with National Sanitation Foundation or National Automatic Merchandizing Association standards, or the equivalent thereof.

114245. Vending machines shall meet all the requirements of Article 6 (commencing with Section 113975) and applicable sections of Article 7 (commencing with Section 113990).

Article 11. Vehicles

114250. This article governs sanitation requirements for vehicles as defined in this chapter.

114255. The name, address, and telephone number of the owner, operator, permittee, business name, or commissary shall be clearly and permanently indicated on both sides of a vehicle exterior. The name shall be in letters at least 8 centimeters (3 inches) high and shall have strokes at least 1 centimeter ($^3/_8$ inch) wide, and shall be of a color contrasting with the vehicle exterior. Letters for address and telephone numbers shall not be less than 2.5 centimeters (1 inch) high.

114260. (a) Equipment on a vehicle, including the interior of cabinet units or compartments, shall be equipped so as to have smooth, easily accessible, and easily cleanable surfaces. Unfinished wooden surfaces are not permitted. Construction joints shall be tightly fitted and sealed so as to be readily cleanable. Equipment, including utensils, shall be constructed of nontoxic materials and shall be readily cleanable.

(b) All food displayed, sold, or offered for sale from vehicles shall be prepackaged at a facility approved by the enforcement agency except as provided in Sections 114265 and 114275.

(c) During operation, no food shall be stored, displayed, or served from any place other than the vehicle.

(d) Food condiments shall be protected from contamination and, where available for self-service, shall be prepackaged or available only from approved dispensing devices.

(e) During transportation and storage, food and food contact surfaces shall be protected from contamination.

(f) All vehicles shall operate out of a commissary or other facility approved by the enforcement agency. Vehicles shall report to the commissary at least once each operating day for cleaning and servicing operations. In addition, vehicles whereon nonprepackaged

hot dogs are handled shall be properly stored at a commissary or other facility approved by the enforcement agency so as to be protected from unclean or unsanitary conditions.

(g) Food products remaining after each day's operation shall be stored only in an approved food facility.

(h) Utensils and equipment shall be handled and stored so as to be protected from contamination. Single-service utensils shall be obtained only in sanitary containers or approved sanitary dispensers, stored in a clean, dry place until used, handled in a sanitary manner, and used once only.

(i) All waste water shall be drained to an approved water receptor.

(j) Potentially hazardous foods shall be maintained at or below 7 degrees Celsius (45 degrees Fahrenheit) or at or above 60 degrees Celsius (140 degrees Fahrenheit) at all times.

(k) Vehicular food sales shall be conducted within 60 meters (200 feet) of approved and readily available toilet and handwashing facilities or as otherwise approved by the enforcement officer to ensure proper sanitary facilities are available to the vehicle employee.

114265. (a) The following foods may be sold from vehicles in an unpackaged state, provided the storage, display, and dispensing methods are approved by the enforcement agency:

(1) Popcorn.

(2) Nuts.

(3) Produce.

(4) Pretzels and similar bakery products.

(5) Candy.

(6) Hot dogs.

(7) Snow cones.

(8) Whole fish and whole aquatic invertebrates.

(9) Frozen ice cream bars that meet the requirements of subdivision (d).

(10) Cappuccino, espresso, cafe latté, cafe macchiato, mocha, hot chocolate, and other coffee-based or cocoa-based beverages that may contain cream, milk, or similar dairy products, to be made and immediately served to the consumer.

(b) Hot and cold beverages that are not potentially hazardous, as defined in Section 113845, may be sold from approved bulk dispensing units.

(c) (1) Vehicles selling or offering for sale nonprepackaged foods, as specified in subdivision (a), except produce and approved beverages made without cream, milk, or similar dairy products, shall be equipped with a food compartment as specified in subdivision (a) of Section 114275.

(2) In addition, those vehicles handling nonprepackaged hot dogs, popcorn, frozen ice cream bars, snow cones, or beverages described

in paragraph (10) of subdivision (a) shall comply with subdivisions (b), (c), (d) and (e) of Section 114275.

(3) Vehicles selling unpackaged frozen ice cream bars and beverages described in paragraph (10) of subdivision (a) shall have overhead protection, utensils and equipment equal or equivalent to National Sanitation Foundation Standards, a commissary for cleaning utensils, compartments, and vessels used for product storage, and shall also meet all sanitary design and operating requirements of the local enforcement officials. Vehicles selling unpackaged frozen ice cream bars or holding cream, milk, or similar dairy products shall be equipped with refrigeration units, as described in Section 113860.

(4) Those vehicles handling unpackaged whole fish and aquatic invertebrates shall comply with subdivision (e) of Section 114275, for drainage of waste water from display and storage compartments.

(d) Frozen ice cream bars may be sold from vehicles in an unpackaged state if the frozen ice cream bars are prepackaged at a facility approved by the enforcement agency pursuant to subdivision (b) of Section 114260 and unpackaged for the purpose of adding condiments.

114270. All potentially hazardous food shall be prepackaged in an approved facility except as provided in Section 114275. A tamale shall be considered prepackaged if dispensed to the customer in its original, inedible wrapper.

114275. Vehicles on which nonprepackaged hot dogs, popcorn, or snowcones are sold or offered for sale shall, in addition to the requirements of Section 114260, be constructed and equipped as follows:

(a) The food compartment shall be completely closed. The opening to the food compartment shall be sufficiently large to permit food assembly and service operations and shall be provided with a tightly fitted closure that, when closed, protects interior surfaces from dust, debris, and vermin. All food compartments and food contact surfaces shall be constructed so as to be smooth, easily accessible, and easily cleanable.

(b) A one-compartment metal sink furnished with warm running water that is at least 38 degrees Celsius (101 degrees Fahrenheit) and cold water. The sink shall be of a size suitable for washing hands and utensils.

(c) Handwashing cleanser and single-service towels.

(d) A water supply tank of at least 18 liters (5 gallons) capacity.

(e) A waste water tank of at least 28 liters (7.5 gallons) capacity.

114280. Vehicles on which nonprepackaged hot dogs, popcorn, or snowcones are sold or offered for sale that operate exclusively on premises wherein approved toilet, handwashing, and utensil washing facilities are readily available and within 60 meters (200 feet) shall be exempt from the requirements of subdivisions (b) through (e) of Section 114275.

Vehicles subject to this section which were in operation as of July 1, 1986, shall not be required to meet the requirements of this article relating to utensil washing facilities, as long as an approved reserve supply of utensils is maintained on the vehicle.

Article 12. Mobile Food Preparation Units, Stationary Mobile Food Preparation Units, and Commissaries

114285. This article governs sanitation requirements for mobile food preparation units, stationary mobile food preparation units, and commissaries as defined in this chapter.

114290. (a) All mobile food preparation units, stationary mobile food preparation units, and commissaries shall meet the applicable requirements in Article 6 (commencing with Section 113975), Article 7 (commencing with Section 113990), and Article 8 (commencing with Section 114075), unless specifically exempted from any of these provisions as provided in this article, and shall meet Article 10 (commencing with Section 13600) of, and Article 10.1 (commencing with Section T17-13611) of Subchapter 2 of Chapter 5 of Part 1 of Title 17 of the California Code of Regulations, except that a hose used for filling water tanks and used for cleaning the interior of a mobile food preparation unit from a commissary that services mobile food preparation units is not required to be kept at least four feet above the ground at all times if the hose is equipped with a quick disconnect device, retrofitted on the end of the hose so that it seals the opening when not in use. Hoses inside the mobile preparation unit and potable water tank connectors shall have matching connecting devices. Devices for external cleaning may not be used inside the mobile preparation unit for potable water purposes. Hoses and faucets equipped with quick connect and disconnect devices for these purposes shall be deemed to meet the requirements of Section T17-13613 of Title 17 of the California Code of Regulations. Mobile food preparation units and stationary mobile food preparation units shall be exempt from the requirements of Sections 114105 and 114135, and subdivision (b) of Section 114165.

(b) Each stationary mobile food preparation unit shall be certified pursuant to Article 10 (commencing with Section 13600) of Subchapter 2 of Chapter 5 of Part 1 of Title 17 of the California Code of Regulations before commencing operation each calendar year. The local enforcement agency shall address all applicable construction standards and submit proof of certification to the state department. Construction recertification within a calendar year shall not be required unless either of the following occurs:

(1) Where structural modifications are made.

(2) Where otherwise required by the state department.

The state department may issue an annual certificate of compliance for each certified vehicle, as required by regulation.

114295. All mobile food preparation units shall operate out of a commissary or other facility approved by the enforcement agency. Mobile food preparation units shall report to the commissary at least once each operating day for cleaning and servicing operations, except as otherwise approved by the enforcement officer.

114300. Stationary mobile food preparation units may include a staffed counter that serves hot and cold beverages that are not a potentially hazardous food as defined in Section 113845, and that are dispensed from approved bulk dispensing units.

114305. (a) The enforcement agency may permit storage of supplies and food, that is not a potentially hazardous food as defined in Section 113845, in unopened containers adjacent to a stationary mobile food preparation unit, or in unopened containers in a nearby temporary storage unit.

(b) As used in this section, ‘‘unopened container’’ means a factory sealed container that has not been previously opened, that is suitably constructed to be resistant to contamination from moisture, dust, insects, and rodents.

Article 13. Temporary Food Facilities

114310. This article governs sanitation requirements for temporary food facilities as defined in this chapter.

114315. (a) Floors shall be smooth and cleanable. The use of sawdust or similar materials is prohibited.

(b) Walls and ceilings shall be constructed of either wood, canvas, plastic, or similar material and fine mesh fly screening and shall completely enclose the facility. Facilities wherein all food and beverage is prepackaged at a facility approved by the local enforcement officer shall not be required to be fully enclosed with fly screening. Food service openings shall be equipped with tightfitting closures to minimize the entrance of insects.

(c) Except where all food and beverage is prepackaged, handwashing and utensil washing facilities approved by the enforcement officer shall be provided within temporary food facilities.

(d) Facilities for the sanitary disposal of all liquid waste shall be subject to the approval of the enforcement officer.

(e) At least one toilet facility for each 15 employees shall be provided within 60 meters (200 feet) of each temporary food facility.

(f) Food contact surfaces shall be smooth, easily cleanable, and nonabsorbent.

114320. (a) All food shall be prepared in a food establishment or on the premises of a temporary food facility. No food or beverage stored or prepared in a private home may be offered for sale, sold, or given away from a temporary food facility.

(b) All food and beverage shall be protected at all times from unnecessary handling and shall be stored, displayed and served so as to be protected from contamination.

(c) Potentially hazardous food and beverage shall be maintained at or below 7 degrees Celsius (45 degrees Fahrenheit) or at or above 60 degrees Celsius (140 degrees Fahrenheit) at all times.

(d) Ice used in beverages shall be protected from contamination and shall be maintained separate from ice used for refrigeration purposes.

(e) All food and food containers shall be stored off the floor on shelving or pallets located within the facility.

(f) Smoking is prohibited in temporary food facilities.

(g) (1) Except as provided in paragraph (2), live animals, birds, or fowl shall not be kept or allowed in temporary food facilities.

(2) Paragraph (1) does not prohibit the presence, in any room where food is served to the public, guests, or patrons, of a guide dog, signal dog, or service dog, as defined by Section 54.1 of the Civil Code, accompanied by a totally or partially blind person, deaf person, person whose hearing is impaired, or handicapped person, or dogs accompanied by persons licensed to train guide dogs for the blind pursuant to Chapter 9.5 (commencing with Section 7200) of Division 3 of the Business and Professions Code.

(3) Paragraph (1) does not apply to dogs under the control of uniformed law enforcement officers or of uniformed employees of private patrol operators and operators of a private patrol service who are licensed pursuant to Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code, while these employees are acting within the course and scope of their employment as private patrol persons.

(4) The persons and operators described in paragraphs (2) and (3) are liable for any damage done to the premises or facilities by the dog.

(5) The dogs described in paragraphs (2) and (3) shall be excluded from food preparation and utensil wash areas. Aquariums and aviaries shall be allowed if enclosed so as not to create a public health problem.

(h) All garbage shall be disposed of in a manner approved by the enforcement officer.

(i) Employees preparing or handling food shall wear clean clothing and shall keep their hands clean at all times.

114325. The enforcement officer may establish additional structural or operational requirements as necessary to ensure that food is of a safe and sanitary quality.

114330. Open-air barbecue facilities may be operated adjacent to temporary food facilities with the approval of the enforcement officer and subject to the requirements of Article 9 (commencing with Section 114185).

Article 14. Produce Stands

114335. This article governs sanitation requirements for produce stands as defined in this chapter.

114340. (a) Produce stands operated by a producer selling or offering for sale produce or shell eggs, or both, are exempt from this chapter, provided the produce stand is operated on premises controlled by the producer.

(b) For purposes of this section, ‘‘producer’’ means a person or entity who produces shell eggs, fruits, nuts, or vegetables by practice of the agricultural arts upon land that the person or entity controls.

(c) Except as otherwise provided in this chapter, all other produce stands shall meet the requirements of Article 6 (commencing with Section 113975), Article 7 (commencing with Section 113990), and Article 8 (commencing with Section 114075).

(d) Notwithstanding subdivision (c), all other produce stands shall also meet all of the following requirements:

(1) All food shall be stored at least 46 centimeters (18 inches) off the floor, except that food stored in a walk-in refrigeration unit shall be stored at least 13 centimeters (5 inches) off the floor.

(2) Food preparation is prohibited.

(3) Foods, other than trimmed produce and shell eggs, shall not be kept at these food establishments. This shall not apply to retail dairy processing rooms.

(e) A produce stand shall have no more than one side open to the outside air during business hours.

Article 15. Certified Farmers’ Markets

114345. This article governs general sanitation requirements for certified farmers’ markets, as defined in this chapter.

114350. Certified farmers’ markets shall meet the provisions of Article 6 (commencing with Section 113975) and, in addition, shall meet all of the following requirements:

(a) All food shall be stored at least 15 centimeters (6 inches) off the floor or ground or under any other conditions which are approved.

(b) Food preparation is prohibited at certified farmers’ markets with the exception of the food samples. Distribution of food samples is allowed provided that the following sanitary conditions exist:

(1) Samples shall be kept in approved, clean, covered containers.

(2) All food samples shall be distributed by the producer in a sanitary manner.

(3) Clean, disposable plastic gloves shall be used when cutting food samples.

(4) Food intended for sampling shall be washed, or cleaned in another manner, of any soil or other material by potable water in order that it is wholesome and safe for consumption.

(5) Potable water shall be available for hand washing and sanitizing as approved by the local enforcement agency.

(6) Potentially hazardous food samples shall be maintained at or below 45 degrees fahrenheit. All other food samples shall be disposed of within two hours after cutting.

(7) Utensil and hand washing water shall be disposed of in a facility connected to the public sewer system or in a manner approved by the local enforcement agency.

(8) Utensils and cutting surfaces shall be smooth, nonabsorbent, and easily cleaned or disposed of as approved by the local environmental health agency.

(c) Approved toilet and hand washing facilities shall be available within 60 meters (200 feet) of the premises of the certified farmers' market or as approved by the enforcement officer.

(d) No live animals, birds, or fowl shall be kept or allowed within 6 meters (20 feet) of any area where food is stored or held for sale. This subdivision does not apply to guide dogs, signal dogs, or service dogs when used in the manner specified in Section 54.1 of the Civil Code.

(e) All garbage and rubbish shall be stored, and disposed of, in a manner approved by the enforcement officer.

(f) Notwithstanding Article 11 (commencing with Section 114250), vendors selling food adjacent to and under the jurisdiction and management of a certified farmers' market may store, display, and sell from a table or display fixture apart from the vehicle, in a manner approved by the local enforcement agency.

(g) This section shall be repealed on January 1, 1997.

114350. Certified farmers' markets shall meet the provisions of Article 6 (commencing with Section 113975) and, in addition, shall meet all of the following requirements:

(a) All food shall be stored at least 15 centimeters (6 inches) off the floor or ground or under any other conditions which are approved.

(b) Food preparation is prohibited.

(c) Approved toilet and hand washing facilities shall be available within 60 meters (200 feet) of the premises of the certified farmers' market or as approved by the enforcement officer.

(d) No live animals, birds, or fowl shall be kept or allowed within 6 meters (20 feet) of any area where food is stored or held for sale. This subdivision does not apply to guide dogs, signal dogs, or service dogs when used in the manner specified in Section 54.1 of the Civil Code.

(e) All garbage and rubbish shall be stored, and disposed of, in a manner approved by the enforcement officer.

(f) This section shall become operative on January 1, 1997.

Article 16. Swap Meet Prepackaged Food Stands

114360. (a) Swap meet prepackaged food stands operated by a swap meet operator offering prepackaged food for sale at a swap meet shall meet the requirements of Article 6 (commencing with Section 113975), Article 7 (commencing with Section 113990), and Article 8 (commencing with Section 114075).

(b) Notwithstanding subdivision (a), swap meet prepackaged food stands shall also meet the following requirements:

(1) Food preparation is prohibited.

(2) Foods, other than prepackaged foods, shall not be kept at these food facilities.

(3) Foods that are potentially hazardous as defined in Section 113845 may not be sold.

Article 17. Satellite Food Distribution Facilities

114363. This article governs general sanitation requirements for satellite food distribution facilities as defined in this chapter.

114365. All satellite food distribution facilities shall be subject to the applicable provisions of Article 6 (commencing with Section 113975) and Article 7 (commencing with Section 113990) and, in addition, shall meet all of the following requirements:

(a) All utensils and equipment shall be scrapped, cleaned, or sanitized as circumstances require.

(b) Utensils and equipment shall be handled and stored so as to be protected from contamination. Single-service utensils shall be contained only in sanitary containers or approved sanitary dispensers, stored in a clean, dry place until used, handled in a sanitary manner, and used once only.

Article 18. Restricted Food Service Transient Occupancy Establishments

114368. This article governs general sanitation requirements for restricted food service transient occupancy establishments, as defined in Section 113870.

114370. Except as otherwise set forth in this article, restricted food service transient occupancy establishments shall meet the applicable requirements in Article 6 (commencing with Section 113975), Article 7 (commencing with Section 113990), and Article 8 (commencing with Section 114075).

114375. For purposes of Section 114015, a restricted food service transient occupancy establishment shall not be deemed to be a ‘‘private home’’ solely because the owner or operator thereof resides

on the premises or prepares on the premises food for his or her consumption and that of his or her family.

114380. Notwithstanding Section 114020, restricted food service transient occupancy establishments shall not be required to post signs in toilet rooms in guestrooms.

114385. Restricted food service transient occupancy establishments shall be exempt from Section 114045; provided, however, that no live animal, bird, or fowl shall be kept or allowed in any portion of the premises where food for the registered guests of the establishment is used, stored, served, offered for sale, or given away. Aquariums and aviaries shall be allowed if enclosed so as not to create a public health problem.

114390. Restricted food service transient occupancy establishments shall be exempt from Section 114065; provided, however, that the enforcement officer shall have the right to disapprove any new or replacement equipment that would create a public health problem.

114395. Restricted food service transient occupancy establishments shall be exempt from the provisions of Section 114135; provided, however, that no person shall store clothing or personal effects in any area used for the storage or preparation of food.

114400. (a) All utensils and equipment shall be scrapped, cleaned, or sanitized as circumstances require.

(b) Restricted food service transient occupancy establishments shall comply with the provisions of subdivisions (b) to (e), inclusive, of Section 114090 or, at the option of the owner or operator of the establishment, shall utilize a domestic or commercial dishwasher for the purpose of cleaning and sanitizing multiservice kitchen utensils and multiservice consumer utensils; provided, however, that the dishwasher is capable of providing heat to the surface of the utensils of a temperature of at least 165 degrees Fahrenheit. Except as otherwise set forth in this subdivision, restricted food service transient occupancy establishments shall comply with Section 114090.

114405. Notwithstanding Section 114100, food preparation sinks in restricted food transient occupancy establishments need not have indirect sewer connections.

114410. Restricted food service transient occupancy establishments shall be exempt from the provisions of Section 114140; provided, however, that ventilation shall be provided to remove gases, odors, steam, heat, grease, vapors and smoke from the food establishment. In the event that the enforcement officer determines that the ventilation must be mechanical in nature, the ventilation shall be accomplished by methods approved by the department.

114415. In restricted food service transient occupancy establishments, only new and replacement walls and ceilings (or their coverings) need comply with Section 114155; provided,

however, that all walls and ceilings (and their coverings) must be maintained in a clean and sanitary condition.

114420. Restricted food service transient occupancy establishments shall be exempt from the provisions of subdivision (b) of Section 114165; provided, however, that hot water must be available for janitorial purposes and that waste water from janitorial activities cannot be disposed of in any sink used for washing utensils or for the preparation of food.

114425. Restricted food service transient occupancy establishments shall be exempt from Section 114175. However, no sleeping accommodations shall be allowed in any area where food is stored, prepared, or served.

114430. All food intended for consumption by guests shall be from an approved source. The use of home canned foods and meat and dairy products from unapproved sources is prohibited.

Article 19. Food Facility Food Donations

114435. Any food facility may donate, free of charge, food to a food bank or to any other nonprofit charitable organization for distribution to persons free of charge.

114440. For the purposes of this article, ‘‘nonprofit charitable organization’’ means any organization that was organized and is operating for charitable purposes and meets the requirements of Section 214 of the Revenue and Taxation Code.

114445. For the purposes of this article, ‘‘food bank’’ means a surplus food collection and distribution system operated and established to assist in bringing donated food to nonprofit charitable organizations and individuals for the purpose of reducing hunger and nutritional needs.

114450. No food facility that donates food as permitted by this article shall be subject to civil or criminal liability or penalty for violation of any laws, regulations, or ordinances regulating the labeling or packaging of the donated product or, with respect to any other laws, regulations, or ordinances, for a violation occurring after the time of the donation.

114455. The immunities provided in this article and by Section 1714.25 of the Civil Code are in addition to any other immunities provided by law including those provided by Chapter 5 (commencing with Section 58501) of Part 1 of Division 21 of the Food and Agricultural Code.

PART 8. OCCUPATIONAL HEALTH (Reserved)

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

PART 9. RADIATION

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. RADIATION PROTECTION ACT OF 1988

Article 1. Radiation Protection

114650. (a) As used in this chapter:

(1) ''Office'' means the Office of Emergency Services.

(2) ''Department'' means the State Department of Health Services.

(3) ''Emergency planning zone'' means a zone identified in state and local government emergency plans where immediate decisions for effective public protective action may be necessary.

(4) ''Ingestion pathway zone'' means the 50-mile radius around each of the state's nuclear powerplants in which protective actions may be required to protect the food chain in the event of an emergency.

(5) ''Site'' means the location of a nuclear powerplant and its surrounding emergency planning zone.

(6) ''Plume emergency phase'' means the period beginning at the onset of an emergency at a nuclear powerplant when immediate decisions for public protective actions are needed.

(7) ''Ingestion pathway phase'' means the period beginning after any release of radioactive material from a nuclear powerplant accident when the plume emergency phase has ceased, and reliable environmental measurements are available for making decisions on additional protective actions to protect the food chain. The main concern is to prevent exposure from ingestion of contaminated water or food, such as milk, fresh vegetables, or aquatic foodstuffs.

(8) ''Recovery and reentry phase'' means the period when actions designed to reduce radiation levels in the environment to acceptable levels for unrestricted use are commenced, and ending when all recovery actions have been completed.

(9) ‘‘Local government’’ means a city or county that provides emergency response for a nuclear powerplant emergency.

(10) ‘‘Local jurisdiction’’ means an entity that provides emergency response for a nuclear powerplant emergency in accordance with the plans of a local government.

(11) ‘‘Interjurisdictional Planning Committee’’ means the planning committee, comprised of representatives of the Counties of Orange and San Diego, the Cities of Dana Point, San Clemente, San Juan Capistrano, the Camp Pendleton Marine Corps Base, the State Department of Parks and Recreation, and the Southern California Edison Company, established as a mechanism for coordinating integrated preparedness and response in the event of an emergency at the San Onofre Nuclear Generating Station.

114655. The Legislature hereby finds and declares as follows:

(a) Existing law requires the development of a nuclear powerplant emergency response program by state and local jurisdictions based on federal and state criteria.

(b) The office, in consultation with the department and the counties, has investigated the consequences of a serious nuclear powerplant accident and has established emergency planning zones for direct plume exposure and ingestion radiation pathways. These zones imply mutually supportive emergency planning and preparedness arrangements by all levels of government.

(c) An integrated emergency planning program is necessary for the benefit of the citizens within the planning zones.

(d) It is the intent of the Legislature that the office should be responsible for the coordination and integration of all emergency planning programs and response plans. The department has the lead technical role in the ingestion pathway and recovery and reentry phases. The office will coordinate the department’s support to local government. The state provides support to local government during the plume emergency phase and has the lead role in the ingestion pathway and recovery and reentry phases.

(e) It is the intent of the Legislature that local government shall be responsible for developing and maintaining an organization capable of implementing protective actions which safeguard public health and safety. Local government has the lead role in the plume emergency phase, and supports the state in the ingestion pathway and recovery and reentry phases.

(f) It is further the intent of the Legislature that nothing in this chapter shall limit the activities of any government carrying out its general responsibilities pertaining to the public health and safety aspects of emergency response.

Article 2. Responsibilities of the Department

114660. (a) The office shall be responsible for the coordination and integration of all emergency planning programs and response plans. The office shall also coordinate resources and activities to implement protective measures for safeguarding public health and safety.

(b) The office shall perform the following duties and functions:

(1) Coordinate the activities of all state agencies relating to preparation and implementation of the State Nuclear Powerplant Emergency Response Plan. The office shall be the focal point for coordinating nuclear powerplant emergency preparedness activities with local jurisdictions, other state agencies, federal agencies and other organizations.

(2) Exercise explicit, ultimate authority for allocating funds from the Nuclear Planning Assessment Special Account to local jurisdictions.

(3) Participate in exercises of the state's nuclear emergency response plan at least biennially to ensure that state personnel are adequately trained to respond in the event of an actual emergency. The exercises shall include the department and other relevant state agencies, and the office shall activate the State Operations Center of the office for each exercise.

(4) Perform an independent accident assessment, at the time of an emergency, in conjunction with the department. The office shall also review protective action recommendations given to local jurisdiction representatives in the dose assessment center.

(5) Coordinate planning guidance to state agencies and local jurisdictions.

(6) Develop and maintain the State Nuclear Powerplant Emergency Response Plan and procedures necessary to carry out those responsibilities and review and approve state agency plans in draft prior to publication.

(7) Exercise discretionary authority regarding the formation of interagency agreements with state agencies having local emergency responsibilities. The purpose of the interagency agreement is to ensure state agencies have updated emergency plans and trained emergency response personnel to respond during the plume emergency phase.

(8) Annually prepare and submit a report to any joint committee and Senate and Assembly policy committee with jurisdiction over emergency and disaster services which includes all of the following:

(A) A description of the purpose of all nuclear emergency response exercises in the state involving local and state authorities.

(B) A description of state and local government roles in each exercise.

(C) An accounting of revenues from each utility and a description of expenditures of special account funds by each jurisdiction and the state.

(D) A description of all nuclear emergency response training and education efforts undertaken by the state and local agencies, and identification of any additional training and educational needs.

(E) Recommendations consistent with this chapter.

(9) Conduct a study similar to that described in Section 8610.3 of the Government Code, for any nuclear powerplant with a generating capacity of 50 megawatts or more that is proposed for certification in this state.

114665. (a) The department shall have the lead technical role in the ingestion pathway and recovery and reentry phases of a nuclear powerplant emergency. The department shall ensure that its ingestion pathway and recovery and reentry plan is prepared, and shall provide guidelines for local government ingestion pathway and recovery and reentry plans.

(b) The department shall maintain plans for communicating public health information during the ingestion pathway and recovery and reentry emergency phases. The department shall also maintain a radiation emergency screening team, and shall maintain designation of medical facilities to care for any casualties.

(c) The department shall perform the following duties and functions:

(1) Act as the responsible entity for ensuring that ingestion pathway and recovery and reentry plans are maintained and ready to be implemented, including necessary training and exercises, in coordination with affected counties and the office.

(2) Establish protective action guidelines for ingestion pathway and recovery and reentry operations with due regard for compatibility with the recommendations of the Environmental Protection Agency.

(3) Establish criteria for, coordinate development and maintenance by counties of, and annually review an information catalogue of food, water, and animal resources for the 50-mile ingestion pathway zone around the San Onofre and Diablo Canyon nuclear generating stations.

(4) Establish measurement standards and procedures to assess radioactivity in exposure pathways, including, but not limited to, food, water, and animals, which are compatible with the Environmental Protection Agency's standards and procedures.

(5) Support local government nuclear emergency planning, training, exercises, and response in coordination with the office.

(6) Maintain plans for coordinating the dissemination of public health information during the recovery and reentry phase of a nuclear powerplant emergency.

(7) Maintain a Radiation Emergency Screening Team, also known as the Radiological Advisory Team and develop guidelines for the team. The team shall not be authorized to make decisions within the jurisdiction of emergency planning and response organizations. The guidelines for the team shall meet, but not be limited to, the following requirements:

(A) The team shall include individuals with expertise in medicine, radiation biology, radiation casualty management, emergency preparedness and disaster response, public health, and government and responsibilities.

(B) The team shall be available to advise the department on its nuclear powerplant emergency planning.

(C) The team shall be available for immediate response, 24 hours a day, during the emergency phase of a nuclear powerplant accident. Upon the request of the department, the team shall provide advice and counsel regarding initial patient management and casualty evacuation, and shall provide radiation exposure medical advice to field and hospital medical care providers. Activation of the department's emergency ''call-down'' list will provide the method of notification.

(D) Individuals shall be designated to serve as backup for members of the team who are unable to immediately respond to a radiation emergency.

(8) Maintain guidelines for the designation for one or more medical facilities which would be capable of managing and caring for casualties caused by a nuclear radiation accident.

(A) The facilities shall have the capability to provide the following:

(i) Provide radiologic and microbiologic isolation, as prescribed by the department, for 10 to 25 casualties.

(ii) Perform radioactivity measurements.

(iii) To quickly mobilize and augment the treatment staff to care for a sudden influx of casualties.

(B) In maintaining the team guidelines, the department shall consider input from other relevant groups or organizations, such as the California Conference of Local Health Officers, the California Medical Association, the California Association of Hospitals, and the University of California medical facilities.

(C) The department shall consider geographic location and critical and supportive care available when developing guidelines.

(D) The department shall designate facilities in accordance with the guidelines developed pursuant to subparagraph (A) of paragraph (8) of subdivision (c), and shall maintain a list of designated facilities.

114670. It is the intent of the Legislature to provide necessary funding for medical facilities designated by the department to enable each facility to be effective in receiving casualties from a nuclear radiation accident.

Article 4. Local Jurisdictions

114675. The Interjurisdictional Planning Committee for the San Onofre nuclear emergency response plan, shall appoint a chairperson who will be a discussion leader and decisionmaking facilitator during a nuclear powerplant accident.

114680. Any local jurisdiction within an Emergency Planning Zone, with responsibility to conduct nuclear response planning, shall annually provide nuclear emergency training to individuals within that zone who may be responsible for an evacuation or sheltering action, including, but not limited to, public school teachers, bus drivers, peace officers, public works officials, and fire officials.

114685. The office shall do all of the following: (a) When the Emergency Broadcast System is activated within an Emergency Planning Zone during a nuclear powerplant emergency, notify counties adjacent to the Emergency Planning Zone and provide these counties with details of the emergency. (b) Exercise explicit, ultimate authority for allocating funds from the Nuclear Planning Assessment Special Account to local jurisdictions. Purposes for which the office may approve reimbursement include expenditures related to equipment that is used by local jurisdictions primarily for nuclear powerplant emergency planning and response activities, prorated according to the percentage of use for these activities. (c) Ensure that counties within the Public Education Zones have a primary and backup communications capability with the county emergency operations centers located within the Emergency Planning Zones. (d) Consider, along with the local jurisdictions and the utilities, that emergency response personnel, as well as the public, may respond differently to a nuclear powerplant emergency than to a naturally occurring emergency, and to take this difference into account when developing training and education programs for nuclear powerplant emergencies. (e) Participate in exercises of the state’s nuclear emergency response plan at least once a year to ensure that state personnel are adequately trained to respond in the event of an actual emergency. The exercises shall include the department and other relevant state agencies and the office shall activate the State Operations Center of the office for each exercise. (f) In cooperation with local emergency response authorities and utilities operating nuclear power facilities, evaluate the primary and backup communications systems mandated by federal requirements for nuclear emergency response plans. If the office determines that a primary or backup communications system does not meet those requirements, the office shall report this determination to the utility and to the Federal Emergency Management Agency. (g) Investigate the feasibility, costs, and possible funding mechanisms for providing programmable transceivers for emergency response vehicles that may have to respond to a nuclear power plant emergency. The office

shall report to the director of the office and any joint committee and Senate and Assembly policy committee with jurisdiction over emergency and disaster services its findings and recommendations by December 31, 1989. (h) Commencing January 1, 1990, annually prepare and submit a report to any joint committee and Senate and Assembly policy committee with jurisdiction over emergency and disaster services that includes all of the following: (1) A description of the purpose of all nuclear emergency response exercises in the state involving local and state authorities. (2) A description of the office's role in each exercise. (3) An accounting of revenues spent from the Nuclear Planning Assessment Special Account from each utility, a description of expenditures of special account funds by each jurisdiction and the state, and explanations for any denied funding requests. (4) A description of all nuclear emergency response training and education efforts undertaken by the office, and identification of any additional training and education needs of state and local agencies, including specific reference to any agency that has not demonstrated adequate training of management and line personnel. (5) Recommendations consistent with this section.

Article 6. Responsibilities of Other Agencies

114690. The Department of Transportation shall include within its criteria for funding repair and construction projects the need for adequate emergency evacuation routes.

114695. State and local law enforcement agencies shall ensure that traffic flow plans for areas outside the Emergency Planning Zones adequately reflect the possible evacuation of residents outside the Emergency Planning Zones. State and local law enforcement agencies shall ensure that traffic flow plans take into consideration that some evacuation routes may be impassable under certain weather conditions and that these agencies should have plans for designating alternative routes.

114700. State law enforcement agencies shall ensure that officers who may be needed to respond during a nuclear powerplant emergency receive the necessary training, as well as refresher courses at least once per year.

CHAPTER 5. CONTAINMENT OF RADIOACTIVE MATERIALS

Article 1. Control of Radioactive Contamination of the Environment

114705. The Legislature finds and declares that radioactive contamination of the environment may subject the people of the State of California to unnecessary exposure to ionizing radiation unless it is properly controlled. It is therefore declared to be the

policy of this state that the department initiate and administer necessary programs of surveillance and control of those activities that could lead to the introduction of radioactive materials into the environment.

114710. As used in this article the following terms have the meanings described in this section.

(a) ''Department'' means the State Department of Health Services.

(b) ''Environment'' means all places outside the control of the person responsible for the radioactive materials.

(c) ''Field tracer study'' is any project, experiment, or study that includes provision for deliberate introduction of radioactive material into the environment for experimental or test purposes.

(d) ''Person'' includes any association of persons, copartnership or corporation.

(e) ''Radiation,'' or ''ionizing radiation,'' means gamma rays and X-rays; alpha and beta particles, high-speed electrons, neutrons, protons, and other nuclear particles; but not sound or radio waves, or visible, infrared, or ultraviolet light.

(f) ''Radioactive material'' means any material or combination of materials that spontaneously emits ionizing radiation.

(g) ''Radioactive waste'' means any radioactive material that is discarded as nonusable.

(h) ''Significant'' or ''significantly,'' as applied to radioactive contamination, means concentrations or amounts of radioactive material as are likely to expose persons to ionizing radiation equal to or greater than the guide levels published by the Federal Radiation Council.

(i) ''Radiological monitoring'' means the measurement of the amounts and kinds of radioactive materials in the environment.

114715. No person shall bury, throw away, or in any manner dispose of radioactive wastes within the state except in a manner and at locations as will result in no significant radioactive contamination of the environment.

114720. The department may, by written order, prohibit the disposal of radioactive wastes by any person when, upon investigation, it has determined that the disposal violates Section 114715.

114725. The department may, by written order, prohibit the storage, packaging, transporting, or loading of radioactive wastes if there is a reasonable likelihood that the activities will result in significant radioactive contamination of the environment.

114730. The person to whom an order has been issued pursuant to Section 114720 or 114725 may appeal the order of the department to any court of competent jurisdiction.

114735. The department may bring an action in a court of competent jurisdiction to enjoin the storage, packaging,

transporting, loading, or disposal of radioactive wastes in violation of any written order issued by the department pursuant to Section 114720 or 114725. The court may, if it appears necessary, enjoin any person from using radioactive material who thereby produces radioactive waste that the court finds is being disposed of in violation of this article.

114740. The department shall maintain surveillance over the storage, packaging, transporting, and loading of radioactive material within this state regardless of the material's ultimate destination. In carrying out its duties under this section, the department may enter into an agreement with the Division of Occupational Safety and Health and other state and local agencies to conduct any appropriate inspection and enforcement activities. Any agreement with state and local agencies shall not duplicate work to be done pursuant to agreement with the Division of Occupational Safety and Health, nor shall work done by the Division of Occupational Safety and Health duplicate work agreed to be done by other state and local agencies. Licensees of the Nuclear Regulatory Commission and the facilities of the Department of Energy and the Department of Defense are exempt from this section.

114745. No person shall operate a nuclear reactor, nuclear fuel reprocessing plant, or other installation, as defined by the department, that could, as a result of routine operations, accident, or negligence, significantly contaminate the environment with radioactive material, without first instituting and maintaining an adequate program of radiological monitoring. The proposed program shall be submitted to the department for review and acceptance as to its adequacy.

114750. No person shall conduct any field tracer study unless detailed plans of the study have been approved by the department. In reviewing proposed field tracer studies, the department shall consider at least the following elements:

(a) That there is shown to be a substantial public interest in the information intended to be obtained by the study.

(b) That the study will be performed by persons or agencies competent to handle and use the radioactive material safely and with due regard for potential effects on public health.

(c) That the study is planned so as to impose the least possible exposure to ionizing radiation consistent with achieving the study's desired objectives.

(d) That there is no likelihood that any person will be exposed to ionizing radiation in excess of guide levels published by the Federal Radiation Council. The department may, as a condition to its approval of a field tracer study, require a representative of the department to be present during the study.

114755. The department shall monitor radioactive materials in the environment, including radioactive materials in media such as

air, milk, food, and water in locations and with a frequency as the department may deem necessary to determine radiation exposure to the people of the state from the materials.

114760. The department shall, at least once per month, make public to news media the results of its monitoring of radioactive materials.

114765. Any regulations relating to radioactive material cargo, including, but not limited to, packing, marking, loading, handling, and transportation, shall be reviewed and made compatible with the federal regulations adopted pursuant to the federal Department of Transportation Docket No. HM-164, Notice No. 80-1, within 60 days of the date the federal regulations become effective.

114770. The department, utilizing available funds and in cooperation with the Department of Fish and Game and the Joint Committee on Fisheries and Aquaculture, shall do all of the following:

(a) Cooperate with any federal agency that conducts monitoring of marine life or ocean waters, or both, at the sites of radioactive waste dumping off the California coast to determine the effects of the dumping.

(b) Purchase and test samples of seafood taken in the vicinity of the Farallon Islands radioactive waste dump site to determine whether the seafood contains radioactivity beyond natural and artificial background levels.

(c) Establish a scientific advisory committee on ocean dumping of radioactive waste. The committee shall include, but not be limited to, scientists from the staffs of the department, the Department of Fish and Game, the California Coastal Commission, the Senate Office of Research, the Assembly Office of Research, the faculties of the University of California and the California State University, and private nonprofit marine resource and public policy organizations. The advisory committee shall meet at least once a year and design the procedures for the testing required by subdivision (b), subject to approval by the department. The advisory committee shall also analyze the results of the monitoring conducted pursuant to subdivision (a) and the testing conducted pursuant to subdivision (b), and make any recommendations that it deems appropriate to the department, the Department of Fish and Game, and the Legislature. The members of the committee shall serve without compensation.

(d) Take emergency action pursuant to the general authority contained in the Sherman Food, Drug, and Cosmetic Law (Part 5 (commencing with Section 109875)) to prohibit the commercial sale of seafood for human consumption if, in the judgment of the director, samples analyzed pursuant to subdivision (b), are found to contain radioactivity that poses a threat to human health.

114775. The department, utilizing available funds and in cooperation with the Department of Fish and Game and the Joint

Committee on Fisheries and Aquaculture, shall do all of the following:

(a) Cooperate with any federal agency that conducts monitoring of marine life or ocean waters, or both, at the sites of radioactive waste dumping off the California coast to determine the effects of the dumping.

(b) Purchase and test samples of seafood taken in the vicinity of the Farallon Islands radioactive waste dump site to determine whether the seafood contains radioactivity beyond natural and artificial background levels.

(c) Make annual reports to the Legislature on the implementation of this section, including any recommendations for legislation it deems necessary to protect the health of Californians.

(d) Take emergency action pursuant to the general authority contained in the Sherman Food, Drug, and Cosmetic Law (Part 5 (commencing with Section 109875)) to prohibit the commercial sale of seafood for human consumption if, in the judgment of the director, samples analyzed pursuant to subdivision (b), are found to contain radioactivity that poses a threat to human health.

114780. (a) The Legislature finds and declares that the dumping of radioactive waste, including the scuttling of radioactive nuclear submarines, into the Pacific Ocean, could adversely affect the California coastal zone.

(b) The California Coastal Commission, in cooperation when appropriate with the department, the Department of Justice, the Department of Fish and Game, and the Joint Committee on Fisheries and Aquaculture, shall use any means available to the commission, pursuant to law, to prevent any dumping of radioactive waste in the Pacific Ocean by any public or private entity, unless the commission finds that the dumping would be consistent with the goals and policies of Division 20 (commencing with Section 30000) of the Public Resources Code.

Article 2. Radiation Monitoring Devices for Nuclear Power Plants

114785. Each privately owned and publicly owned public utility operating a nuclear powerplant with a generating capacity of 50 megawatts or more shall establish a system of offsite radiation monitoring devices as specified by the Nuclear Regulatory Commission pursuant to Regulatory Guide 1.97 or related standards. The utility shall consult with the department and the appropriate county emergency services agency regarding the type, number, and locations of the radiation monitoring devices. The consultation with the department and the appropriate county emergency services agency shall be completed prior to submitting a plan to the Nuclear Regulatory Commission regarding the radiation monitoring devices.

114790. The information transmitted to the radiation monitoring displays in the technical support center or emergency operating facility of a nuclear powerplant shall be simultaneously transmitted to the Office of Emergency Services State Warning Center.

114795. The funds expended by privately owned utilities complying with this article shall be allowed for ratemaking purposes by the Public Utilities Commission. Publicly owned utilities shall include funds expended complying with this article in their rates.

114800. In no event shall a plant operator be required to spend more than one million dollars ($1,000,000) in capital outlay for a nuclear powerplant site in complying with this article.

114805. Nothing in this article shall require powerplant modifications or the conduct of operations that may be in conflict with conditions of the license to operate issued by the Nuclear Regulatory Commission or with other activities authorized by the Nuclear Regulatory Commission, or that may be in conflict with regulations of the Environmental Protection Agency.

114810. Failure to comply with this article shall not constitute the basis for an action in a court of law or in an administrative proceeding to enjoin or prevent the operation or start-up of a nuclear facility.

Article 3. Transportation of Radioactive Materials

114815. For the purposes of this article the term ''radioactive materials'' shall include any material or combination of materials that spontaneously emits ionizing radiation.

114820. (a) The department, with the assistance of the Office of Emergency Services, the State Energy Resources Conservation and Development Commission, and the Department of the California Highway Patrol shall, with respect to any fissile radioactive material coming within the definition of ''fissile class II,'' ''fissile class III,'' ''large quantity radioactive materials,'' or ''low-level radioactive waste'' provided by the regulations of the United States Department of Transportation (49 C.F.R. 173.389), do all of the following:

(1) Study the adequacy of current packaging requirements for radioactive materials.

(2) Study the effectiveness of special routing and timing of radioactive materials shipments for the protection of the public health.

(3) Study the advantages of establishing a tracking system for shipments of most hazardous radioactive materials.

(b) A report on these studies, together with recommendations for any necessary changes in transportation regulations, shall be submitted by the department to the Legislature on or before July 1, 1982.

(c) The department, with the assistance of the Office of Emergency Services, the State Energy Resources Conservation and

Development Commission, and the Department of the California Highway Patrol, shall extend the nuclear threat emergency response plan to include radioactive materials in transit and provide training for law enforcement officers in dealing with those threats.

(d) Subject to Section 114765, the department, in cooperation with the Department of the California Highway Patrol, shall adopt, in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, reasonable regulations that, in the judgment of the department, promote the safe transportation of radioactive materials. The regulations shall (1) prescribe the use of signs designating radioactive material cargo; shall designate, in accordance with the results of the studies done pursuant to subdivision (a), the manner in which the shipper shall give notice of the shipment to appropriate authorities; (2) prescribe the packing, marking, loading, and handling of radioactive materials, and the precautions necessary to determine whether the material when offered is in proper condition to transport, but shall not include the equipment and operation of the carrier vehicle; and (3) be reviewed and amended, as required, pursuant to Section 114765. The regulations shall be compatible with those established by the federal agency or agencies required or permitted by federal law to establish the regulations.

(e) Subject to Section 114765, the Department of the California Highway Patrol, after consulting with the department, shall adopt regulations specifying the time at which shipments may occur and the routes that are to be used in the transportation of cargoes of hazardous radioactive materials, as those materials are defined in regulations of the department.

114825. Regulations adopted by the department pursuant to Section 114820 may be enforced, within their respective jurisdictions, by any authorized representatives of the department, the Division of Industrial Safety of the Department of Industrial Relations, the Public Utilities Commission, the health department of any city or county, the Department of the California Highway Patrol, or any traffic officer as defined by Section 625 of the Vehicle Code.

114830. It is the legislative intention in enacting this article that the regulations adopted by the department pursuant to this article shall apply uniformly throughout the state, and no state agency, city, county, or other political subdivision of this state, including a chartered city or county, shall adopt or enforce any ordinance or regulation that is inconsistent with the regulations adopted by the department pursuant to this article.

114835. A violation of any regulation adopted by the department pursuant to Section 114820 is a misdemeanor.

CHAPTER 6. RADIOLOGIC TECHNOLOGY

Article 1. Declaration of Policy

114840. The Legislature finds and declares that the public health interest requires that the people of this state be protected from excessive and improper exposure to ionizing radiation. It is the purpose of this chapter to establish standards of education, training, and experience for persons who use X-rays on human beings and to prescribe means for assuring that these standards are met.

114845. The Legislature finds and declares that the public health interest requires that increased steps be taken to ensure the accuracy of mammograms, including increased inspections and calibration of equipment, competency requirements for radiologic technologists, accreditation of mammography facilities, and the use of computers to read mammograms.

Article 2. Definitions

114850. As used in this chapter:

(a) ''Department'' means the State Department of Health Services.

(b) ''Committee'' means the Radiologic Technology Certification Committee.

(c) ''Radiologic technology'' means the application of X-rays on human beings for diagnostic or therapeutic purposes.

(d) ''Radiologic technologist'' means any person other than a licentiate of the healing arts making application of X-rays to human beings for diagnostic or therapeutic purposes pursuant to subdivision (b) of Section 114870.

(e) ''Limited permit'' means a permit issued pursuant to subdivision (c) of Section 114870 to persons to conduct radiologic technology limited to the performance of certain procedures or the application of X-ray to specific areas of the human body, except for a mammogram.

(f) ''Approved school for radiologic technologists'' means a school that the department has determined provides a course of instruction in radiologic technology that is adequate to meet the purposes of this chapter.

(g) ''Supervision'' means responsibility for, and control of, quality, radiation safety, and technical aspects of all X-ray examinations and procedures.

(h) ''Licentiate of the healing arts'' means a person licensed under the provisions of the Medical Practice Act, and a person licensed under the provisions of the initiative act entitled ''An act prescribing the terms upon which licenses may be issued to practitioners of chiropractic, creating the State Board of Chiropractic Examiners and

declaring its powers and duties, prescribing penalties for violation thereof, and repealing all acts and parts of acts inconsistent herewith,'' approved by electors November 7, 1922, as amended, or under the ''Osteopathic Act.''

(i) ''Certified supervisor or operator'' means a licentiate of the healing arts who has been certified under subdivision (e) of Section 114870 or 107115 to supervise the operation of X-ray machines or to operate X-ray machines, or both.

(j) ''Student of radiologic technology'' means a person who has started and is in good standing in a course of instruction that, if completed, would permit the person to be certified a radiologic technologist or granted a limited permit upon satisfactory completion of any examination required by the department. ''Student of radiologic technology'' does not include any person who is a student in a school of medicine, chiropractic, podiatry, dentistry, dental radiography, or dental hygiene.

(k) ''Mammogram'' means an X-ray image of the human breast.

(*l*) ''Mammography'' means the procedure for creating a mammogram.

Article 3. Radiologic Technology Certification

114855. The department shall appoint a certification committee to assist, advise, and make recommendations for the establishment of regulations necessary to insure the proper administration and enforcement of this chapter, and for those purposes to serve as consultants to the department. The appointments shall be made from lists of at least three nominees for each position submitted by appropriate professional associations and societies designated by the Director of Health Services, and provisions shall be made for orderly rotation of membership.

114860. The committee shall consist of the director or his or her designate, who shall serve as chairperson ex officio, but who shall not vote, and the following 11 members who are residents of the state:

(a) Six physicians and surgeons licensed to practice medicine in this state, three of whom shall be certified in radiology by the American Board of Radiology. At least one of the radiologists shall be representative of the hospital practice of radiology.

(b) Two persons with at least five years' experience in the practice of radiologic technology. At least one of these persons shall be representative of the hospital practice of radiologic technology. Except for the appointment of these two persons to the first committee, every person thereafter appointed to the committee under this subdivision shall be certified as a radiologic technologist.

(c) One radiological physicist, qualified in the use of physics in the practice of medicine.

(d) One podiatrist licensed to practice podiatry in this state.

(e) One chiropractic practitioner licensed to practice chiropractic in this state.

114865. Members of the committee shall serve without compensation but shall receive their actual and necessary expenses incurred in the performance of the duties of their office.

Article 4. Committee Administration and Regulations

114870. The department shall:

(a) Upon recommendation of the committee, adopt regulations as may be necessary to accomplish the purposes of this chapter.

(b) Provide for certification of radiologic technologists, without limitation as to procedures or areas of application, except as provided in Section 106980. Separate certificates shall be provided for diagnostic radiologic technology, for mammographic radiologic technology, and for therapeutic radiologic technology. If a person has received accreditation to perform mammography from a private accreditation organization, the department shall consider this accreditation when deciding to issue a mammographic radiologic technology certificate.

(c) Provide, as may be deemed appropriate, for granting limited permits to persons to conduct radiologic technology limited to the performance of certain procedures or the application of X-ray to specific areas of the human body, except for mammography, prescribe minimum standards of training and experience for these persons, and prescribe procedures for examining applicants for limited permits. The minimum standards shall include a requirement that persons granted limited permits under this subdivision shall meet those fundamental requirements in basic radiological health training and knowledge similar to those required for persons certified under subdivision (b) of this section as the department determines are reasonably necessary for the protection of the health and safety of the public.

(d) Provide for the approval of schools for radiologic technologists.

(e) Provide, upon recommendation of the committee, for certification of licentiates of the healing arts to supervise the operation of X-ray machines or to operate X-ray machines, or both, prescribe minimum standards of training and experience for these licentiates of the healing arts, and prescribe procedures for examining applicants for certification. This certification may limit the use of X-rays to certain X-ray procedures and the application of X-rays to specific areas of the human body.

(f) Upon recommendation of the committee, exempt from certification requirements licentiates of the healing arts who have successfully completed formal courses in schools certified by the department and who have successfully passed a roentgenology

technology and radiation protection examination approved by the department and administered by the board that issued his or her license.

114875. The department may, upon application, on a form prescribed and supplied by the department, by a licentiate of the healing arts, approve the licentiate to give on-the-job training, based on instructional standards prescribed by the department, to a student of radiologic technology if the following requirements are complied with:

(a) The training is restricted to applicants for limited permits in one category or an approved combination of categories.

(b) The training is given by a certified supervisor or operator.

(c) The didactic instruction and clinical experience are equivalent to that required of approved schools for radiologic technology limited permits and shall be outlined by the department in a manual or syllabus.

(d) On-the-job training may not exceed one year for any one student.

(e) There shall not be at any one time more than one student per licentiate.

(f) Records, subject to department inspection, shall be kept of hours of didactic training given the student and the number and kind of clinical procedures performed by the student. If the licentiate does not choose to give both clinical and didactic on-the-job training, as prescribed by the department, that portion not given by the licentiate shall be taken in a school approved by the department pursuant to Section 114870.

The department may establish and collect fees in an amount sufficient to defray the cost incurred by the department in administering the program of on-the-job training authorized by this section.

114880. Any regulations adopted by the department pursuant to subdivision (a) of Section 114870 shall be adopted only after consultation with and approval of the committee. Approval of those regulations shall be made by six affirmative votes of those present at an official meeting of the committee.

114885. The department shall, upon individual application, grant special permits to persons, excepting those persons from specific provisions of this chapter or of the regulations issued thereunder, if the department finds to its satisfaction that there is substantial evidence that the people in the locality of this state, in which the exemption is sought, would be denied adequate medical care because of unavailability of certified or certifiable radiologic technologists. Those special permits shall be granted for limited periods of time to be prescribed by the department in accordance with the purposes of this chapter, and the permits may be renewed.

114890. Notwithstanding Section 107075, any person who violates any provision of this chapter relating to mammography or regulations adopted pursuant to those provisions is guilty of a misdemeanor and shall, upon conviction, be punished by a fine not to exceed five thousand dollars ($5,000) per day, per offense or by imprisonment in the county jail not to exceed 180 days, or by both the fine and imprisonment.

114895. (a) Any person who intentionally or through gross negligence violates any provision of this chapter relating to mammography, or any rule or regulation adopted relating to mammography, or who fails or refuses to comply with a cease and desist order or other order of the department issued thereunder, which action causes a substantial danger to the health of others, shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) per day, per offense.

(b) The remedies under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal.

CHAPTER 7. ATOMIC ENERGY DEVELOPMENT

Article 1. Short Title

114900. This chapter may be cited and shall be known as the California Atomic Energy Development Law.

Article 2. Declaration of Policy

114905. The Legislature finds and declares that the peacetime uses of atomic energy and radiation can be instrumental in improving the health, welfare and economic productivity of the people of the State of California if properly utilized, and may be hazardous to the health and safety of the public if carelessly or excessively employed. It is therefore declared to be the policy of the state to:

(a) Encourage the constructive development of industries producing or utilizing atomic energy and radiation and to eliminate unnecessary exposure of the public to ionizing radiation.

(b) Have state agencies retain their traditional jurisdictions wherever possible.

(c) Have various departments and agencies of the state that are concerned with atomic energy and radiation and its various applications develop programs designed to protect the people of the state from unnecessary exposure to radiation.

(d) Assure the coordination of the programs of the state agencies and the laws, regulations incident thereto and to insure the coordination of these activities with the development and regulatory activities of local agencies, other states and the government of the United States, including the Atomic Energy Commission.

(e) Keep the public, labor, industry, and all other legitimate interests as completely informed as possible on all matters relating to peacetime atomic energy and radiation development and control in this state.

114907. ''Atomic energy'' means all forms of energy released in the course of nuclear transformation.

114908. As used in this chapter, ''secretary'' means the Secretary of the Resources Agency.

Article 3. Coordination of Atomic Energy Development

114910. The secretary shall perform the liaison function between the state and the federal government, including the United States Atomic Energy Commission, and between this state and other states in matters pertaining to atomic energy development.

114915. The secretary shall coordinate the programs, and regulations of the several departments and agencies of the state and the cities and counties relating to atomic energy development, and shall so far as may be practicable coordinate the studies conducted and the recommendations and proposals made in this state on these subjects with like activities in other states and by the federal government and with the policies and regulations of the United States Atomic Energy Commission.

The departments and agencies of the state which are concerned with atomic energy development, and the cities and counties, shall keep the secretary currently informed as to their activities and programs relating to atomic energy development.

114920. No rule or regulation applying to atomic energy development, or amendment thereto or repeal thereof, that any state agency may propose to adopt, unless it is an emergency regulation, shall be noticed under Section 11346.4 of the Government Code prior to 30 days after it has been submitted to the secretary for comments, recommendations, or suggestions as he or she may deem necessary or desirable with respect thereto, unless the secretary in writing waives all or a portion of the 30-day period.

114925. Whenever the secretary determines that an existing or proposed regulation is inconsistent with any regulation of another agency of the state, he or she may, after consultation with the agencies involved, find that the proposed regulation is inconsistent with a regulation of the other agency and shall issue an order to that effect, in which event the proposed rule or regulation shall not become effective. The secretary may, in the alternative, upon a similar determination, direct the appropriate agency to amend or repeal the existing regulation to achieve consistency with the proposed regulation.

114930. The secretary may, when he or she deems necessary or appropriate, recommend to any state department or other state

agency the adoption, amendment, or repeal of regulations relating to atomic energy development.

114935. The secretary shall keep the Governor and the various interested state departments and agencies and the cities and counties informed of private and public activities affecting the peacetime uses of atomic energy.

114940. The secretary shall disseminate to the public factual data and information and interpretations thereof concerning atomic energy development and the uses of radiation in the state with the view to providing a reliable source of accurate information relating to the benefits and hazards of such development and uses. Data and information relating to hazards of radiation shall be developed and disseminated in cooperation with the State Department of Health, as provided for in paragraph (3) of subdivision (e) of Section 115000.

114945. The secretary may consult with and seek the advice of technically qualified persons within and without the state to advise on matters relating to atomic energy, particularly with regard to regulations relating to atomic energy development usage.

114950. The department shall keep current information on the permits or licenses issued by the United States Atomic Energy Commission in the state and, along with current information on the radiation sources licensed or registered under the provisions of Section 115060, shall transmit the information upon request to any state department or agency or member of the public.

114955. Nothing contained in this chapter shall impair the authority or jurisdiction of the State Water Resources Control Board or any of the regional water quality control boards in this state to regulate the discharge of waste for the protection of the quality of waters of this state.

CHAPTER 8. RADIATION CONTROL LAW

Article 1. General

114960. This chapter shall be known, and may be cited, as the Radiation Control Law.

114965. It is the policy of the State of California, in furtherance of its responsibility to protect the public health and safety, to institute and maintain a regulatory program for sources of ionizing radiation so as to provide for: (a) compatibility with the standards and regulatory programs of the federal government, (b) an integrated effective system of regulation within the State, and (c) a system consonant insofar as possible with those of other states.

114970. It is the purpose of this chapter to effectuate the policies set forth in Section 114965 by providing for programs to:

(a) Effectively regulate sources of ionizing radiation for the protection of the occupational and public health and safety.

(b) Promote an orderly regulatory pattern within the State, among the states, and between the federal government and the State, and facilitate intergovernmental co-operation with respect to use and regulation of sources of ionizing radiation to the end that duplication of regulation may be minimized.

(c) Establish procedures for assumption and performance of certain regulatory responsibilities with respect to byproduct, source, and special nuclear materials.

(d) Permit maximum utilization of sources of ionizing radiation consistent with the health and safety of the public.

114975. Rules and regulations adopted under this chapter shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and Sections 25733 and 114920 of this code.

114980. (a) The Radiation Control Fund is hereby created as a special fund in the State Treasury. All moneys, including fees, penalties, interest earned, and fines collected under Sections 107160, 107100, 115045, 115065, and 115080, and the regulations adopted pursuant to those sections, shall be deposited in the Radiation Control Fund to cover the costs related to the enforcement of this chapter, Article 6 (commencing with Section 107150) of Chapter 4 of Part 1, and the Radiologic Technology Act (Section 27), and shall be available for expenditure by the department only upon appropriation by the Legislature. In addition to any moneys collected by, or on behalf of, the department for deposit in the Radiation Control Fund, all interest earned by the Radiation Control Fund shall be deposited in the Radiation Control Fund.

(b) This section shall become operative on July 1, 1993.

114985. As used in this chapter:

(a) ''Secretary'' means the Secretary of the Resources Agency.

(b) ''Ionizing radiation'' means gamma rays and X-rays; alpha and beta particles, high-speed electrons, neutrons, protons, and other nuclear particles; but not sound or radio waves, or visible, infrared, or ultraviolet light.

(c) ''Person'' means any individual, corporation, partnership, limited liability company, firm, association, trust, estate, public or private institution, group, agency, political subdivision of this state, any other state or political subdivision or agency thereof, and any legal successor, representative, agent, or agency of the foregoing, other than the United States Nuclear Regulatory Commission, the United States Department of Energy, or any successor thereto, and other than federal government agencies licensed by the United States Nuclear Regulatory Commission, under prime contract to the United States Department of Energy, or any successor thereto.

(d) ''Byproduct material'' means any radioactive material, except special nuclear material, yielded in, or made radioactive by exposure

to the radiation incident to, the process of producing or utilizing special nuclear material.

(e) ''Source material'' means (1) uranium, thorium, or any other material which the department declares by rule to be source material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material to be such; or (2) ores containing one or more of the foregoing materials, in such concentration as the department declares by rule to be source material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material in such concentration to be source material.

(f) ''Special nuclear material'' means (1) plutonium, uranium 233, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the department declares by rule to be special nuclear material after the United States Nuclear Regulatory Commission, or any successor thereto, has determined the material to be such, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(g) ''General license'' means a license, pursuant to regulations promulgated by the department, effective without the filing of an application, to transfer, acquire, own, possess or use quantities of, or devices or equipment utilizing, byproduct, source, or special nuclear materials or other radioactive material occurring naturally or produced artificially.

(h) ''Specific license'' means a license, issued after application, to use, manufacture, produce, transfer, receive, acquire, own, or possess quantities of, or devices or equipment utilizing, byproduct, source, or special nuclear materials or other radioactive material occurring naturally or produced artificially.

(i) ''Registration'' means the reporting of possession of a source of radiation and the furnishing of information with respect thereto, in accordance with subdivision (b) of Section 115060.

(j) ''Department'' means the State Department of Health Services.

(k) ''Director'' means the State Director of Health Services.

(*l*) ''Federal research and development activity'' means any activity of the Secretary of Energy conducted at any research facility owned or operated by the United States Department of Energy.

(m) ''Low-level waste'' means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or the byproduct material defined in Section 11(e)(2) of the Atomic Energy Act of 1954 (42 U.S.C. Sec. 2014 (e)(2)). For purposes of this subdivision, the following definitions shall apply:

(1) ''High-level radioactive waste'' means either of the following:

(A) The highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced

directly in reprocessing and any solid material derived from this liquid waste that contains fission products in sufficient concentrations.

(B) Other highly radioactive material that the Nuclear Regulatory Commission, consistent with existing law, determines by rule requires permanent isolation.

(2) ''Spent nuclear fuel'' means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

(3) ''Transuranic waste'' means any waste containing more than 100 nanocuries of alpha emitting transuranic nuclides with half-life greater than five years per gram of waste material.

(n) ''Mammogram'' means an X-ray image of the human breast.

(o) ''Mammography'' means the procedure for creating a mammogram.

(p) ''Mammography quality assurance'' means the detection of a change in X-ray and ancillary equipment that adversely affects the quality of films and the glandular radiation dose, and the correction of this change.

(q) ''Mammogram certification'' means a certification, issued by the department after registration, that the equipment dedicated to or used for mammography meets the standards prescribed pursuant to this chapter.

Article 3. Control Agency

114990. The department is designated as the agency responsible for the issuance of licenses. In carrying out its duties under this section, the department may enter into an agreement with the Division of Occupational Safety and Health and other state and local agencies to conduct technical evaluations of license applications prior to issuance of licenses. The agreements shall also include provisions for conducting inspections in accordance with Section 115095.

114995. The authority of the department to issue licenses pursuant to Section 114990 is not affected by any requirements to conduct studies or planning efforts specified in Section 115005.

115000. The department shall, for the protection of public health and safety do all of the following:

(a) Develop programs for evaluation of hazards associated with use of sources of ionizing radiation.

(b) Develop programs, with due regard for compatibility with federal programs, for licensing and regulation of byproduct, source, and special nuclear materials, and other radioactive materials.

(c) Except as provided in Section 18930, adopt regulations relating to control of other sources of ionizing radiation.

(d) Issue any regulations that may be necessary in connection with proceedings under Article 4 (commencing with Section 115060).

(e) Collect and disseminate information relating to control of sources of ionizing radiation, including all of the following:

(1) Maintenance of a file of all license applications, issuances, denials, amendments, transfers, renewals, modifications, suspensions, and revocations.

(2) Maintenance of a file of all regulations relating to regulation of sources of ionizing radiation, pending or adopted, and proceedings thereon.

(3) Disseminate information regarding the evaluation of hazards associated with the use of sources of ionizing radiation.

Nothing in this chapter shall be construed as precluding the Division of Occupational Safety and Health from adopting and enforcing regulations relating to matters within its jurisdiction consistent with, in furtherance of, and designed to implement this chapter and the regulations adopted thereunder.

115005. In addition to the requirements imposed by Section 115000, the department shall develop an overall plan, in consultation with other state, regional, and federal agencies, for the management, treatment, and disposal of low-level radioactive waste generated within California. The plan shall contain, at a minimum, all of the following elements:

(a) Specific contingency plans to address the needs of the state for the short-term storage of low-level radioactive waste in the event of a precipitous closure of existing out-of-state commercial waste disposal facilities and to evaluate feasible alternatives for meeting the state's needs. This element of the plan shall include, but is not limited to, all of the following factors:

(1) The amount and kinds of low-level radioactive waste generated by California licensees and current disposal locations.

(2) The size and nature of an interim storage facility required to meet California's interim low-level radioactive waste disposal needs.

(3) The cost of developing and operating an interim storage site by the department or contracting organizations.

(4) Criteria for the siting of an interim storage site, including, but not limited to, all of the following:

(A) Proximity to population.

(B) Geologic stability.

(C) Proximity to ground or surface water.

(D) Availability of transportation.

(E) General public health and economic considerations.

This element of the plan shall be completed and submitted to the appropriate committees of each house of the Legislature on or before December 31, 1982.

(b) A classification scheme for the separation of low-level waste that will facilitate the management, treatment, storage, and ultimate disposal of the waste. This classification scheme shall consider the matters as possible de minimus radiation levels for specific radionuclides, the quantity and specific activity of the material, its persistence, toxicity, chemical form, reactivity, and the principal radionuclides present. The classification scheme shall also include the specifications necessary to determine which classes of waste may or may not be accepted for storage in an interim storage facility stablished pursuant to Section 115045, that may or may not be held by the licensee for decay to specified residual radioactivity levels and that require long-term isolation from the environment, as the case may be, for the protection of the public health and safety. The department may require as a condition of licensure the submission of information necessary to determine the total amount of waste produced in each class of the classification scheme. The department may, by regulation, adopt the classification scheme establishing which wastes may or may not be accepted at an interim storage facility or at a treatment or disposal facility.

This element of the plan shall be completed and submitted to the appropriate committees of each house of the Legislature on or before December 31, 1982.

(c) Siting criteria for potential land burial disposal sites and treatment facilities within the state. In establishing these criteria, the department shall consider the following factors, including, but not limited to:

(1) The present and projected future uses of land, water, and natural resources.

(2) The proximity of the site to major population centers.

(3) The presence of active earthquake faults.

(4) Geologic and other natural barriers which protect against surface or groundwater contamination.

(5) The effectiveness of engineered barriers, waste treatment, and waste packaging in ensuring isolation of the waste from the environment.

(6) Transportation of radioactive materials as it relates to public health and safety.

(7) The relative economic impact of location and operation of treatment or disposal facilities.

This element of the plan shall be completed and submitted to the appropriate committees of each house of the Legislature on or before December 31, 1982.

(d) A plan of action to minimize the environmental, occupational, and public health impact of low-level radioactive waste and to protect the public health and safety by encouraging a reduction in the amount and toxicity of waste produced. This activity shall include conducting or having studies conducted that evaluate the technical

and economic feasibility of (1) reducing the volume, reactivity, and chemical and radioactive hazard of the waste, (2) cleaning contaminated, nonactivated metals and other materials to permit their recycle and reuse, and (3) substituting nonradioactive or short-lived radioactive materials for those radionuclides that require long-term isolation from the environment. The results of these studies, along with the departmental recommendations for their implementation, shall be reported by the department to the appropriate committees of the Legislature on or before December 31, 1983.

(e) Within six months after September 28, 1983, the Governor shall direct the appropriate state agency or agencies, as determined by the Governor, to conduct and complete a study that identifies those regions of the state within which it is likely the criteria developed pursuant to subdivision (c) could be met. The state agency or agencies, so directed, may also request, when appropriate, the assistance of state or federal agencies or private organizations.

115010. (a) The department shall not grant any license to receive radioactive material from other persons for disposal on land unless all of the following requirements are satisfied:

(1) The land on which the radioactive wastes are to be buried is owned by the federal or state government.

(2) The department determines that the site is consistent with the public health and safety.

(3) The applicant for the license will comply with the emergency regulations adopted by the department pursuant to subdivision (b).

(b) Not later than six months after September 28, 1983, the department shall adopt emergency regulations for the licensing of those persons engaged in the disposal of low-level radioactive waste and for implementing this section and Sections 115015, 115020, and 115030.

The emergency regulations shall be consistent with the federal regulations found in Sections 301 through 311, inclusive, of Part 20 of Title 10 and in Part 61 of Title 10 of the Code of Federal Regulations (Federal Register, Vol. 47, No. 28, page 57446, December 27, 1982) and shall be adopted solely for the purposes of clarifying and rendering specific, for application in California, these federal regulations and implementing this section and Sections 115015, 115020, and 115030.

(c) The emergency regulations specified in subdivision (b) shall be adopted by the department in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health and safety, and general

welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the department pursuant to this subdivision shall not be repealed by the Office of Administrative Law and shall remain in effect until revised or repealed by the department.

(d) The department may, by emergency regulation adopted in accordance with subdivision (c), establish and collect a fee for the issuance or renewal of a license specified in subdivision (a).

115015. The department may limit the number of licenses issued pursuant to Sections 114990, 115010, and 115020 authorizing the receipt of radioactive material from other persons for disposal on land.

115020. (a) All applicants filing a statement of capabilities and notice of intention to file an application for a license to receive radioactive materials from other persons for disposal on land shall file the statement and notice within three months after the department adopts the emergency regulations specified in subdivision (b) of Section 115010. Within 45 days after the termination of that three-month filing period, the department shall evaluate the statements of capabilities and notices of intent. The director shall determine, within that 45-day period, whether the department has received one or more statements and notices that are likely to result in the filing of an application for a license satisfying the requirements of Section 115010.

(b) If the director determines, within the 45-day period specified in subdivision (a), that the department has received one or more statements of capabilities and notices of intent which are likely to result in the filing of an application for a license, the department shall, within the 45-day period, select one of the applicants who filed the statement of capabilities and notice of intent to file a license application as a license designee.

(c) The department shall adopt emergency regulations establishing procedures for the review and evaluation of the statements of capabilities and notices of intent, as specified in subdivision (a), and for the selection of a license designee, as specified in subdivision (b). These emergency regulations shall be adopted by the department in accordance with subdivision (c) of Section 115010 and shall include procedures for soliciting, evaluating, ranking, and designating license designees and for selecting alternative license designees based upon the ranking.

(d) The department may solicit additional statements of capabilities and notices of intent if a license designee withdraws or becomes ineligible for licensing, or if a license is issued and is then suspended, revoked, or terminated.

(e) The department may, by emergency regulations adopted in accordance with subdivision (c) of Section 115010, establish and collect a fee for filing a statement of capabilities and notice of intent.

(f) The department may require that a person selected as a license designee pursuant to this section post a bond of up to one million dollars ($1,000,000) to guarantee that the person will carry out the activities connected with completing the license application and obtaining the license. The department shall, by emergency regulation adopted in accordance with subdivision (c) of Section 115010, establish standards for the forfeiture of the bond.

115025. (a) If, within 45 days after the termination of the three-month filing period specified in subdivision (a) of Section 115020, the director determines that the department has not received a statement of capabilities and a notice of intent to file an application for a license to receive radioactive materials from other persons for disposal on land that is likely to result in the filing of an application that satisfies the requirements of Section 115010, the director shall notify the Secretary of the Resources Agency.

(b) Within one year after receiving the notification specified in subdivision (a), the Secretary of the Resources Agency shall file with the department an application for a license to receive radioactive materials from other persons for disposal on land at a site within a region identified pursuant to subdivision (e) of Section 115005 and that is owned, operated, or both, by the state.

(c) (1) Upon the request of the Resources Agency, the Director of Finance may provide a loan from the General Fund to the Resources Agency for the purposes of implementing this section. The Resources Agency shall repay any loans made pursuant to this section pursuant to the terms and conditions prescribed by the Department of Finance, including interest at the rate set by the Pooled Money Investment Board pursuant to Section 16314 of the Government Code.

(2) The Director of Finance shall not provide more than two million dollars ($2,000,000) pursuant to this subdivision during the 1983–84 fiscal year. The amount for loans in the 1984–85 fiscal year, and subsequent fiscal years, shall be specified annually in the Budget Act and the total of all loans made pursuant to this subdivision shall not exceed fifteen million dollars ($15,000,000).

(d) If a radioactive materials disposal site that is owned, operated, or both, by the state is established pursuant to this section, the Secretary of the Resources Agency shall establish a schedule of fees to be charged each person who disposes of radioactive materials at the site. The schedule of fees shall be set at an amount sufficient to reimburse the state for any costs incurred in developing, constructing, and operating the site.

115030. The department may require that all schedules of fees charged for the disposal of radioactive material by a person owning

or operating a site licensed pursuant to Section 115010 are to be submitted to the department prior to their implementation. The department may determine, following a public hearing and based upon written findings, if the fees to be charged are reasonable and may require the owner or operator to modify the fee schedule if so determined by the department.

115035. In addition to the fees authorized to be levied pursuant to Section 115065, the department may, by regulation, set fees to be paid for the disposal in the state of low-level radioactive waste, set in an amount sufficient to pay the costs of the regulatory activities specified in paragraphs (2) and (3) of subdivision (E) of Article 4 of the Southwestern Low-Level Radioactive Waste Disposal Compact, as specified in Section 115255.

115040. (a) The license designee shall file periodic financial reports with the department as directed by the department. These reports shall provide detailed information on past and projected expenditures for development and operation of the low-level radioactive waste disposal site according to progammatic function, including, but not limited to, all of the following:

(1) Program management.
(2) Candidate sites selection.
(3) Site characterization.
(4) Environmental.
(5) Public and agency involvement.
(6) Licensing and permitting.
(7) Site development.
(8) Land acquisition.
(9) Financing.
(10) Operations.

(b) The license designee shall file reports with the department, as directed by the department, that identify, quantify, and explain major causes of actual and projected cost overruns and cost underruns with regard to the cost projections provided in the statement of capabilities and notice of intent.

(c) The Legislature finds and declares that the purpose of this section is to identify minimum financial reporting requirements for the costs of developing and operating the state's low-level radioactive waste disposal facility. This section does not limit the authority of the department to require the license designee to furnish any additional information that the department determines to be necessary to fulfill its duties under this chapter, including Section 115030.

115045. (a) The department is authorized, pursuant to subdivision (d), to establish and operate, or contract for the establishment and contract for operation, of one or more low-level radioactive waste interim storage facilities for the exclusive use of persons located in California who are licensed by the department or the United States Nuclear Regulatory Commission.

(b) In addition to the fees authorized to be levied pursuant to Section 115065, the department is authorized to set and collect fees, by regulation, to be paid by generators in California of low-level radioactive waste in an amount sufficient to support the development and operation of the facilities including the surveillance and repair of damaged packages, maintenance of the facilities, decontamination, decommissioning, and postclosure maintenance of these facilities, recordkeeping systems, and other activities as the department finds necessary to ensure the safe operation of such a facility. In no event shall any fee be set in an amount that exceeds the amount reasonably necessary to implement this section. The department is also authorized to require the operators or the users of the facilities to post bonds or possess adequate insurance as may be reasonably necessary to protect the state against such liabilities as storage and ultimate disposal costs for abandoned waste and against claims arising out of accidents or failures of the storage facility.

(c) All users of any facility operated pursuant to this section must all meet state and federal orders, requirements, or regulations for handling and management of low-level radioactive waste including those prescribed pursuant to subdivision (b) of Section 115005.

(d) No low-level radioactive waste interim storage facility may be established pursuant to subdivision (a) until all of the following occurs:

(1) The department has fulfilled the requirements of subdivisions (a) and (b) of Section 115005 and has submitted its findings to the Legislature.

(2) The establishment of the interim storage facility is consistent with the elements of the low-level radioactive waste disposal plan specified in subdivisions (a) and (b) of Section 115005.

(3) The department files a notice with the Legislature, while in session, 60 days before establishing the facility.

(e) In addition to any other grounds authorizing the department, or any person with whom it contracts, to cease the operation of a low-level radioactive waste interim storage facility, any such facility shall cease accepting low-level radioactive waste for interim storage (1) no later than five years after the date it commences operating or (2) if the director determines that an alternate disposal site is available to California licensees in the western region of the United States, whichever event occurs first.

(f) Within seven years of commencing operation of any interim storage facility all wastes stored at the facility shall be transferred to a permanent land burial disposal site or permanently disposed of by some other treatment or means of disposal and the facility shall be closed and thereafter, to the extent necessary, as determined by the department, decontaminated and decommissioned.

(g) This section shall remain in effect for a period of eight years from the date of the establishment of a low-level radioactive waste interim storage facility pursuant to this section, and as of that date is repealed. The director shall report the date the facility is established to the appropriate committees of each house of the Legislature and the Legislative Counsel Bureau.

115050. The Governor shall negotiate and enter into interstate agreements, interstate compacts, or agreements with compacts, for the purpose of establishing access to, or maintaining access to, land disposal facilities for low-level radioactive waste generated in California. The terms of the agreement or compact may include, but are not limited to, a provision that the other parties to the agreement or compact will have reciprocal access to California permanent disposal facilities, when operational.

The Governor shall report to the Legislature on the status of these negotiations within four months after September 28, 1983, and every four months thereafter, until an agreement or compact is entered into or the negotiations are terminated.

Any agreement or compact that proposes membership for California in a compact made pursuant to the Low-Level Radioactive Waste Policy Act (42 U.S.C. Secs. 2021b to 2021d, inclusive) or any interstate agreement or agreement with a compact that includes a provision that the other parties to the agreement will have reciprocal access to California permanent disposal facilities, when operational, shall be submitted to the Legislature for ratification by statute.

115055. The director shall appoint, in consultation with the Chairperson of the Senate Committee on Rules and the Speaker of the Assembly, an advisory committee to advise the department regarding methods for minimizing the environmental impact of low-level wastes, criteria for siting low-level waste treatment and burial facilities, alternatives to land burial of low-level waste, and waste classification schemes.

The committee shall include representatives from the field of medicine, and from research, industrial, environmental, and public health organizations, who have demonstrated expertise and experience with radioactive materials, waste management, the health effects of exposure to low-level waste, or the environmental impact associated with the storage of low-level waste. The director shall appoint to the advisory committee the director of environmental health of the county where a low-level waste disposal facility is sited.

Article 4. Licensing and Regulation of Sources of Ionizing Radiation

115060. (a) The department shall provide by rule or regulation for general or specific licensing of persons to receive, possess, or

transfer radioactive materials, or devices or equipment utilizing these materials. That rule or regulation shall provide for amendment, suspension, or revocation of licenses.

(b) The department may require registration and inspection of sources of ionizing radiation other than those that require a specific license, and compliance with specific safety standards to be adopted by the department.

(c) The department may exempt certain sources of ionizing radiation or kinds of uses or users from the licensing or registration requirements set forth in this section when the department makes a finding that the exemption of these sources of ionizing radiation or kinds of uses or users will not constitute a significant risk to the health and safety of the public.

(d) Regulations adopted pursuant to this chapter may provide for recognition of other state or federal licenses as the department may deem desirable, subject to registration requirements as the department may prescribe.

(e) The department shall adopt registration and certification regulations for mammography equipment. These regulations shall include, but not be limited to, all of the following requirements:

(1) An X-ray machine used for mammography shall be specifically designed for mammography and inspected by the department, or deemed satisfactory by the department based upon evidence of certification by the American College of Radiology mammography accreditation program, or an accreditation program that the department deems equivalent before it is certified.

(2) That all persons who have a certificate for mammography equipment follow a quality assurance program to be adopted by the department to ensure the protection of the public health and safety.

(3) That quality assurance tests, as determined by the department, are performed on all mammography equipment located in a mobile van or unit after each relocation of the mobile van or unit to a different location for the purpose of providing mammography. This equipment shall be recalibrated if images are not of diagnostic quality as determined by the department. A written record of the location of mobile vans or units with dates and times shall be maintained and available for inspection by the department.

(4) On or after July 15, 1993, all mammography equipment shall be registered with and certified by the department. If this mammography equipment is certified by a private accreditation organization, the department shall take into consideration evidence of this private certification when deciding to issue a mammogram certification.

(5) All licenses, permits, and certificates issued by the department pursuant to this chapter and the Radiologic Technology Act (Section 27) relating to the use of mammography equipment shall be publicly

posted pursuant to this section and regulations adopted by the department.

(f) To further ensure the quality of mammograms, the department shall require all mammogram facilities, other than mobile units or vans, to operate quickly and efficiently so as to ensure that the facilities are able to develop mammograms of diagnostic quality prior to when the patient leaves the facility.

115065. (a) The department shall provide by regulation a schedule of the fees that shall be paid by the following persons:

(1) Persons possessing radioactive materials under licenses issued by the department or under other state or federal licenses for the use of these radioactive materials, when these persons use these radioactive materials in the state in accordance with the regulations adopted pursuant to subdivision (d) of Section 115060.

(2) Persons generally licensed for the use of devices and equipment utilizing radioactive materials that are designed and manufactured for the purpose of detecting, measuring, gauging, or controlling thickness, density, level, interface location, radiation, leakage, or qualitative or quantitative chemical composition, or for producing light or an ionized atmosphere, if the devices are manufactured pursuant to a specific license authorizing distribution to general licensees.

(b) The revenues derived from the fees shall be used, together with other funds made available therefor, for the purpose of the issuance of licenses or the inspection and regulation of the licensees.

(c) The department may adopt emergency regulations pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code to establish and adjust fees for radioactive materials licenses in an amount to produce estimated revenues equal to at least 95 percent of the department's costs in carrying out these licensing requirements, if the new fees were to remain in effect throughout the fiscal year for which the fee is established or adjusted.

(d) A local agency participating in a negotiated agreement pursuant to Section 114990 shall be fully reimbursed for direct and indirect costs based upon activities governed by Section 115070. With respect to these agreements, any salaries, benefits, and other indirect costs shall not exceed comparable costs of the department.

(e) The fees for licenses for radioactive materials and of devices and equipment utilizing those materials shall be adjusted annually pursuant to Section 100425.

115070. The frequency of inspections of radioactive materials shall be based on priorities established by the United States Nuclear Regulatory Commission.

115075. In addition to the annual adjustment of the fees authorized by this chapter pursuant to Section 100425, on or before January 1, 1991, the director may adopt emergency regulations in

accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, to establish and adjust these fees, and for purposes of that chapter, including Section 11349.6 of the Government Code, an adoption of these regulations is an emergency and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health and safety, and general welfare.

115080. (a) The department shall provide by regulation a ranking of priority for inspection, as determined by the degree of potentially damaging exposure of persons by ionizing radiation and the requirements of Section 115085, and a schedule of fees, based upon that priority ranking, that shall be paid by persons possessing sources of ionizing radiation that are subject to registration in accordance with subdivisions (b) and (e) of Section 115060, and regulations adopted pursuant thereto. The revenues derived from the fees shall be used, together with other funds made available therefor, for the purpose of carrying out any inspections of the sources of ionizing radiation required by this chapter or regulations adopted pursuant thereto. The fees shall, together with any other funds made available to the department, be sufficient to cover the costs of administering this chapter, and shall be set in amounts intended to cover the costs of administering this chapter for each priority source of ionizing radiation. Revenues generated by the fees shall not offset any general funds appropriated for the support of the radiologic programs authorized pursuant to this chapter, and the Radiologic Technology Act (Section 27), and Chapter 7.6 (commencing with Section 114960). Persons who pay fees shall not be required to pay, directly or indirectly, for the share of the costs of administering this chapter of those persons for whom fees are waived. The department shall take into consideration any contract payment from the Health Care Financing Administration for performance of inspections for Medicare certification and shall reduce this fee accordingly.

(b) A local agency participating in a negotiated agreement pursuant to Section 114990 shall be fully reimbursed for direct and indirect costs based upon activities governed by Section 115085. With respect to these agreements, any salaries, benefits, and other indirect costs shall not exceed comparable costs of the department. Any changes in the frequency of inspections or the level of reimbursement to local agencies made by this section or Section 115085 during the 1985–86 Regular Session shall not affect ongoing contracts.

(c) The fees paid by persons possessing sources of ionizing radiation shall be adjusted annually pursuant to Section 100425.

115085. The average inspection frequency for ionizing radiation machines shall be once each year for mammography X-ray units, once every three years for high-priority sources of ionizing radiation,

and once every four and one-quarter years for medium-priority sources. Sources of ionizing radiation used in dentistry shall be screened for defects by mail or other offsite methodology not less frequently than once every five years, with physical inspection of the 50 percent, determined by the department to be most in need of inspection, to average at least once every six years.

115090. In making the determination of whether to grant, deny, amend, revoke, suspend, or restrict a certification, registration, or license, the department may consider those aspects of a person's background that, in its judgment, bear materially on that person's ability to fulfill her or his obligations, including but not limited to technical competency and her or his current or prior record in areas involving ionizing radiation.

Article 5. Inspection

115095. Any officer, employee, or agent of the department or of any state or local agency with which an agreement has been made pursuant to Section 114990 shall have the power to enter at all reasonable times upon any private or public property within the jurisdiction of the agency for the purpose of determining whether or not there is compliance with or violation of this chapter, building standards published in the State Building Standards Code relating to buildings in which there are sources of ionizing radiation, or of the regulations adopted pursuant to this chapter, and the owner, occupant, or person in charge of the property shall permit that entry and inspection. Entry into areas under the jurisdiction of the federal government shall be effected only with the concurrence of the federal government or its duly designated representative.

115100. (a) The person responsible for registering mammographic X-ray equipment shall be responsible for assuring that the mammographic X-ray equipment under his or her jurisdiction has been inspected and that mammography quality assurance tests are performed by a medical physicist, health physicist, or other individual with qualifications similar to those approved by the department and prescribed in the May 1990 version of the ''Rules of Good Practice for Supervision and Operation of Mammographic X-Ray Equipment,'' as approved by the Radiologic Technology Certification Committee.

(b) If the department adopts regulations on or after January 1, 1993, that provide similar or stronger protection of a patient's health and safety than the ''Rules of Good Practice for Supervision and Operation of Mammographic X-Ray Equipment,'' as determined by the department, then those rules shall no longer apply to this section.

Article 6. Records

115105. The department shall require each person who acquires, possesses or uses a source of ionizing radiation to maintain records relating to its receipt, storage, transfer or disposal, and other records as the department may require, subject to exemptions as may be provided by regulations.

115110. The department shall require each person who possesses or uses a source of ionizing radiation to maintain appropriate records showing the radiation exposure of all individuals for whom personnel monitoring is required by regulations of the department. Copies of these records and those required to be kept in accordance with Section 115105 shall be submitted to the department upon request.

The department shall adopt reasonable regulations, compatible with those of the United States Atomic Energy Commission, pertaining to reports of exposure of personnel. The regulations shall require that reports of excessive exposure be made to the individual exposed and to the department, and shall make provision for periodic and terminal reports to individuals for whom personnel monitoring is required. Section 6411 of the Labor Code shall not be construed as exempting any person from making any report required by this section.

115115. (a) The person responsible for registering mammographic X-ray equipment or a certified supervisor, as defined in subdivision (i) of Section 114850, shall establish and maintain a Mammography Quality Assurance Program that includes:

(a) A Mammography Quality Assurance Manual for the identification of mammography quality assurance tests performed, test frequency, test equipment used, maintenance and calibration of test equipment, and the qualifications of individuals who perform the tests in order to ensure compliance with the May 1990 version of ''Rules of Good Practice for Supervision and Operation of Mammographic X-Ray Equipment'' or the regulations of the department.

(b) A ''Mammography X-Ray Equipment and Facility Accreditation Certificate'' issued by the department that shall be posted on each X-ray machine specifically dedicated for the purpose of mammography.

Article 7. Federal-State Agreements

115120. The Governor, on behalf of this state, may enter into agreements with the federal government providing for discontinuance of certain of the federal government's responsibilities with respect to sources of ionizing radiation and the assumption thereof by this state. The agreements shall become effective only when ratified by law.

115125. Any person who, on the effective date of an agreement under Section 115120, possesses a license issued by the federal government shall be deemed to possess the same pursuant to a license issued under this chapter. The license shall expire either 90 days after receipt from the department of a notice of expiration of the license, or on the date of expiration specified in the federal license, whichever is the earlier.

Article 8. Inspection Agreements and Training Programs

115130. The department, on behalf of this state, may enter into an agreement or agreements with the federal government, other states, or interstate agencies, whereby this state will perform on a co-operative basis with the federal government, other states, or interstate agencies, inspections or other functions relating to control of sources of ionizing radiation.

115135. The department and any other appropriate state agency may institute training programs for the purpose of qualifying personnel to carry out this chapter, and may make those personnel available for participation in any program or programs of the federal government, other states, or interstate agencies in furtherance of the purposes of this chapter.

115140. Ordinances, resolutions or regulations, now or hereafter in effect, of the governing body of a city or county relating to radioactive materials or other sources of radiation shall not be superseded by this chapter, provided that the ordinances or regulations are and continue to be consistent with the provisions of this chapter, amendments thereto, and regulations thereunder. No city or county shall require the payment of a fee in connection with the activities governed by Section 115065 when a fee is required by rules or regulations adopted pursuant to that section, and no city or county shall require the payment of a fee in connection with the activities governed by Section 115080 when a fee is required by rules or regulations adopted pursuant to that section.

Article 10. Administrative Procedure

115145. (a) In any proceeding under this chapter for granting or amending any license, or for determining compliance with, or granting exceptions from, regulations adopted in accordance with this chapter, the department shall afford an opportunity for a hearing on the record upon the request of any person whose interest may be affected by the proceeding, and shall admit that person as a party to the proceeding.

(b) Proceedings for the suspension or revocation of licenses under this chapter shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of

the Government Code, and the department shall have all the powers granted therein.

(c) The adoption, repeal, or amendment of regulations pursuant to this chapter shall be accomplished in conformity with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

115150. Whenever the department finds that an emergency exists requiring immediate action to protect the public health and safety, the department may, without notice or hearing, issue a regulation or order reciting the existence of the emergency and requiring that action be taken as is deemed necessary to meet the emergency. Notwithstanding any provision of this chapter, the regulation or order shall be effective immediately. Any person to whom the regulation or order is directed shall comply therewith immediately, but on application to the department shall be afforded a hearing within 15 days. On the basis of the hearing, the emergency regulation or order shall be continued, modified, or revoked within 30 days after the hearing.

115155. Any final order entered in any proceeding under Sections 115145 and 115150 shall be subject to judicial review in the manner prescribed in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Article 11. Injunction Proceedings

115160. Whenever, in the judgment of the department, any person has engaged in or is about to engage in any acts or practices that constitute or will constitute a violation of any provision of this chapter, or any rule, regulation or order issued thereunder, and at the request of the department, the Attorney General may make application to the superior court for an order enjoining the acts or practices, or for an order directing compliance, and upon a showing by the department that the person has engaged in or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

Article 12. Uses

115165. It shall be unlawful for any person to use, manufacture, produce, knowingly transport, transfer, receive, acquire, own, or possess, any source of ionizing radiation unless licensed by or registered with the department in accordance with this chapter and regulations issued thereunder.

115170. It is unlawful for any person to manufacture, construct, produce, transfer, acquire, use, or possess any of the materials or facilities for which a permit or license is required under the provisions of the Atomic Energy Act of 1954 (Public Law 85-256)

unless he or she shall have first obtained a permit or license. Violation of this section is a misdemeanor.

Article 13. Impounding of Materials

115175. The department shall have the authority in the event of an emergency to impound or order the impounding of sources of ionizing radiation in the possession of any person who is not equipped to observe or fails to observe this chapter or any rules or regulations issued thereunder.

115180. The term ‘‘decontamination,’’ as used in this chapter, means the reduction of the level of contamination from radioactive material to the level that the department determines is reasonably necessary to eliminate the hazard to public health that is caused by the contamination of any object, building, structure, or premises. Any order by the department pursuant to Section 115185 shall prescribe the level to which the contamination is required to be reduced in order to eliminate the hazard to the public health.

115185. If the department determines that any object, building, structure, or premises is contaminated by radioactive material and constitutes a hazard to the public health, it shall order the person who has control of the object, building, structure, or premises to cease to use or occupy and to exercise due caution to prevent others from using or occupying the object, building, structure, or premises, except to the extent necessary to accomplish the decontamination, or to the extent necessary to accomplish the disposal of the object, building, or structure as radioactive waste. The normal use or occupancy of the object, building, structure, or premises may not be resumed until decontamination has been accomplished and a release obtained from the department.

If the person who has control of the object, building, structure, or premises fails to comply with the department’s order to decontaminate, the department may impound or seize the object, building, structure, or premises. The department after impounding or seizure of an object, building, structure, or premises, may decontaminate the object, building, structure, or premises.

115190. If the department determines that the object, building, structure, or premises does not warrant decontamination because of its low value, it shall so notify in writing the person who had control of the object, building, structure, or premises. The person so notified may decontaminate the object, building, structure, or premises, but if he or she fails to do so within 15 days after the notice, the department may cause the object, building, structure, or premises to be disposed of as radioactive waste.

115195. If the department causes the object, building, structure or premises to be decontaminated, the department shall, upon the completion of the decontamination, return the impounded article or

seized building, structure, or premises to the person who had control of the article, building, structure, or premises prior to the impounding or seizure. The person who has control of the object, building, structure, or premises and was responsible for its contamination shall pay the department for the reasonable and necessary costs incurred by the department in seizing and decontaminating or in seizing and disposing of the object, building, structure, or premises.

115200. If the contamination of the object, building, structure, or premises resulted from the negligence of another person, then the department may require that person to pay all reasonable and necessary costs incurred by the department in seizing and decontaminating or disposing of the object, building, structure, or premises and may maintain any action necessary to recover those costs.

115205. (a) A lien in favor of the people of California shall be imposed upon any object, building, structure, or premises for the reasonable amount of expenses and costs incurred by the department in carrying out the provisions of Section 115185, 115190, 115195, or 115200 if the owner of the property or of any interest therein is the person responsible for the contamination, and to the extent of the interest of that person. Notice of lien or notice of intent to impose a lien shall be posted by the department upon any object, building, structure, or premises impounded or seized by the department and notice of lien or notice of intent to impose a lien shall be filed with the county recorder of the county in which they are located.

The lien shall not become effective until the notice of lien, particularly identifying the property, the interest subject to the lien and the name of the owner of record of the property, and the amount of the lien, is recorded in the office of the county recorder in the county where the property is located. Upon the recordation, the lien shall have the same force, effect and priority as if it had been a judgment lien imposed upon real property that was not exempt from execution, except that it shall attach only to the property described in the notice and impounded or seized by the department, and shall continue for 10 years from the time of the recording of the notice unless sooner released or otherwise discharged.

(b) The department may at any time release all or any portion of the property subject to a lien imposed pursuant to subdivision (a) from the lien or subordinate the lien to other liens and encumbrances if it determines that the amount owed is sufficiently secured by a lien on other property or that the release or subordination of the lien will not jeopardize the collection of the amount owed. A certificate by the department to the effect that any property has been released from the lien or that the lien has been subordinated to other liens and encumbrances shall be conclusive evidence that the property has

been released or that the lien has been subordinated as provided in the certificate.

115210. (a) The city attorney of the city or the district attorney of the county in which any violations of this chapter occur, occurred, or will occur, or the Attorney General, at the request of the department, may institute on behalf of the people of California any civil action necessary to carry out this chapter, including, but not restricted to, the enforcement of liens, the obtaining of injunctions, or the imposition of civil penalties.

(b) If the civil penalties are awarded and the action is brought by a city attorney or district attorney, the penalty shall be paid directly to the city or county. If no penalty is awarded or paid, or both, the state shall have no obligation to make any payment to the city or county.

If the civil penalty is awarded and the action is brought by the Attorney General, the penalty shall be deposited in the General Fund.

Article 14. Penalties

115215. (a) Any person who violates this chapter, or rules, regulations, or orders in effect adopted pursuant to this chapter, is guilty of a misdemeanor and shall, upon conviction, be punished by a fine not to exceed one thousand dollars ($1,000) or by imprisonment in the county jail for a period not to exceed 180 days, or by both the fine and imprisonment.

(b) Any person who knowingly disposes or causes the disposal of any radioactive material regulated by this chapter, or who reasonably should have known that the person was disposing or causing the disposal of the material, at a facility within the state that does not have a license for disposal issued by the department pursuant to this chapter, or at any point in the state that is not authorized according to this chapter, or by any other local, state, or federal agency having authority over radioactive materials, and is in violation of this chapter, or any regulation or order adopted pursuant to this chapter, is guilty of a public offense, and upon conviction, may be punished as follows:

(1) If the disposal is found to have caused a substantial danger to the public health or safety, the person may be punished by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for 16, 24, or 36 months, except as otherwise provided in paragraph (2). The court may also impose, upon a person convicted of violating this subdivision, a fine of not more than one hundred thousand dollars ($100,000) for each day of violation, except as otherwise provided in paragraph (2).

(2) If the act that violated this subdivision caused great bodily injury or caused a substantial probability that death could result, the

person convicted may be punished by imprisonment in the state prison for three, five, or seven years and may be fined not more than two hundred fifty thousand dollars ($250,000) for each day of violation.

(c) Any person who knowingly transports or causes the transportation of any radioactive material regulated by this chapter, or who reasonably should have known that the person was causing the transportation of the material, to a facility in the state that does not have a license from the department issued pursuant to this chapter, to any point in the state that is not authorized by this chapter, or to any point in the state that is not authorized by any other local, state, or federal agency having authority over radioactive materials, and is in violation of this chapter, or any regulation or order adopted pursuant to this chapter, is guilty of a public offense and, upon conviction, may be punished as follows:

(1) If the transportation is found to have caused a substantial danger to the public health or safety, the person may be punished by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for 16, 24, or 36 months, except as otherwise provided in paragraph (2). The court may also impose, upon a person convicted of violating this subdivision, a fine of not more than one hundred thousand dollars ($100,000) for each day of violation, except as provided by paragraph (2).

(2) If the transportation that violated this subdivision caused great bodily injury or caused a substantial probability that death could result, the person convicted may be punished by imprisonment in the state prison for three, five, or seven years and may be fined not more than two hundred fifty thousand dollars ($250,000) for each day of violation.

(d) Notwithstanding any other provision of this chapter, radioactive materials used in medical treatment or result from medical treatment, that are disposed, stored, handled, or transported in a manner authorized pursuant to this chapter, are exempt from subdivisions (b) and (c).

(e) Notwithstanding subdivision (a), any person who violates any provision of this chapter relating to mammography or regulations adopted pursuant to those provisions is guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not to exceed five thousand dollars ($5,000), per day of offense, or by imprisonment in the county jail not to exceed 180 days, or both the fine and imprisonment.

115220. (a) Any person who intentionally or through gross negligence violates any provision of this chapter, or any rule or regulation adopted pursuant thereto, or who fails or refuses to comply with a cease and desist order or other order of the department issued thereunder, and that action causes a substantial danger to the health of others, shall be liable to the department for

a civil penalty not to exceed five thousand dollars ($5,000) per day, per offense.

(b) The remedies under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal.

Article 15. Effective Date of Licensing Provisions

115225. Subdivision (a) of Section 115060 and other provisions of this chapter relating to licensing and the enforcement thereof shall become effective only upon execution of an agreement pursuant to Section 115120. Section 115080 shall become operative on July 1, 1962.

Article 16. Agreement Between the United State Atomic Energy Commission and the State of California

115230. The Legislature of the State of California hereby ratifies and approves that certain agreement designated as the ''Agreement between the United States Atomic Energy Commission and the State of California for Discontinuance of Certain Commission Regulatory Authority and Responsibility within the State Pursuant to Section 274 of the Atomic Energy Act of 1954, as Amended,'' that was approved by the Chairman of the Atomic Energy Commission on the ninth day of March 1962, under authority of Section 274 of the Atomic Energy Act of 1954, as amended (Public Law 86-373), and by the Governor of California on the 12th day of March 1962, under authority of and in conformity with Section 115120; and the provisions of this agreement shall become effective in accordance with Article IX of the agreement set forth in Section 115235.

115235. The provisions of said agreement are as follows:

Article I

Subject to the exceptions provided in Articles II, III, and IV, the Commission shall discontinue, as of the effective date of this Agreement, the regulatory authority of the Commission in the State under Chapters 6, 7, and 8, and Section 161 of the Act with respect to the following materials:

A. Byproduct materials;

B. Source materials; and

C. Special nuclear materials in quantities not sufficient to form a critical mass.

Article II

This Agreement does not provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of:

A. The construction and operation of any production or utilization facility;

B. The export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

C. The disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

D. The disposal of other byproduct, source, or special nuclear material as the Commission from time to time determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

Article III

Notwithstanding this Agreement, the Commission may from time to time by rule, regulation, or order, require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of the product except pursuant to a license or an exemption from licensing issued by the Commission.

Article IV

This Agreement shall not affect the authority of the Commission under Subsection 161 b. or i. of the Act to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material.

Article V

The State will use its best efforts to maintain continuing compatibility between its program and the program of the Commission for the regulation of like materials. To this end the State will use its best efforts to keep the Commission informed of proposed changes in its regulations, and licensing, inspection, and enforcement policies and criteria, and of proposed requirements for the design and distribution of products containing source, byproduct, or special nuclear material, and to obtain the comments and assistance of the Commission thereon.

Article VI

The Commission will use its best efforts to keep the State informed of proposed changes in its regulations, and licensing, inspection, and enforcement policies and criteria and to obtain the comments and assistance of the State thereon.

Article VII

The Commission and the State agree that it is desirable to provide for reciprocal recognition of licenses for the materials listed in Article I licensed by the other party or by any agreement State. Accordingly, the Commission and the State agree to use their best efforts to develop appropriate rules, regulations, and procedures by which such reciprocity will be accorded.

Article VIII

The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State, or upon request of the Governor of the State, may terminate or suspend this Agreement and reassert the licensing and regulatory authority vested in it under the Act if the Commission finds that such termination or suspension is required to protect the public health and safety.

Article IX

This Agreement, upon ratification by law of the State, shall become effective on the ninety-first day after the adjournment of the First Extraordinary Session of the 1962 California Legislature or on September 1, 1962, whichever is later, and shall remain in effect unless, and until such time as it is terminated pursuant to Article VIII.

Article 17. Southwestern Low Level Radioactive Waste Disposal Compact

115250. The Legislature of the State of California hereby enacts and ratifies the agreement set forth in Section 115255 and designated as the ''Southwestern Low-Level Radioactive Waste Disposal Compact,'' entered into pursuant to the Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C. Sec. 2021b to 2021j, incl.). This compact shall become effective in accordance with Article 7 of the compact as set forth in Section 115255.

115255. The provisions of the Southwestern Low-Level Radioactive Waste Disposal Compact are as follows:

Article 1. Compact Policy and Formation

The party states hereby find and declare all of the following:

(A) The United States Congress, by enacting the Low-Level Radioactive Waste Policy Act, Public Law 96-573, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C. Sec. 2021b to 2021j, incl.), has encouraged the use of interstate compacts to provide for the establishment and operation of facilities for regional management of low-level radioactive waste.

(B) It is the purpose of this compact to provide the means for such a cooperative effort between or among party states to protect the citizens of the states and the states' environments.

(C) It is the policy of party states to this compact to encourage the reduction of the volume of low-level radioactive waste requiring disposal within the compact region.

(D) It is the policy of the party states that the protection of the health and safety of their citizens and the most ecological and economical management of low-level radioactive wastes can be accomplished through cooperation of the states by minimizing the amount of handling and transportation required to dispose of these wastes and by providing facilities that serve the compact region.

(E) Each party state, if an agreement state pursuant to Section 2021 of Title 42 of the United States Code, or the Nuclear Regulatory Commission if not an agreement state, is responsible for the primary regulation of radioactive materials within its jurisdiction.

Article 2. Definitions

As used in this compact, unless the context clearly indicates otherwise, the following definitions apply:

(A) ''Commission'' means the Southwestern Low-Level Radioactive Waste Commission established in Article 3 of this compact.

(B) ''Compact region'' or ''region'' means the combined geographical area within the boundaries of the party states.

(C) ''Disposal'' means the permanent isolation of low-level radioactive waste pursuant to requirements established by the Nuclear Regulatory Commission and the Environmental Protection Agency under applicable laws, or by a party state if that state hosts a disposal facility.

(D) ''Generate,'' when used in relation to low-level radioactive waste, means to produce low-level radioactive waste.

(E) ‘‘Generator’’ means a person whose activity, excluding the management of low-level radioactive waste, results in the production of low-level radioactive waste.

(F) ‘‘Host county’’ means a county, or other similar political subdivision of a party state, in which a regional disposal facility is located or being developed.

(G) ‘‘Host state’’ means a party state in which a regional disposal facility is located or being developed. The State of California is the host state under this compact for the first 30 years from the date the California regional disposal facility commences operations.

(H) ‘‘Institutional control period’’ means that period of time in which the facility license is transferred to the disposal site owner in compliance with the appropriate regulations for long-term observation and maintenance following the postclosure period.

(I) ‘‘Low-level radioactive waste’’ means regulated radioactive material that meets all of the following requirements:

(1) The waste is not high-level radioactive waste, spent nuclear fuel, or byproduct material (as defined in Section 11e(2) of the Atomic Energy Act of 1954 (42 U.S.C. Sec. 2014(e)(2))).

(2) The waste is not uranium mining or mill tailings.

(3) The waste is not any waste for which the federal government is responsible pursuant to subdivision (b) of Section 3 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C. Sec. 2021c(b)).

(4) The waste is not an alpha emitting transuranic nuclide with a half-life greater than five years and with a concentration greater than 100 nanocuries per gram, or Plutonium-241 with a concentration greater than 3,500 nanocuries per gram, or Curium-242 with a concentration greater than 20,000 nanocuries per gram.

(J) ‘‘Management’’ means collection, consolidation, storage, packaging, or treatment.

(K) ‘‘Major generator state’’ means a party state that generates 10 percent of the total amount of low-level radioactive waste produced within the compact region and disposed of at the regional disposal facility.

If no party state other than California generates at least 10 percent of the total amount, ‘‘major generator state’’ means the party state which is second to California in the amount of waste produced within the compact region and disposed of at the regional disposal facility.

(L) ‘‘Operator’’ means a person who operates a regional disposal facility.

(M) ‘‘Party state’’ means any state that has become a party in accordance with Article 7 of this compact.

(N) ‘‘Person’’ means an individual, corporation, partnership, or other legal entity, whether public or private.

(O) ‘‘Postclosure period’’ means that period of time after completion of closure of a disposal facility during which the licensee

shall observe, monitor, and carry out necessary maintenance and repairs at the disposal facility to assure that the disposal facility will remain stable and will not need ongoing active maintenance. This period ends with the beginning of the institutional control period.

(P) ''Regional disposal facility'' means a nonfederal low-level radioactive waste disposal facility established and operated under this compact.

(Q) ''Site closure and stabilization'' means the activities of the disposal facility operator taken at the end of the disposal facility's operating life to assure the continued protection of the public from any residual radioactivity or other potential hazards present at the disposal facility.

(R) ''Transporter'' means a person who transports low-level radioactive waste.

(S) ''Uranium mine and mill tailings'' means waste resulting from mining and processing of ores containing uranium.

Article 3. The Commission

(A) There is hereby established the Southwestern Low-Level Radioactive Waste Commission.

(1) The commission shall consist of one voting member from each party state to be appointed by the Governor, confirmed by the Senate of that party state, and to serve at the pleasure of the Governor of each party state, and one voting member from the host county. The appointing authority of each party state shall notify the commission in writing of the identity of the member and of any alternates. An alternate may act in the member's absence.

(2) The host state shall also appoint that number of additional voting members of the commission that is necessary for the host state's members to compose at least 51 percent of the membership on the commission. The host state's additional members shall be appointed by the host state Governor and confirmed by the host state Senate.

If there is more than one host state, only the state in which is located the regional disposal facility actively accepting low-level radioactive waste pursuant to this compact may appoint these additional members.

(3) If the host county has not been selected at the time the commission is appointed, the Governor of the host state shall appoint an interim local government member, who shall be an elected representative of a local government. After a host county is selected, the interim local government member shall resign and the Governor shall appoint the host county member pursuant to paragraph (4).

(4) The Governor shall appoint the host county member from a list of at least seven candidates compiled by the board of supervisors of the host county.

(5) In recommending and appointing the host county member pursuant to paragraph (4), the board of supervisors and the Governor shall give first consideration to recommending and appointing the member of the board of supervisors in whose district the regional disposal facility is located or being developed. If the board of supervisors of the host county does not provide a list to the Governor of at least seven candidates from which to choose, the Governor shall appoint a resident of the host county as the host county member.

(6) The host county member is subject to confirmation by the Senate of that party state and shall serve at the pleasure of the Governor of the host state.

(B) The commission is a legal entity separate and distinct from the party states and shall be so liable for its actions. Members of the commission shall not be personally liable for actions taken in their official capacity. The liabilities of the commission shall not be deemed liabilities of the party states.

(C) The commission shall conduct its business affairs pursuant to the laws of the host state and disputes arising out of commission action shall be governed by the laws of the host state. The commission shall be located in the capital city of the host state in which the regional disposal facility is located.

(D) The commission's records shall be subject to the host state's public records law, and the meetings of the commission shall be open and public in accordance with the host state's open meeting law.

(E) The commission members are public officials of the appointing state and shall be subject to the conflict of interest laws, as well as any other law, of the appointing state. The commission members shall be compensated according to the appointing state's law.

(F) Each commission member is entitled to one vote. A majority of the commission constitutes a quorum. Unless otherwise provided in this compact, a majority of the total number of votes on the commission is necessary for the commission to take any action.

(G) The commission has all of the following duties and authority:

(1) The commission shall do, pursuant to the authority granted by this compact, whatever is reasonably necessary to ensure that low-level radioactive wastes are safely disposed of and managed within the region.

(2) The commission shall meet at least once a year and otherwise as business requires.

(3) The commission shall establish a compact surcharge to be imposed upon party state generators. The surcharge shall be based upon the cubic feet of low-level radioactive waste and the radioactivity of the low-level radioactive waste and shall be collected by the operator of the disposal facility.

The host state shall set, and the commission shall impose, the surcharge after congressional approval of the compact. The amount of the surcharge shall be sufficient to establish and maintain at a reasonable level funds for all of the following purposes:

(a) The activities of the commission and commission staff.

(b) At the discretion of the host state, a third-party liability fund to provide compensation for injury to persons or property during the operational, closure, stabilization, and postclosure and institutional control periods of the regional disposal facility. This subparagraph does not limit the responsibility or liability of the operator, who shall comply with any federal or host state statutes or regulations regarding third-party liability claims.

(c) A local government reimbursement fund, for the purpose of reimbursing the local government entity or entities hosting the regional disposal facility for any costs or increased burdens on the local governmental entity for services, including, but not limited to, general fund expenses, the improvement and maintenance of roads and bridges, fire protection, law enforcement, monitoring by local health officials, and emergency preparation and response related to the hosting of the regional disposal facility.

(4) The surcharges imposed by the commission for purposes of subparagraphs (b) and (c) of paragraph (3) and surcharges pursuant to paragraph (3) of subdivision (E) of Article 4 shall be transmitted on a monthly basis to the host state for distribution to the proper accounts.

(5) The commission shall establish a fiscal year that conforms to the fiscal years of the party states to the extent possible.

(6) The commission shall keep an accurate account of all receipts and disbursements. An annual audit of the books of the commission shall be conducted by an independent certified public accountant, and the audit report shall be made a part of the annual report of the commission.

(7) The commission shall prepare and include in the annual report a budget showing anticipated receipts and disbursements for the subsequent fiscal year.

(8) The commission may accept any grants, equipment, supplies, materials, or services, conditional or otherwise, from the federal or state government. The nature, amount and condition, if any, of any donation, grant, or other resources accepted pursuant to this paragraph and the identity of the donor or grantor shall be detailed in the annual report of the commission.

However, the host state shall receive, for the uses specified in subparagraph (E) of paragraph (2) of subsection (d) of Section 2021e of Title 42 of the United States Code, any payments paid from the special escrow account for which the Secretary of Energy is trustee pursuant to subparagraph (A) of paragraph (2) of subsection (d) of Section 2021 (e) of Title 42 of the United States Code.

(9) The commission shall submit communications to the governors and to the presiding officers of the legislatures of the party states regarding the activities of the commission, including an annual report to be submitted on or before January 15 of each year. The commission shall include in the annual report a review of, and recommendations for, low-level radioactive waste disposal methods which are alternative technologies to the shallow land burial of low-level radioactive waste.

(10) The commission shall assemble and make available to the party states, and to the public, information concerning low-level radioactive waste management needs, technologies, and problems.

(11) The commission shall keep a current inventory of all generators within the region, based upon information provided by the party states.

(12) The commission shall keep a current inventory of all regional disposal facilities, including information on the size, capacity, location, specific low-level radioactive wastes capable of being managed, and the projected useful life of each regional disposal facility.

(13) The commission may establish advisory committees for the purpose of advising the commission on the disposal and management of low-level radioactive waste.

(14) The commission may enter into contracts to carry out its duties and authority, subject to projected resources. No contract made by the commission shall bind a party state.

(15) The commission shall prepare contingency plans, with the cooperation and approval of the host state, for the disposal and management of low-level radioactive waste in the event that any regional disposal facility should be closed.

(16) The commission may sue and be sued and, when authorized by a majority vote of the members, may seek to intervene in an administrative or judicial proceeding related to this compact.

(17) The commission shall be managed by an appropriate staff, including an executive director. Notwithstanding any other provision of law, the commission may hire or retain, or both, legal counsel.

(18) The commission may, subject to applicable federal and state laws, recommend to the appropriate host state authority suitable land and rail transportation routes for low-level radioactive waste carriers.

(19) The commission may enter into an agreement to import low-level radioactive waste into the region only if both of the following requirements are met:

(a) The commission approves the importation agreement by a two-thirds vote of the commission.

(b) The commission and the host state assess the affected regional disposal facilities' capability to handle imported low-level radioactive

wastes and any relevant environmental or economic factors, as defined by the host state's appropriate regulatory authorities.

(20) The commission may, upon petition, allow an individual generator, a group of generators, or the host state of the compact, to export low-level radioactive wastes to a low-level radioactive waste disposal facility located outside the region. The commission may approve the petition only by a two-thirds vote of the commission. The permission to export low-level radioactive wastes shall be effective for that period of time and for the amount of low-level radioactive waste, and subject to any other term or condition, which may be determined by the commission.

(21) The commission may approve, only by a two-thirds vote of the commission, the exportation outside the region of material, which otherwise meets the criteria of low-level radioactive waste, if the sole purpose of the exportation is to process the material for recycling.

(22) The commission shall, not later than 10 years before the closure of the initial or subsequent regional disposal facility, prepare a plan for the establishment of the next regional disposal facility.

Article 4. Rights, Responsibilities, and Obligations of Party States

(A) There shall be regional disposal facilities sufficient to dispose of the low-level radioactive waste generated within the region.

(B) Low-level radioactive waste generated within the region shall be disposed of at regional disposal facilities and each party state shall have access to any regional disposal facility without discrimination.

(C) (1) Upon the effective date of this compact, the State of California shall serve as the host state and shall comply with the requirements of subdivision (E) for at least 30 years from the date the regional disposal facility begins to accept low-level radioactive waste for disposal. The extension of the obligation and duration shall be at the option of the State of California.

If the State of California does not extend this obligation, the party state, other than the State of California, which is the largest major generator state shall then serve as the host state for the second regional disposal facility.

The obligation of a host state which hosts the second regional disposal facility shall also run for 30 years from the date the second regional disposal facility begins operations.

(2) The host state may close its regional disposal facility when necessary for public health or safety.

(D) The party states of this compact cannot be members of another regional low-level radioactive waste compact entered into pursuant to the Low-Level Radioactive Waste Policy Act, as amended by the Low-Level Radioactive Waste Policy Amendments Act of 1985 (42 U.S.C. Secs. 2021b to 2021j, incl.).

(E) A host state shall do all of the following:

(1) Cause a regional disposal facility to be developed on a timely basis.

(2) Ensure by law, consistent with any applicable federal laws, the protection and preservation of public health and safety in the siting, design, development, licensing, regulation, operation, closure, decommissioning, and long-term care of the regional disposal facilities within the state.

(3) Ensure that charges for disposal of low-level radioactive waste at the regional disposal facility are reasonably sufficient to do all of the following:

(a) Ensure the safe disposal of low-level radioactive waste and long-term care of the regional disposal facility.

(b) Pay for the cost of inspection, enforcement, and surveillance activities at the regional disposal facility.

(c) Assure that charges are assessed without discrimination as to the party state of origin.

(4) Submit an annual report to the commission on the status of the regional disposal facility including projections of the facility's anticipated future capacity.

(5) The host state and the operator shall notify the commission immediately upon the occurrence of any event which could cause a possible temporary or permanent closure of a regional disposal facility.

(F) Each party state is subject to the following duties and authority:

(1) To the extent authorized by federal law, each party state shall develop and enforce procedures requiring low-level radioactive waste shipments originating within its borders and destined for a regional disposal facility to conform to packaging and transportation requirements and regulations. These procedures shall include, but are not limited to, all of the following requirements:

(a) Periodic inspections of packaging and shipping practices.

(b) Periodic inspections of low-level radioactive waste containers while in the custody of transporters.

(c) Appropriate enforcement actions with respect to violations.

(2) A party state may impose a surcharge on the low-level radioactive waste generators within the state to pay for activities required by paragraph (1).

(3) To the extent authorized by federal law, each party state shall, after receiving notification from a host state that a person in a party state has violated packaging, shipping, or transportation requirements or regulations, take appropriate actions to ensure that these violations do not continue. Appropriate actions may include, but are not limited to, requiring that a bond be posted by the violator to pay the cost of repackaging at the regional disposal facility and prohibit future shipments to the regional disposal facility.

(4) Each party state shall maintain a registry of all generators within the state that may have low-level radioactive waste to be disposed of at a regional disposal facility, including, but not limited to, the amount of low-level radioactive waste and the class of low-level radioactive waste generated by each generator.

(5) Each party state shall encourage generators within its borders to minimize the volume of low-level radioactive waste requiring disposal.

(6) Each party state may rely on the good faith performance of the other party states to perform those acts which are required by this compact to provide regional disposal facilities, including the use of the regional disposal facilities in a manner consistent with this compact.

(7) Each party state shall provide the commission with any data and information necessary for the implementation of the commission's responsibilities, including taking those actions necessary to obtain this data or information.

(8) Each party state shall agree that only low-level radioactive waste generated within the jurisdiction of the party states shall be disposed of in the regional disposal facility, except as provided in paragraph (19) of subdivision (G) of Article 3.

(9) Each party state shall agree that if there is any injury to persons on property resulting from the operation of a regional disposal facility, the damages resulting from the injury may be paid from the third-party liability fund pursuant to subparagraph (b) of paragraph (3) of subdivision (G) of Article 3, only to the extent that the damages exceed the limits of liability insurance carried by the operator. No party state, by joining this compact, assumes any liability resulting from the siting, operation, maintenance, long-term care, or other activity relating to a regional facility, and no party state shall be liable for any harm or damage resulting from a regional facility not located within the state.

Article 5. Approval of Regional Facilities

A regional disposal facility shall be approved by the host state in accordance with its laws. This compact does not confer any authority on the commission regarding the siting, design, development, licensure, or other regulation, or the operation, closure, decommissioning, or long-term care of, any regional disposal facility within a party state.

Article 6. Prohibited Acts and Penalties

(A) No person shall dispose of low-level radioactive waste within the region unless the disposal is at a regional disposal facility, except

as otherwise provided in paragraphs (20) and (21) of subdivision (G) of Article 3.

(B) No person shall dispose of or manage any low-level radioactive waste within the region unless the low-level radioactive waste was generated within the region, except as provided in paragraphs (19), (20), and (21) of subdivision (G) of Article 3.

(C) Violations of this section shall be reported to the appropriate law enforcement agency within the party state's jurisdiction.

(D) Violations of this section may result in prohibiting the violator from disposing of low-level radioactive waste in the regional disposal facility, as determined by the commission or the host state.

Article 7. Eligibility, Entry into Effect, Congressional Consent, Withdrawal, Exclusion

(A) The States of Arizona, North Dakota, South Dakota, and California are eligible to become parties to this compact. Any other state may be made eligible by a majority vote of the commission and ratification by the legislatures of all of the party states by statute, and upon compliance with those terms and conditions for eligibility which the host state may establish. The host state may establish all terms and conditions for the entry of any state, other than the states named in this subparagraph, as a member of this compact.

(B) Upon compliance with the other provisions of this compact, an eligible state may become a party state by legislative enactment of this compact or by executive order of the governor of the state adopting this compact. A state becoming a party state by executive order shall cease to be a party state upon adjournment of the first general session of its legislature convened after the executive order is issued, unless before the adjournment the legislature enacts this compact.

(C) A party state, other than the host state, may withdraw from the compact by repealing the enactment of this compact, but this withdrawal shall not become effective until two years after the effective date of the repealing legislation. If a party state which is a major generator of low-level radioactive waste voluntarily withdraws from the compact pursuant to this subdivision, that state shall make arrangements for the disposal of the other party states' low-level radioactive waste for a time period equal the period of time it was a member of this compact.

If the host state withdraws from the compact, the withdrawal shall not become effective until five years after the effective date of the repealing legislation.

(D) A party state may be excluded from this compact by a two-thirds vote of the commission members, acting in a meeting, if the state to be excluded has failed to carry out any obligations required by compact.

(E) This compact shall take effect upon the enactment by statute by the legislatures of the State of California and at least one other eligible state and upon the consent of Congress and shall remain in effect until otherwise provided by federal law. This compact is subject to review by Congress and the withdrawal of the consent of Congress every five years after its effective date, pursuant to federal law.

Article 8. Construction and Severability

(A) The provisions of this compact shall be broadly construed to carry out the purposes of the compact, but the sovereign powers of a party state shall not be infringed unnecessarily.

(B) This compact does not affect any judicial proceeding pending on the effective date of this compact.

(C) If any provision of this compact or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the compact that can be given effect without the invalid provision or application, and to this end the provisions of this compact are severable.

(D) Nothing in this compact diminishes or otherwise impairs the jurisdiction, authority, or discretion of either of the following:

(1) The Nuclear Regulatory Commission pursuant to the Atomic Energy Act of 1954, as amended (42 U.S.C. Sec. 2011 et seq.).

(2) An agreement state under Section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. Sec. 2021).

(E) Nothing in this compact confers any new authority on the states or commission to do any of the following:

(1) Regulate the packaging or transportation of low-level radioactive waste in a manner inconsistent with the regulations of the Nuclear Regulatory Commission or the United States Department of Transportation.

(2) Regulate health, safety, or environmental hazards from source, byproduct, or special nuclear material.

(3) Inspect the activities of licensees of the agreement states or of the Nuclear Regulatory Commission.

115260. Notwithstanding Section 115255, authority for on-highway routing and enforcement relating to low-level radioactive waste shall, pursuant to other provisions of law, remain with the Department of the California Highway Patrol for low-level radioactive waste generated from, and shipments into, California.

115265. Notwithstanding Section 115255, authority for rail transportation routing and enforcement relating to low-level radioactive waste shall remain with the Public Utilities Commission pursuant to the Public Utilities Act (Part 1 (commencing with

Section 201) of Division 1 of the Public Utilities Code) for low-level radioactive waste generated from, and shipped into, California.

115270. The department shall adopt regulations specifying the modes of transportation which are most protective of public health and the environment which shall be used by generators to transport low-level radioactive waste within the state.

CHAPTER 9. NUCLEAR POWERPLANT RADIATION

115275. It is the intent of the Legislature that in the event of a nuclear accident timely and effective communications between the operators of nuclear powerplants in California and those state and local officials charged with nuclear emergency response activities be assured.

115280. (a) Each privately-owned and publicly-owned public utility operating a nuclear powerplant with a generating capacity of 50 megawatts or more shall install an automated alert system that will activate alarms in the California State Warning Center of the Office of Emergency Services in a manner to be determined by the Office of Emergency Services in consultation with the department and the appropriate county emergency services agency. This automated alert system shall duplicate the following alarms in the control rooms of each nuclear powerplant:

(1) Safety injection actuation (operation of the emergency core cooling system).

(2) High radiation alarm of the radioactive gas effluent stack monitor.

(b) The automated alert system shall be operative within 12 months of the effective date of this chapter.

(c) In no event shall the capital costs of complying with this section exceed two hundred thousand dollars ($200,000) per nuclear powerplant. The operator of each nuclear powerplant shall be responsible for any maintenance or recurring charges. The funds expended by privately owned utilities under this section shall be allowed for ratemaking purposes by the Public Utilities Commission. Publicly owned public utilities shall include funds expended under this section in their rates.

(d) The automated alert system shall be operational whenever corresponding alarms in the control rooms of each nuclear powerplant are required to be operational under the terms of the operating license issued by the Nuclear Regulatory Commission, except for periods of time required for maintenance, repair, calibration, or testing.

(e) Nothing in this section shall require plant modifications or the conduct of operations that may be in conflict with conditions of a license to operate issued by the Nuclear Regulatory Commission or other activities authorized by the Nuclear Regulatory Commission.

(f) The Office of Emergency Services shall make provision for immediate notification of appropriate local officials upon activation of the automated alert system pursuant to this section.

115285. Nothing in this chapter shall relieve nuclear powerplant operators of their responsibilities to notify local authorities as otherwise provided by law.

115290. Failure to comply with any provision of this chapter shall not constitute the basis for an action in a court of law or administrative proceeding to enjoin or prevent the operation or start-up of a nuclear facility.

115295. If the Humboldt Bay Nuclear Generating Station is not in operation on the effective date of this section, the local emergency plan for it shall not be required to meet the revised emergency response plan requirements of Section 8610.5 of the Government Code until the Nuclear Regulatory Commission determines that the powerplant meets Nuclear Regulatory Commission seismic safety criteria, or until the Nuclear Regulatory Commission issues an order rescinding the restrictions imposed on the Humboldt Bay Nuclear Generating Station in its order of May 21, 1976.

In the event that the Nuclear Regulatory Commission determines that the Humboldt Bay Nuclear Generating Station meets Nuclear Regulatory Commission seismic safety standards, or issues an order rescinding the restrictions in its order of May 21, 1976, a draft county emergency plan meeting the requirements of Section 8610.5 of the Government Code shall be submitted to the Office of Emergency Services for review within 180 days of the determination or rescission. Within 90 days after submission of the draft county emergency plan, approval of a final plan shall be completed by the Office of Emergency Services.

PART 10. RECREATIONAL SAFETY

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND AUTHORITIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. SAFE RECREATIONAL LAND USE (Reserved)

Article 1. Abandoned Excavations

115700. (a) Every person owning land in fee simple or in possession thereof under lease or contract of sale who knowingly permits the existence on the premises of any abandoned mining shaft, pit, well, septic tank, cesspool, or other abandoned excavation dangerous to persons legally on the premises, or to minors under the

age of 12 years, who fails to cover, fill, or fence securely that dangerous abandoned excavation and keep it so protected, is guilty of a misdemeanor.

(b) Every person owning land in fee simple or in possession thereof under lease or contract of sale who knowingly permits the existence on the premises of any permanently inactive well, cathodic protection well, or monitoring well that constitutes a known or probable preferential pathway for the movement of pollutants, contaminants, or poor quality water, from above ground to below ground, or vertical movement of pollutants, contaminants, or poor quality water below ground, and that movement poses a threat to the quality of the waters of the state, shall be guilty of a misdemeanor.

(c) For purposes of this section, ''well'' includes any of the following:

(1) A ''monitoring well'' as defined by Section 13712 of the Water Code.

(2) A ''cathodic well'' as defined by Section 13711 of the Water Code.

(3) A ''water well'' as defined by Section 13710 of the Water Code.

(d) A ''permanently inactive well'' is a well that has not been used for a period of one year, unless the person owning land in fee simple or in possession thereof under lease or contract of sale demonstrates an intent for future use for water supply, ground water recharge, drainage, or ground water level control, heating or cooling, cathodic protection, ground water monitoring, or related uses. A well owner shall provide evidence to the local health officer of an intent for future use of an inactive well by maintaining the well in a way that the following requirements are met:

(1) The well shall not allow impairment of the quality of water within the well and ground water encountered by the well.

(2) The top of the well or well casing shall be provided with a cover, that is secured by a lock or by other means to prevent its removal without the use of equipment or tools, to prevent unauthorized access, to prevent a safety hazard to humans and animals, and to prevent illegal disposal of wastes in the well. The cover shall be watertight where the top of the well casing or other surface openings to the well are below ground level, as in a vault or below known levels of flooding. The cover shall be watertight if the well is inactive for more than five consecutive years. A pump motor, angle drive, or other surface feature of a well, when in compliance with the above provisions, shall suffice as a cover.

(3) The well shall be marked so as to be easily visible and located, and labeled so as to be easily identified as a well.

(4) The area surrounding the well shall be kept clear of brush, debris, and waste materials.

(e) At a minimum, permanently inactive wells shall be destroyed in accordance with standards developed by the Department of Water

Resources pursuant to Section 13800 of the Water Code and adopted by the State Water Resources Control Board or local agencies in accordance with Section 13801 of the Water Code. Minimum standards recommended by the department and adopted by the state board or local agencies for the abandonment or destruction of ground water monitoring wells or class 1 hazardous injection wells shall not be construed to limit, abridge, or supersede the powers or duties of the department, in accordance with Section 13801 of the Water Code.

(f) Nothing in this section is a limitation on the power of a city, county, or city and county to adopt and enforce additional penal provisions regarding the types of wells and other excavations described in subdivisions (a) and (b).

115705. The board of supervisors may order securely covered, filled, or fenced abandoned mining excavations on unoccupied public lands in the county.

115710. The board of supervisors shall order securely fenced, filled, or covered any abandoned mining shaft, pit, or other excavation on unoccupied land in the county whenever it appears to them, by proof submitted, that the excavation is dangerous or unsafe to man or beast. The cost of covering, filling, or fencing is a county charge.

115715. Every person who maliciously removes or destroys any covering or fencing placed around, or removes any fill placed in, any shaft, pit, or other excavation, as provided in this article, is guilty of a misdemeanor.

115720. This article is not applicable to any abandoned mining shaft, pit, well, septic tank, cesspool, or other abandoned excavation that contains a surface area of more than one-half acre.

Article 2. Playgrounds

115725. On or before January 1, 1992, the state department, in consultation with the office of the State Architect, the California Parks and Recreation Society, the League of California Cities, the Department of Parks and Recreation, the State Department of Education, and the California Council of the American Society of Landscape Architects, shall adopt regulations for the design, installation, inspection, maintenance, and supervision where appropriate, and training of personnel involved in the design, installation, and maintenance, of all playgrounds either operated by public agencies, including a state agency, city, county, city and county, school district, and any other district, or operated by any entity where the playground is open to the public. Those regulations shall meet the standard of care imposed by courts of law on playground operators, and shall, at a minimum, impose guidelines and criteria that shall be at least as protective as the guidelines in the Handbook for Public Playground Safety produced by the United

States Consumer Products Safety Commission, shall give due consideration to any successor to the Handbook for Public Playground Safety that may be published, and shall include more protective requirements where the state department finds those guidelines will provide inadequate protection. The regulations shall include special provisions for playgrounds in day care settings, that shall be developed in consultation with the State Department of Social Services and the California Children's Lobby, and that shall be appropriate for children within the range of ages in day care settings. The state department shall not be responsible for enforcement of any regulations pursuant to this section.

115730. All public agencies operating playgrounds, including a state agency, city, county, city and county, and district, shall upgrade their playgrounds by replacement or improvement as necessary to satisfy the regulations adopted pursuant to Section 115725 to the extent state funds are made available specifically for that purpose through state bonds or other means. All other entities operating playgrounds open to the public shall upgrade their playgrounds by replacement or improvement, as necessary to satisfy the regulations adopted pursuant to Section 115725, on or before January 1, 2000. This section shall not affect the liability or absence of liability of playground operators.

115735. For purposes of this article, all of the following shall apply:

(a) An ''entity operating a playground open to the public'' shall include, but not be limited to, a church, subdivision, hotel, motel, resort, camp, office, hospital, shopping center, day care setting, and restaurant.

(b) ''Playground'' shall refer to an improved outdoor area designed, equipped, and set aside for children's play that is not intended for use as an athletic playing field or athletic court, and shall include any play equipment, surfacing, fencing, signs, internal pathways, internal land forms, vegetation, and related structures.

(c) ''Supervision'' shall include all general and specific supervision necessary to protect children from unreasonable risk of harm from site hazards, the acts of other children, or the use of the playground in a way that was not intended by the designer or manager of the playground. The regulations required pursuant to this article shall not expand on the periods or circumstances when supervision shall be provided beyond the periods or circumstances already determined to be within the existing standard of care to which a playground operator is held.

115740. Regulations adopted pursuant to this article shall include special provisions where appropriate, as determined by the state department, for the needs of the developmentally disabled in state institutions, pursuant to Division 4.1 (commencing with Section 4400) of, and Division 4.5 (commencing with Section 4500) of, the Welfare and Institutions Code, and in community care facilities, and

other public and private institutions that provide residential or day care specifically for the developmentally disabled.

115745. (a) After the effective date of the regulations adopted pursuant to this article, no state funding shall be available for the planning, development, or redevelopment of any playground, unless the playground, after completion of the state-funded project, will conform to the applicable regulations adopted pursuant to this article. However, where state funds have been appropriated to, or allocated for, a playground project prior to the effective date of the regulations but the regulations become effective prior to the completion of the project, that funding shall be maintained, as long as the playground is altered to conform to the regulations to the extent the alterations can be made without adding significantly to the project cost.

(b) After the date by which an entity is required to conform its playground to satisfy regulations adopted pursuant to this article, no state funding shall be available for the operation, maintenance, or supervision of the playground unless the playground conforms to the applicable regulations adopted pursuant to this article.

115750. All new playgrounds open to the public built by a public agency or any other entity more than six months after the effective date of the regulations adopted pursuant to this article shall conform to the requirements of those regulations. Where the playground developer knows of the regulations before undertaking any expenses related to designing or building the playground, this six-month grace period shall not apply.

Article 3. Wooden Playground Equipment

115775. (a) No state funds shall be used by any state agency, onsite employee child care center for state employees, city, county, city and county, district, superintendent of schools, school district, or community college district to purchase wooden playground or recreational equipment where there is a likelihood of contact by children and when the equipment has been treated with any of the following substances:

(1) Pentachlorophenol.

(2) Creosote.

(3) Arsenic, elemental arsenic, or arsenic copper combination, unless the wood is treated with a nontoxic and nonslippery sealer and the seller certifies that the wood is treated in accordance with commodity standard C-17 for playground equipment as adopted by the American Wood-Preservers Association.

(b) The state or any city, county, city and county, district, superintendent of schools, school district, community college district, or onsite employee child care center for state employees that receives education or parks and recreation funds from the state shall

not use any portion of these funds for the maintenance or upkeep of any wooden structures treated with any of the substances that are prohibited from purchase pursuant to subdivision (a) and where there is a likelihood of contact by children, unless the state, city, county, city and county, superintendent of schools, school district, district, community college district, or onsite employee child care center for state employees treats the wooden structures with nontoxic and nonslippery sealers and reseals the treated structure in accordance with subdivision (c).

(c) The installer of any wooden playground or recreational equipment that will be available for public use and that has been treated with a substance listed in paragraph (3) of subdivision (a) shall seal the structures with a nontoxic and nonslippery sealant prior to, or at the time of, the installation of the equipment. After the equipment that is available for public use has been sealed pursuant to this subdivision, the owner of the equipment shall reseal the treated equipment every two years thereafter with a nontoxic and nonslippery sealant.

115800. (a) No operator of a skateboard park shall permit any person to ride a skateboard therein, unless that person is wearing a helmet, elbow pads, and knee pads.

(b) With respect to any facility, owned or operated by a local public agency, that is designed and maintained for the purpose of recreational skateboard use, and that is not supervised on a regular basis, the requirements of subdivision (a) may be satisfied by compliance with the following:

(1) Adoption by the local public agency of an ordinance requiring any person riding a skateboard at the facility to wear a helmet, elbow pads, and knee pads.

(2) The posting of signs at the facility affording reasonable notice that any person riding a skateboard in the facility must wear a helmet, elbow pads, and knee pads, and that any person failing to do so will be subject to citation under the ordinance required by paragraph (1).

(c) ''Local public agency'' for purposes of this section includes, but is not limited to, a city, county, or city and county.

CHAPTER 5. SAFE RECREATIONAL WATER USE

Article 1. Recreational Use of Reservoirs

115825. (a) It is hereby declared to be the policy of this state that multiple use should be made of all public water within the state, to the extent that multiple use is consistent with public health and public safety.

(b) Except as provided in Section 115840, recreational uses shall not, with respect to a reservoir in which water is stored for domestic

use, include recreation in which there is bodily contact with the water by any participant.

115830. All water supply reservoirs of a public agency, whether heretofore or hereafter constructed, shall be open for recreational use by the people of this state, subject to the regulations of the department.

115835. Unless the context otherwise requires, the following definitions shall control the construction of this article:

(a) ''Multiple use'' includes domestic, industrial, agricultural, and recreational uses.

(b) ''Public agency'' means the state or any city, other than a chartered city, county, public district, or other public institution.

(c) ''Reservoir'' does not include ditches, canals, or any similar type of water distributing facility.

115840. (a) In San Diego County, recreational uses shall not, with respect to a reservoir in which water is stored for domestic use, include recreation in which there is bodily contact with the water by any participant, unless both of the following conditions are satisfied:

(1) The water subsequently receives complete water treatment, including coagulation, flocculation, sedimentation, filtration, and disinfection, before being used for domestic purposes.

(2) The reservoir is operated in compliance with regulations of the department, as provided in Section 115830.

(b) The recreational use may be subject to additional conditions and restrictions adopted by the entity operating the water supply reservoir, if the conditions and restrictions do not conflict with regulations of the department and are designed to further protect or enhance the public health and safety.

115845. The public agency operating any water supply reservoir that is open for recreational use pursuant to this article may charge a use fee to cover the cost of policing the area around the reservoir, including the cost of providing the necessary sanitary facilities and other costs incidental to the recreational use of the reservoir.

115850. This article does not apply to terminal reservoirs for the supply of domestic water.

Article 2. Public Beaches

115875. ''Public beach,'' as used in Sections 115875 to 115895, inclusive, means any beach area used by the public for recreational purposes that is owned, operated, or controlled by the state, any state agency, any local agency, or any private person in this state.

115880. The department shall by regulation establish minimum standards for the sanitation of public beaches, including, but not limited to, the removal of refuse, as it determines are reasonably necessary for the protection of the public health and safety.

Any city or county may adopt standards for the sanitation of public beaches within its jurisdiction that are stricter than the standards adopted by the state department pursuant to this section.

115885. The health officer having jurisdiction over the area in which a public beach is created shall:

(a) Inspect the public beach to determine whether the standards established pursuant to Section 115880 are being complied with. If the health officer finds any violation of the standards, he or she shall restrict the use of, or close, the public beach or portion thereof in which the violation occurs until such time as the standard violated is complied with.

(b) Investigate any complaint of a person of a violation of any standard established by the department pursuant to Section 115880. If the health officer finds any violation of the standards prescribed by the department, he or she shall restrict the use of, or close, the public beach or portion thereof until the time as the standard violated is complied with. If the person who made the complaint is not satisfied with the action taken by the health officer, he or she may report the violation to the department. The department shall investigate the reported violation, and, if it finds that the violation exists, it shall restrict the use of or close the public beach or portion thereof until the standard violated is complied with.

(c) Report any violation of the standards established pursuant to Section 115880 to the Director of Parks and Recreation.

(d) Report any violation of the standards established pursuant to Section 115880 to the district attorney, or if the violation occurred in a city and, pursuant to Section 41803.5 of the Government Code, the city attorney is authorized to prosecute misdemeanors, to the city attorney.

115890. Prior to restricting the use of or closing a public beach or portion thereof alleged to be in violation of standards, the health officer, or the department as the case may be, shall give reasonable notice of the violation to the owner of, or person or agency in charge of, the beach.

115895. Any private person who violates any regulation adopted by the state department pursuant to Section 115880 is guilty of a misdemeanor.

115900. For the purposes of Sections 115900 to 115915, inclusive, the following definitions apply:

(a) ''Beach'' means any public beach of the ocean waters and bays of the state where water-contact sports are engaged in by the public.

(b) ''Board'' means the State Water Resources Control Board.

(c) ''Health officer'' means the legally appointed health officer or director of environmental health of the county or city having jurisdiction of the area in which a public saltwater beach is located.

115905. The Legislature finds and declares all of the following:

(a) California's world-famous beaches are an invaluable economic, environmental, and recreational resource that must be protected for present and future generations. Millions of residents and visitors alike visit the state's beaches annually.

(b) Pollution from toxic spills, untreated municipal sewage, and agricultural and urban runoff threatens this critical resource.

(c) During 1989 through 1991 alone, at least 400 of the state's beaches had to be posted ''off-limits'' due to dangerous levels of bacterial and toxic contamination.

(d) Due to this pollution, local health officials were forced to close one or more beaches between San Diego and Mendocino Counties for all but 18 days in 1991.

(e) This contamination of our beaches poses serious threats to the public's health, increasing the risk that persons who use the beaches will suffer from hepatitis, gastroenteritis, and other dangerous illnesses.

(f) Notwithstanding the importance and potential severity of this problem, the state has never conducted a statewide survey to document annual beach closings.

(g) The state does not have uniform testing protocols that must be followed to ensure that the public is never exposed to dangerous contamination at the state's beaches.

(h) The state does not have uniform standards requiring beach postings when California Ocean Plan bathing water standards, as adopted by the board pursuant to Section 13170.2 of the Water Code, are exceeded.

(i) The state does not have uniform requirements mandating the frequency with which beach waters must be tested to ensure public safety. Beach water sampling currently varies greatly from county to county. For example, Los Angeles County tests its beaches every week of the year while other coastal counties test much less frequently.

(j) More accurate and centralized recordkeeping on the relative contributions of pollutant sources to beach closures would enable more effective targeting of corrective actions to keep our beaches safe and our coastal areas economically strong.

115910. (a) On or before March 30, 1994, and annually thereafter, each health officer shall submit to the board a survey documenting all beach postings and closures due to threats to the public health that occurred during the preceding calendar year. The survey shall, at a minimum, include the location and duration of each beach closure in its jurisdiction and the suspected sources of the contamination that caused the closure, if known.

(b) On or before September 30, 1994, and annually thereafter, the board shall publish a statewide report documenting the beach posting and closure data provided to the board by health officers for the preceding calendar year. The report shall, at a minimum, include

the location and duration of each beach closure and the suspected sources of the contamination that caused the closure, if known.

(c) Within 30 days of publication of the report, the state board shall distribute copies of the report to the Governor, the Legislature, and major media organizations, and copies of the report shall be made available to the public.

115915. Whenever any beach fails to meet the bacteriological standards of Section 7958 of Title 17 of the California Code of Regulations, the health officer, after determining that the cause of the elevated bacteriological levels constitutes a public health hazard, shall, at a minimum, post the beach with conspicuous warning signs to inform the public of the nature of the problem and the possibility of risk to public health.

Article 3. Life Saving Devices

115975. ''Resort,'' as used in this article, means a resort, bathhouse, or other public place for the purpose of accommodating bathers, bordering upon or adjoining the seacoast or a lake where the public resort for the purpose of bathing in the open sea or lake.

115980. No person shall own or conduct a resort unless it is equipped with at least one lifeboat.

115985. The boat shall be fully equipped with oars, oarlocks, and not less than two life preservers, and two hundred feet of rope.

It shall be kept in good repair and near the resort.

115990. The boat shall have the word ''lifeboat'' plainly printed or painted upon it. It shall be used for no purpose other than for the saving of life or for other cases of emergency.

115995. Every person who violates any provision of this article is guilty of a misdemeanor punishable by a fine of not less than ten nor more than four hundred dollars ($400), or by imprisonment for not less than ten days nor more than six months, or by both.

116000. ''Resort,'' as used in this article, means any public bathing or swimming place or resort on a river or stream.

116005. No person shall maintain a resort unless he or she carefully sounds the depth of water and locates the eddies and pools and determines the presence and nature of dangerous currents, sunken logs, rocks, and obstructions in the stream or river.

116010. No person shall maintain a resort unless signs indicating in plain letters the depth of water, the location of pools or eddies, and the presence and direction of currents of water are placed and maintained in the water during the season when bathing and swimming are permitted or invited.

116015. No person shall maintain a resort unless safety ropes are stretched wherever necessary to show the line of eddies, pools, sunken obstructions, and other hidden dangers to bathers in the water.

116020. Every person who violates any provision of this article is guilty of a misdemeanor.

Article 5. Swimming Pool Sanitation

116025. ''Public swimming pool,'' as used in this article, means any public swimming pool, bathhouse, public swimming and bathing place and all related appurtenances.

116028. ''Lifeguard service,'' as used in this article, means the attendance at a public swimming pool during periods of use, of one or more lifeguards who possess, as minimal qualifications, current Red Cross advanced lifesaving certificates or Y.M.C.A. senior lifesaving certificates, or have equivalent qualifications and who are trained to administer first aid, including, but not limited to, cardiopulmonary resuscitation in conformance with Section 123725 and the regulations adopted thereunder, and who have no duties to perform other than to supervise the safety of participants in water-contact activities. ''Lifeguard services'' includes the supervision of the safety of participants in water-contact activities by lifeguards who are providing swimming lessons, coaching or overseeing water-contact sports, or providing water safety instructions to participants when no other persons are using the facilities unless those persons are supervised by separate lifeguard services.

116030. (a) The construction standards as set forth in this article and the regulations adopted pursuant thereto, shall not apply to any artificially constructed swimming facility in excess of 20,000 square feet of surface area, including, but not limited to, a manmade lake or swimming lagoon with sand beaches.

(b) The requirements of this article and regulations adopted pursuant thereto, pertaining to the operation, maintenance, and use of a public swimming pool, including the quality and purity of the water, lifesaving and other measures to ensure the safety of bathers, and measures to ensure personal cleanliness of bathers shall apply to the swimming facilities described in subdivision (a).

116033. Persons providing aquatic instruction, including, but not limited to, swimming instruction, water safety instruction, water contact activities, and competitive aquatic sports, at a public swimming pool shall possess an American Red Cross Emergency Water Safety Course certificate, or have equivalent qualifications, as determined by the state department. In addition, these persons shall be certified in standard first aid and cardiopulmonary resuscitation (CPR). All of these persons shall meet these qualifications by January 1, 1991. Persons who only disseminate written materials relating to water safety, are not persons providing aquatic instruction within the meaning of this section.

The requirements of this section shall be waived under either of the following circumstances: (a) when one or more aquatic instructors possessing the American Red Cross Emergency Water Safety Course Certificate or its equivalent are in attendance continuously during periods of aquatic instruction, or (b) when one or more lifeguards meeting the requirements of Section 116028 are in attendance continuously during periods of aquatic instruction.

116035. The department has supervision of sanitation, healthfulness, and safety of public swimming pools.

116038. Every person proposing to construct a public swimming pool shall file a copy of the plans therefor, prior to construction, with the local health officer having jurisdiction for approval.

116040. Every person operating or maintaining a public swimming pool must do so in a sanitary, healthful and safe manner.

116043. Every public swimming pool, including swimming pool structure, appurtenances, operation, source of water supply, amount and quality of water recirculated and in the pool, method of water purification, lifesaving apparatus, measures to insure safety of bathers, and measures to insure personal cleanliness of bathers shall be such that the public swimming pool is at all times sanitary, healthful and safe.

116045. (a) Lifeguard service shall be provided for any public swimming pool that is of wholly artificial construction and for the use of which a direct fee is charged. For all other public swimming pools, lifeguard service shall be provided or signs shall be erected clearly indicating that the service is not provided.

(b) ''Direct fee,'' as used in this section, means a separately stated fee or charge for the use of a public swimming pool to the exclusion of any other service, facility, or amenity.

116048. (a) On or after January 1, 1987, for public swimming pools in any common interest development, as defined in Section 1351 of the Civil Code, that consists of fewer than 25 separate interests, as defined in subdivision (*l*) of Section 1351 of the Civil Code, the person operating each such pool open for use shall be required to keep a record of the information required by subdivision (a) of Section 65523 of Title 22 of the California Administrative Code, except that the information shall be recorded at least two times per week and at intervals no greater than four days apart.

(b) On or after January 1, 1987, any rule or regulation of the department that is in conflict with subdivision (a) is invalid.

116049. (a) ''Public swimming pool,'' as used in this section, means any public swimming pool defined in Section 116025 that is owned or operated by the state or any local governmental entity, including, but not limited to, any city, county, city and county, charter city, charter county, or charter city and county.

(b) All dry-niche light fixtures, and all underwater wet-niche light fixtures operating at more than 15 volts in public swimming pools

shall be protected by a ground-fault circuit interrupter in the branch circuit, and all light fixtures in public swimming pools shall have encapsulated terminals. This subdivision is declaratory of existing law.

(c) Any public swimming pools that do not meet the requirements specified in subdivision (b) by January 1, 1995, shall be retrofitted to comply with these requirements by January 1, 1996.

(d) The ground-fault circuit interrupter required pursuant to this section shall comply with Underwriter's Laboratory standards.

(e) Any state or local governmental entity that owns or operates a public swimming pool shall have its public swimming pool inspected by a qualified inspector prior to July 1, 1996, to determine compliance with this section.

(f) A public swimming pool may charge a fee, or increase its fee charged, to the public for use of the pool, for the purpose of recovering the administrative and other costs of retrofitting pools in compliance with this section. The charge or increase due to this section shall terminate when funds sufficient to cover these costs are collected.

(g) All electrical work required for compliance with this section shall be performed by an electrician licensed pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code.

116050. Except as provided in Section 18930, the department shall make and enforce regulations pertaining to public swimming pools as it deems properand shall enforce building standards published in the State Building Standards Code relating to public swimming pools; provided, that no rule or regulation as to design or construction of pools shall apply to any pool that has been constructed before the adoption of the regulation, if the pool as constructed is reasonably safe and the manner of the construction does not preclude compliance with the requirements of the regulations as to bacteriological and chemical quality and clarity of the water in the pool. The department shall adopt and submit building standards for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13 of this code for the purposes described in this section.

116053. Every health officer shall enforce the building standards published in the State Building Standards Code relating to swimming pools and the other regulations adopted by the department pursuant to this article in his or her jurisdiction.

116055. For the purposes of this article, any health officer, or any inspector of the department, may at all reasonable times enter all parts of the premises of a public swimming pool to make examination and investigation to determine the sanitary condition and whether this article, building standards published in the State Building Standards Code relating to swimming pools, or the other regulations

adopted by the department pursuant to this article are being violated.

116058. The department may publish the reports of inspections.

116060. Any public swimming pool constructed, operated, or maintained contrary to the provisions of this article is a public nuisance, dangerous to health.

116063. Any nuisance maintained in violation of this article may be abated or enjoined in an action brought by a local health officer, or the department, or it may be summarily abated in the manner provided by law for the summary abatement of other public nuisances dangerous to health.

116065. Every person who violates any provision of this article, building standards published in the State Building Standards Code relating to swimming pools, or the rules and regulations adopted pursuant to the provisions of this article, is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or by imprisonment for not more than six months, or both.

116068. Each day that a violation of this article continues is a separate offense.

Article 6. Ocean Water-Contact Sports

116070. As used in this article, water-contact sport means any sport in which the body of a person comes into physical contact with water, including but not limited to swimming, surfboarding, paddleboarding, skin diving, and water-skiing. It does not include boating or fishing.

116075. The department has supervision of sanitation, healthfulness, and safety of the public beaches and public water-contact sport areas of the ocean waters and bays of the state and, except as provided in Section 18930, the department may make and enforce regulations pertaining thereto as it deems proper.

116080. Regulations made pursuant to this article shall include suitable standards of safe bacteria count for water-contact sports areas specified by the State Water Pollution Control Board or regional water pollution control boards, which standards shall be applied to all public water-contact sport areas of the ocean waters and bays of the state.

116085. Every person who violates any rule or regulation adopted pursuant to this article is guilty of a misdemeanor.

116090. Nothing contained in this article shall be construed to give the department the authority to fix the areas wherein water-contact sports may be engaged in or to affect the authority of the State Water Pollution Control Board or regional water pollution control boards to fix appropriate areas for various uses.

PART 11. VECTORS

CHAPTER 1. DEFINITIONS

116100. As used in Article 5 (commencing with Section 116185) of Chapter 2, ''department'' means the State Department of Health Services.

116102. ''Place,'' as used in Article 3 (commencing with Section 116125) of Chapter 2 and Section 116250, includes land, place, building, structure, wharf, pier, dock, vessel, or water craft.

116104. ''Rodents,'' as used in Article 3 (commencing with Section 116125) of Chapter 2 and Section 116250, means rats, mice, gophers, and ground squirrels.

116106. ''Possess,'' as used in Article 3 (commencing with Section 116125) of Chapter 2 and Section 116250, includes control, own, lease, occupy, possess, or have charge of or dominion over.

116108. ''Vector,'' as used in Article 1 (commencing with Section 116110) of, and Article 2 (commencing with Section 116120) of Chapter 2, and Section 106925, means any animal capable of transmitting the causative agent of human disease or capable of producing human discomfort or injury, including, but not limited to, mosquitoes, flies, other insects, ticks, mites, and rats.

CHAPTER 2. POWERS AND DUTIES

Article 1. Vector Biology and Control

116110. The department shall maintain a program of vector biology and control including, but not limited to, the following:

(a) Providing consultation and assistance to local vector control agencies in developing and conducting programs for the prevention and control of vectors.

(b) Surveillance of vectors and vector-borne diseases.

(c) Coordinating and conducting emergency vector control, as required.

(d) Training and certifying government agency vector control technicians.

(e) Disseminating information to the public regarding protection from vectors and vector-borne diseases.

Article 2. Importation of Exotic Vectors

116120. (a) It shall be unlawful for any person to import into the state any exotic vector without written approval from the state department.

(b) The state department shall issue an applicant written authority to import into the state any exotic vector upon a

determination by the state department that the public health and safety will not be endangered thereby.

(c) ‘‘Exotic vector’’ means a vector species that is not native to California and is not commonly found in the state.

(d) Any violation of this section is a misdemeanor.

Article 3. Rodent Abatement

116125. Every person possessing any place that is infested with rodents, as soon as their presence comes to his or her knowledge, shall at once proceed and continue in good faith to endeavor to exterminate and destroy the rodents, by poisoning, trapping, and other appropriate means.

116130. The department, the board of supervisors of each county, local health officers, or inspectors appointed by any of them, as provided in this article and Chapter 3 (commencing with Section 116250), may inspect all places for the purpose of ascertaining whether they are infested with rodents and whether the requirements of this article and Chapter 3 (commencing with Section 116250) as to their extermination and destruction are being complied with. However, no building occupied as a dwelling, hotel, or rooming house, shall be entered for inspection purposes except between the hours of 9 a.m., and 5 p.m.

116135. The board of supervisors of each county and the governing body of each city, whenever it may by resolution determine that it is necessary for the preservation of the public health or to prevent the spread of contagious or infectious disease, communicable to mankind, or when it determines that it is necessary to prevent great and irreparable damage to crops or other property, may appropriate money for the purchase of, and may purchase, poison, traps, and other materials for the purpose of exterminating and destroying rodents in that county or city, and may employ and pay inspectors, who shall prosecute the work of extermination and destruction on both private and public property in the county or city.

116140. Whenever any person possessing any place that is infested with rodents, fails, neglects or refuses to proceed and to continue to endeavor to exterminate and destroy the rodents, as required in this article and Chapter 3 (commencing with Section 116250), the department and its inspectors, the county board of supervisors and its inspectors, and the local health officer, shall at once cause the rodents to be exterminated and destroyed.

116145. The expense of exterminating and destroying the rodents is a charge against the county or city in which the work is done, and the board of supervisors or other governing body shall allow and pay it.

116150. The governing body shall record in the office of the county recorder a notice of payment, claiming a lien on the property for the amount of the payment.

116155. All sums so paid by the county or city are a lien on the property on which the work was done, and may be recovered in an action against the property.

116160. The action to foreclose the lien shall be brought within 90 days after the payment, and shall be prosecuted by the district or city attorney in the name of the county, or city, as the case may be, and for its benefit.

116165. When the property is sold, enough of the proceeds shall be paid into the treasury of the county or city to satisfy the lien and the costs, and the surplus, if any, shall be paid to the owner of the property, if known, and if not known shall be paid into the court for the use of the owner when ascertained.

116170. If it appears from the complaint in the action that the property on which the lien is to be foreclosed is likely to be removed from the jurisdiction of the court, the court may appoint a receiver to take possession of the property and hold it while the action is pending or until the defendant executes and files a bond, conditioned for the payment of any judgment that may be recovered against the defendant in the action and of all costs.

Article 4. Mosquito and Gnat Control

116175. The department shall make studies and demonstrations as may be necessary to determine the areas of the state that have a high proportion of mosquito-borne diseases, including malaria and encephalitis.

116180. (a) The department may enter into a cooperative agreement with any local district or other public agency engaged in the work of controlling mosquitoes, gnats, flies, other insects, rodents, or other vectors and pests of public health importance, in areas and under terms, conditions, and specifications as the director may prescribe.

(b) The agreement may provide for financial assistance on behalf of the state and for the doing of all or any portion of the necessary work by either of the contracting parties, except that in no event shall the department agree that the state’s contribution shall exceed 50 percent of the total cost of any acceptable plan.

(c) The agreement may provide for contributions by the local district or other public agency to the Mosquitoborne Disease Surveillance Account.

Article 5. Mosquito Control and Imported Tires

116185. The Legislature finds and declares that used tires imported into this country have contained mosquitos that are carriers of disease that is harmful to humans.

The Legislature further finds and declares that, in order to attempt to ensure that these mosquitos are not brought into this state, it is necessary to require that used tires not be imported into this state unless they have been certified as being free of mosquitos.

116190. (a) No used tires that have been imported into the United States shall be imported into this state, for purposes of sale, resale or disposal, unless they are inspected and certified as free from mosquitos in any stage of development by the department or its designee. Nothing in this section is intended to require inspection of each tire entering the state. The inspection shall be conducted using standard sampling procedures.

(b) Notwithstanding subdivision (a), if a shipment of tires imported into the United States has been inspected in a state other than California and certified as free from mosquitos in any state of development by persons meeting the federal certified pesticide applicator qualifications contained in 7 U.S.C. Section 136b, then the department shall review the certification to determine whether or not it is adequate. For the purposes of this subdivision, ''adequate'' means that the department shall confirm that the certification was performed by persons meeting the qualifications referred to in this subdivision and that the certification applies to the shipment of tires imported into this state.

If the certification is determined by the department to be adequate, the department shall make a written finding to that effect, and the inspection referred to in subdivision (a) shall not be required. The department may charge and collect a reasonable fee, not to exceed fifty dollars ($50) per shipment, to cover its costs incurred pursuant to this subdivision.

If the certification is determined by the department to be inadequate, the inspection referred to in subdivision (a) shall be required.

116195. The department shall administer this article. In carrying out this duty, the department may delegate its authority to other departments of the state or to local governmental agencies, or cooperate with other agencies in the enforcement of this article.

Notwithstanding Section 116180, the department may enter into a contract for services with local agencies, in order to implement this article.

116200. The department shall charge and collect a fee for each certificate issued by the department or its designee, which shall be in an amount reasonably necessary to produce sufficient revenue to effectively implement this article. The initial fee established by the

department shall not be greater than thirty cents ($0.30) per tire or casing imported.

A nonreturnable interim fee of thirty cents ($0.30) per tire or casing imported, and for which a certificate is issued by the department or its designee, is hereby established and shall remain in effect until the department adopts the necessary regulations pursuant to this article.

116205. The department shall collect and account for all money received pursuant to this article and shall deposit it in the Mosquitoborne Disease Surveillance Account provided for in Section 25852 of the Government Code.

116210. Fees collected pursuant to this article shall be subject to the annual fee increase provisions of Section 100425.

116215. Notwithstanding Section 25852 of the Government Code, fees deposited in the Mosquitoborne Disease Surveillance Account pursuant to this article shall be available for expenditure upon appropriation by the Legislature, to implement this article.

116220. It shall be a misdemeanor to violate this article.

116225. This article, with the exception of Section 116185, shall be inoperative upon a finding by the director that the federal government has established and is implementing a program that is at least as effective in ensuring that used tires imported into this state are free of mosquitos, as are the importation requirements established by this article.

CHAPTER 3. ENFORCEMENT AND PENALTIES

116250. A violation of Article 3 (commencing with Section 116125) of Chapter 2 is a misdemeanor.

PART 12. DRINKING WATER

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. CALIFORNIA SAFE DRINKING WATER ACT

Article 1. Pure and Safe Drinking Water

116275. As used in this chapter:

(a) ‘‘Contaminant’’ means any physical, chemical, biological, or radiological substance or matter in water.

(b) ‘‘Department’’ means the State Department of Health Services.

(c) ‘‘Drinking water standards’’ means:

(1) Primary drinking water standards that specify maximum levels of contaminants that, in the judgment of the department, may have an adverse effect on the health of persons.

(2) Secondary drinking water standards that specify maximum contaminant levels that, in the judgment of the department, are necessary to protect the public welfare. Secondary drinking water standards may apply to any contaminant in drinking water that may adversely affect the odor or appearance of the water and may cause a substantial number of persons served by the public water system to discontinue its use, or that may otherwise adversely affect the public welfare. Regulations establishing secondary drinking water standards may vary according to geographic and other circumstances and may apply to any contaminant in drinking water that adversely affects the taste, odor, or appearance of the water when the standards are necessary to assure a supply of pure, wholesome, and potable water.

(3) The monitoring and reporting requirements as specified in regulations adopted by the department that pertain to maximum contaminant levels.

(d) ‘‘Maximum contaminant level’’ means the maximum permissible level of a contaminant in water.

(e) ‘‘Person’’ means an individual, corporation, company, association, partnership, limited liability company, municipality, public utility, or other public body or institution.

(f) ‘‘Public water system’’ means a system for the provision of piped water to the public for human consumption that has 15 or more service connections or regularly serves an average of at least 25 individuals daily at least 60 days out of the year. A public water system includes the following:

(1) Any collection, treatment, storage, and distribution facilities under control of the operator of the system which are used primarily in connection with the system.

(2) Any collection or pretreatment storage facilities not under the control of the operator that are used primarily in connection with the system.

(3) Any person who treats water on behalf of one or more public water systems for the purpose of rendering it safe for human consumption.

(g) ‘‘Community water system’’ means a public water system that serves at least 15 service connections used by yearlong residents or regularly serves at least 25 yearlong residents.

(h) ‘‘Noncommunity water system’’ means a public water system that meets one of the following criteria:

(1) Serves at least 25 nonresident individuals daily at least 60 days of the year, but not more than 24 yearlong residents.

(2) Serves 15 or more service connections and any number of nonresident individuals at least 60 days of the year, but no yearlong residents.

(i) ''Local health officer'' means a local health officer appointed pursuant to Section 101000 or a local comprehensive health agency designated by the board of supervisors pursuant to Section 101275 to carry out the drinking water program.

(j) ''Significant rise in the bacterial count of water'' means a rise in the bacterial count of water that the department determines, by regulation, represents an immediate danger to the health of water users.

(k) ''State small water system'' means a system for the provision of piped water to the public for human consumption that serves at least five, but not more than 14, service connections and does not regularly serve more than an average of 25 individuals daily for more than 60 days out of the year.

(*l*) ''User'' means any person using water for domestic purposes. User does not include any person processing, selling, or serving water or operating a public water system.

(m) ''Waterworks standards'' means regulations adopted by the department that take cognizance of the latest available ''Standards of Minimum Requirements for Safe Practice in the Production and Delivery of Water for Domestic Use'' adopted by the California section of the American Water Works Association.

(n) ''Local primacy agency'' means any local health officer that has applied for and received primacy delegation from the department pursuant to Section 116330.

(o) ''Service connection'' means the point of connection between the customer's piping or ditch, and the public water system's meter, service pipe, or ditch.

116280. This chapter does not apply to a public water system that meets all of the following conditions:

(a) Consists only of distribution and storage facilities and does not have any collection and treatment facilities.

(b) Obtains all of its water from, but is not owned or operated by, a public water system to which this chapter applies.

(c) Does not sell water to any person or user, except for the sale of water to users pursuant to Section 2705.5 of the Public Utilities Code through a submetered service system if the water supply is obtained from a public water system to which this chapter applies.

By enacting this subdivision, it is not the intent of the Legislature to change existing law as to responsibility or liability for distribution systems beyond the mastermeter.

116285. This chapter shall not apply to an irrigation canal system if the owner or operator of the system certifies to the department, and notifies each user, in writing, that the water is untreated and is

being furnished or supplied solely for agricultural purposes to either of the following:

(a) A user where the user receives the water, by pipe or otherwise, directly from the irrigation canal system.

(b) A person who owns or operates an integrated pipe system where the person receives the water, by pipe or otherwise, directly from the irrigation canal system.

''Irrigation canal system,'' as used in this section, means a system of water conveyance facilities, including pipes, tunnels, canals, conduits, pumping plants and related facilities operated to furnish or supply water for agricultural purposes where a substantial portion of the facilities is open to the atmosphere.

116290. In areas where the water service rendered by a person is primarily agricultural, and domestic service is only incidental thereto, this chapter shall not apply except in specific areas in which the department has found its application to be necessary for the protection of the public health and has given written notice thereof to the person furnishing or supplying water in the area.

The department may prescribe reasonable and feasible action to be taken by those persons or the users to insure that their domestic water will not be injurious to health.

116300. The Legislature finds and declares all of the following:

(a) Every citizen of California has the right to pure and safe drinking water.

(b) Feasible and affordable technologies are available and shall be used to remove toxic contaminants from public water supplies.

(c) According to the State Department of Health Services, over 95 percent of all large public water systems in California are in compliance with health-based action levels established by the state department for various contaminants.

(d) It is the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that when present in drinking water may cause cancer, birth defects, and other chronic diseases.

(e) This chapter is intended to ensure that the water delivered by public water systems of this state shall at all times be pure, wholesome, and potable. The provisions of this chapter provide the means to accomplish this objective.

(f) It is the intent of the Legislature to improve laws governing drinking water quality to improve upon the minimum requirements of the federal Safe Drinking Water Act Amendments of 1986, to establish primary drinking water standards that are at least as stringent as those established under the federal Safe Drinking Water Act, and to establish a program under this chapter that is more protective of public health than the minimum federal requirements.

(g) It is the further intent of the Legislature to establish a drinking water regulatory program within the State Department of Health Services in order to provide for the orderly and efficient delivery of

safe drinking water within the state and to give the establishment of drinking water standards and recommended public health goals greater emphasis and visibility within the state department.

Article 2. Department and Local Responsibilities

116325. The department shall be responsible for assuring that all public water systems are operated in compliance with this chapter and any regulations adopted hereunder. The department shall directly enforce this chapter for all public water systems with 200 or more service connections. Effective July 1, 1993, the department shall directly enforce this chapter for all public water systems except as set forth in Section 116500.

116330. (a) The department may delegate primary responsibility for the administration and enforcement of this chapter within a county to a local health officer authorized by the board of supervisors to assume these duties, by means of a local primacy delegation agreement if the local health officer demonstrates that it has the capability to meet the local primacy program requirements established by the department pursuant to subdivision (h) of Section 116375. This delegation shall not include the regulation of community water systems serving 200 or more service connections. The local primacy agreement may contain terms and conditions that the department deems necessary to carry out this chapter. The local primacy agreement shall provide that, although the local primacy agency shall be primarily responsible for administration and enforcement of this chapter for the designated water systems, the department does not thereby relinquish its authority, but rather shall retain jurisdiction to administer and enforce this chapter for the designated water systems to the extent determined necessary by the department.

(b) Any local health officer seeking a local primacy delegation shall submit an application to the department. The application shall be submitted by March 1, 1993, for local health officers seeking local primacy agreements for the 1993–94 fiscal year. Thereafter, the application shall be submitted by January 1, of the fiscal year immediately preceding the commencement of the fiscal year for which the local primacy delegation is sought. The application shall be in the format, and shall contain information, required by the department. The department shall approve the application for primacy if the department determines that the local health officer is capable of meeting the primacy program requirements established by the department.

(c) A local primacy delegation approved by the department shall remain in effect until any of the following conditions occur:

(1) The delegation is withdrawn by mutual agreement.

(2) The local primacy agency provides 120-day advance written notice to the department that it no longer wishes to retain local primacy.

(3) The department determines that the local primacy agency no longer complies with the department's local primacy program requirements. The department shall provide written notice to the local primacy agency and the board of supervisors and shall provide an opportunity for a public hearing prior to initiation of any local primacy revocation action by the department.

(d) The department shall evaluate the drinking water program of each local primacy agency at least annually. The department shall prepare a report of the evaluation and list any program improvements needed to conform to the department's local primacy program requirements. A copy of the evaluation report shall be provided to the local primacy agency and the board of supervisors. The local primacy agency shall be granted a reasonable amount of time to make any needed program improvements prior to the initiation of any local primacy revocation actions.

(e) To the extent funds are available in the Safe Drinking Water Account, the department shall provide the local primacy agency with an annual drinking water surveillance program grant to cover the cost of conducting the inspection, monitoring, surveillance, and water quality evaluation activities specified in the local primacy agreement. The annual program grant pursuant to this subdivision shall not exceed the amount that the department determines would be necessary for the department to conduct inspection, monitoring, surveillance, and water quality evaluation activities in the absence of a local primacy agreement for those systems in that county.

(f) The local primacy agency shall act for the department as the primary agency responsible for the administration and enforcement of this chapter for the specified public water systems and shall be empowered with all of the authority granted to the department by this chapter over those water systems.

116335. For public water systems with less than 200 service connections, except as provided in Section 116500, the local health officer shall be responsible for the enforcement of this chapter. For the purposes of this chapter, unless the context otherwise requires, and whenever enforcement activities involve public water systems with fewer than 200 service connections, the local health officer shall act for the department, except that variances and exemptions may only be granted or revoked by the local health officer following the procedures as provided in Section 116625 subject to the approval of the department.

Annual permit fees may be prescribed by the local governing body in accord with Section 101325 to pay the reasonable expenses of the local health officer in carrying out this chapter and regulations adopted thereunder.

This section does not apply to state small water systems regulated by Section 116340.

This section shall become inoperative on July 1, 1993, and, as of January 1, 1994, is repealed, unless a later enacted statute, which becomes effective on or before January 1, 1994, deletes or extends the dates on which it becomes inoperative and is repealed.

116340. This chapter shall not apply to state small water systems except as provided under this section:

(a) The department shall adopt regulations specifying minimum requirements for operation of a state small water system. The requirements may be less stringent than the requirements for public water systems as set forth in this chapter.

(b) The minimum requirements for state small water systems adopted by the department pursuant to subdivision (a) shall be enforced by the local health officer or a local health agency designated by the local health officer. In counties that do not have a local health officer, the requirements shall be enforced by the department. Local health agencies may adopt more stringent requirements for state small water systems than those specified in the state regulations.

(c) The reasonable costs of the local health officer in carrying out the requirements of this section may be recovered through the imposition of fees on state small water systems by the local governing body in accordance with Section 101325.

116345. (a) The local health officer shall submit a report monthly to the department regarding the status of compliance with this chapter by the public water systems under the jurisdiction of the local health officer. The report shall be in a form and manner prescribed by the department.

(b) The department shall review the public water system program of the local health officer at least every three years to assure compliance with this chapter. A report of the findings of the review along with any recommendations of the department shall be provided to the local health officer and the board of supervisors.

Article 3. Operations

116350. (a) The department shall administer the provisions of this chapter and all other provisions relating to the regulation of drinking water to protect public health.

(b) The department shall also have the following responsibilities:

(1) Conduct research, studies, and demonstration projects relating to the provision of a dependable, safe supply of drinking water, including, but not limited to, all of the following:

(A) Improved methods to identify and measure the existence of contaminants in drinking water and to identify the source of the contaminants.

(B) Improved methods to identify, measure, and assess the potential adverse health effects of contaminants in drinking water.

(C) New methods of treating raw water to prepare it for drinking, so as to improve the efficiency of water treatment and to remove or reduce contaminants.

(D) Improved methods for providing a dependable, safe supply of drinking water, including improvements in water purification and distribution, and methods of assessing health-related hazards.

(E) Improved methods of protecting the water sources of public water systems from contamination.

(F) Alternative disinfection technologies that minimize, reduce, or eliminate hazardous disinfection byproducts.

(2) Enforce provisions of the federal Safe Drinking Water Act and regulations adopted pursuant thereto.

(3) Adopt regulations to implement this chapter.

(c) The department may conduct studies and investigations as it deems necessary to assess the quality of private domestic water wells.

116355. (a) On or before July 1, 1991, the department shall submit to the Legislature a comprehensive Safe Drinking Water Plan for California.

(b) The Safe Drinking Water Plan shall include, but not be limited to, the following information:

(1) An analysis of the overall quality of California's drinking water and the identification of specific water quality problems.

(2) Types and levels of contaminants found in public drinking water systems that have less than 10,000 service connections. The discussion of these water systems shall include the following:

(A) Estimated costs of requiring these systems to meet primary drinking water standards and recommended public health goals.

(B) Recommendations for actions that could be taken by the Legislature, the department, and these systems to improve water quality.

(3) A discussion and analysis of the known and potential health risks that may be associated with drinking water contamination in California.

(4) An evaluation of how existing water quality information systems currently maintained by local or state agencies can be more effectively used to protect drinking water.

(5) An evaluation of the research needed to develop inexpensive methods and instruments to ensure better screening and detection of water borne chemicals, and inexpensive detection methods that could be used by small utilities and consumers to detect harmful microbial agents in drinking water.

(6) An analysis of the technical and economic viability and the health benefits of various treatment techniques that can be used to reduce levels of trihalomethanes, lead, nitrates, synthetic organic

chemicals, micro-organisms, and other contaminants in drinking water.

(7) A discussion of alternative methods of financing the construction, installation, and operation of new treatment technologies, including, but not limited to user charges, state or local taxes, state planning and construction grants, loans, and loan guarantees.

(8) A discussion of sources of revenue presently available, and projected to be available, to public water systems to meet current and future expenses.

(9) An analysis of the current cost of drinking water paid by residential, business, and industrial consumers based on a statewide survey of large, medium, and small public water systems.

(10) Specific recommendations, including recommendations developed pursuant to paragraph (6), to improve the quality of drinking water in California and a detailed five-year implementation program.

116360. The Office of Environmental Health Hazard Assessment shall establish recommended public health goals for contaminants in drinking water in accordance with all of the following criteria:

(a) Recommended public health goals, including those implementing the criteria set forth in subdivisions (b) to (h), inclusive, shall be set at a level that does not exceed the national primary drinking water standard adopted by the United States Environmental Protection Agency.

(b) Any recommended public health goals for an acutely toxic substance shall be set at a level at which scientific evidence indicates that no known or anticipated adverse effects on health will occur, plus an adequate margin of safety.

(c) Any recommended public health goal established for a carcinogen or other substance which may cause chronic disease shall be based solely on health effects without regard to cost impacts or other factors, and shall be set at a level which the office has determined, based upon currently available data, does not pose any significant risk to health.

(d) To the extent the information is available, the office shall consider possible synergistic effects resulting from exposure to, or interaction by, two or more contaminants.

(e) The office shall consider the existence of groups or individuals in the population that are more susceptible to adverse effects of contaminants than a normal healthy adult.

(f) The office shall consider the contaminant exposure and body burden levels that alter physiological function or structure in a manner that may significantly increase the risk of illness.

(g) In cases of scientific ambiguity, the office shall use criteria most protective of public health and shall incorporate safety factors

of noncarcinogenic substances for which generally accepted scientific research indicates there is a safe dose-response threshold.

(h) The office shall consider exposure to contaminants in media other than drinking water, including, but not limited to, exposures in food, in the ambient and indoor air, and the resulting body burden.

(i) Recommended public health goals established by the office shall be reviewed periodically and revised as necessary based upon the availability of new scientific data.

116365. (a) In addition to, and concurrent with, adoption of recommended public health goals established by the office pursuant to Section 116360, the department shall adopt primary drinking water standards for contaminants found in drinking water in accordance with the following criteria:

(1) Primary drinking water standards shall be set at a level that is as close as practical to recommended public health goals placing primary emphasis on protection of public health.

(2) Primary drinking water standards shall be set using considerations of technical feasibility and economic costs of compliance to water purveyors and consumers.

(3) In no event shall primary drinking water standards be set at levels less stringent than primary drinking water standards set by the United States Environmental Protection Agency.

(b) At least once every five years after adoption, the department shall review primary drinking water standards, and, using the criteria set forth in subdivision (a), shall amend any standard if any of the following occur:

(1) Changes in technology or treatment techniques permit greater protection of public health or attainment of the recommended public health goal.

(2) New scientific evidence indicates that a substance may present a substantially different risk to public health than was previously determined.

(3) The department determines that a primary standard no longer meets the requirements of this chapter.

(c) The department may, by regulation, require the use of a specified treatment technique in lieu of establishing a maximum contaminant level for a contaminant if the department determines that it is not economically or technologically feasible to ascertain the level of the contaminant.

116370. On or before January 1, 1992, the department shall propose, hold a public hearing, and promulgate a finding of the best available technology for each contaminant for which a recommended public health goal and a primary drinking water standard have been adopted. Thereafter, the department shall promulgate a finding of best available technology for each contaminant for which a recommended public health goal and a primary drinking water standard have been adopted at the time the

levels and standards are adopted. The finding of the department shall take into consideration the costs and benefits of best available treatment technology that have been proven effective under full-scale field applications.

116375. The department shall adopt regulations it deems necessary to carry out the purposes of this chapter. The regulations shall include, but not be limited to, the following:

(a) The monitoring of contaminants including the type of contaminant, frequency and method of sampling and testing and the reporting of results.

(b) The monitoring of unregulated contaminants for which drinking water standards have not been established by the department. The requirements shall be no less stringent than those promulgated pursuant to paragraph (2) of subsection (a) of Section 1445 of the federal Safe Drinking Water Act, as amended (42 U.S.C. Sec. 300j-4 (a)(2)). Until the time that the department adopts regulations regarding the monitoring of unregulated contaminants, the department may, by order, require any public water system that has been shown to contain detectable levels of any unregulated contaminants to conduct periodic water analyses in accordance with conditions specified by the department. The water analyses shall be reported on a quarterly basis unless the department finds that more or less frequent analysis is necessary.

(c) Requirements for the design, operation, and maintenance of public water systems, including, but not limited to, waterworks standards and the control of cross-connections, that the department determines are necessary to obtain, treat, and distribute a reliable and adequate supply of pure, wholesome, potable, and healthy water.

(d) Requirements for treatment, including disinfection of water supplies.

(e) Requirements for the filtration of surface water supplies at least as stringent as regulations promulgated pursuant to subparagraph (C) of paragraph (7) of subsection (b) of Section 1412 of the federal Safe Drinking Water Act, as amended (42 U.S.C. Sec. 300g-1 (b)(7)(C)).

(f) Requirements for notifying the public of the quality of the water delivered to consumers.

(g) Minimum acceptable financial assurances that a public water system shall be required to submit as a demonstration of its capability to provide for the ongoing operation, maintenance, and upgrading of the system, including compliance with monitoring and treatment requirements and contingencies. For privately owned systems not regulated by the California Public Utilities Commission, the financial assurance may be in the form of a trust fund, surety bond, letter of credit, insurance, or other equivalent financial arrangement acceptable to the department.

(h) Program requirements for the conduct of the public water system program by a local health officer under a primacy delegation from the department as set forth in this chapter. The requirements shall include, but not be limited to, the issuance of permits, surveillance and inspections, reporting of monitoring and compliance data, and the taking of enforcement actions.

(i) Methods for determination of the number of persons served by a public water system for drinking water regulatory purposes.

116380. In addition to the requirements set forth in Section 116375, the regulations adopted by the department pursuant to Section 116375 shall include requirements governing the use of point-of-entry treatment by public water systems in lieu of centralized treatment where it can be demonstrated that centralized treatment is not economically feasible.

116385. Any person operating a public water system shall obtain and provide at that person's expense an analysis of the water to the department, in the form, covering those matters, and at intervals as the department by regulation may prescribe. The analysis shall be performed by a laboratory duly certified by the department.

116390. (a) No laboratory, other than a laboratory operated by the department, shall perform tests required pursuant to this chapter for any public water system without first obtaining a certificate issued by the department pursuant to Article 3 (commencing with Section 100825) of Chapter 4 of Part 1 of Division 101, except that laboratories previously issued a certificate under this section shall be deemed certified until certification under Article 3 (commencing with Section 100825) of Chapter 4 of Part 1 of Division 101 has been either granted or denied, but not beyond the expiration date shown on the certificate previously issued under this section.

(b) No person or public entity of the state shall contract with a laboratory for environmental analyses for which the state department requires certification pursuant to this section, unless the laboratory holds a valid certificate.

116395. (a) The Legislature finds and declares all of the following:

(1) The large water system testing program has discovered chemical contamination of the state's drinking water with increasing frequency.

(2) A significant number of California residents rely on the state's small water systems to provide their water.

(3) The small systems, because they tend to be located in outlying rural areas where pesticide use is prevalent, and because they draw their water from shallow aquifers, face a serious threat of contamination.

(4) Unchecked water sources that may be contaminated pose a potentially serious threat to the health of the citizens of California, particularly those living in outlying rural areas.

(5) It is in the interest of all Californians that a testing program for small public water systems be implemented and carried out as expeditiously as possible.

(b) For purposes of this section, ‘‘small public water system’’ means a system with 200 connections or less, and is one of the following:

(1) A community water system that serves at least 15 service connections used by yearlong residents or regularly serves at least 25 yearlong residents.

(2) A state small water system.

(3) A noncommunity water system such as a school, labor camp, institution, or place of employment, as designated by the department.

(c) The department shall conduct training workshops to assist health officers in evaluation of small public water systems for organic chemical contamination, and in sampling and testing procedures. The department shall, at a minimum, provide health officers with guidelines for evaluating systems and instructions for sampling.

(d) The department shall develop a schedule for conduct of the programs by the local health officers. The schedule shall establish a program to address first those systems with the most serious potential for contamination. The department shall enter into agreements with the local health agencies to conduct the necessary work to be performed pursuant to the schedule. The department shall begin the program no later than three months after September 19, 1985. All local health officers shall complete the evaluation, sampling, testing, review of sampling results, and notification to the public water systems within their jurisdiction in accordance with the agreements entered into with the department and within the schedule established by the department. All work required by this section shall be completed within three years after September 19, 1985.

(e) In consultation with the department, the local health officer shall conduct an evaluation of all small public water systems under their jurisdictions to determine the potential for contamination of groundwater sources by organic chemicals. The evaluation shall include, but not be limited to:

(1) A review of the historical water quality data of each system to determine possible evidence of degradation.

(2) A review, to be coordinated with the State Water Resources Control Board, and the California regional water quality control boards, of past and present waste disposal practices that may potentially affect the respective well water supply.

(3) A review of other organic chemicals used in the water supply area that have potential health risks and that may have the potential for contaminating drinking water supplies because of environmental persistence or resistance to natural degradation under conditions existing in California.

(f) Based upon the evaluation of each system, the local health officers shall develop a sampling plan for each system within their jurisdiction. The health officer shall collect samples in accordance with the plan and shall submit the samples for analysis to a certified laboratory designated by the department. When applicable, the laboratory shall test water samples using the Environmental Protection Agency's 13 approved analytical techniques established under subdivision (h) of Section 304 of the Clean Water Act to qualitatively identify the complete range of contaminants in the same class as the specific contaminant or class of contaminants being analyzed.

(g) Within 10 days of the receipt from the laboratory of the testing results, the local health officer shall notify the small public water system, the department and the California regional water quality control board for that region of the results.

(h) Following a review of the testing results, the local health officer may order the public water system to conduct a periodic water sampling and analysis program in accordance with conditions specified by the local health officer. The department shall provide ongoing advice and assistance to local health officers in interpreting test results and determining appropriate notification and followup activities in those instances where contaminants are found.

(i) This section shall be operative during any fiscal year only if the Legislature appropriates sufficient funds to pay for all state-mandated costs to be incurred by local agencies pursuant to this section during that year.

116400. If the department determines that a public water system is subject to potential contamination, the department may, by order, require the public water system to conduct a periodic water analysis in accordance with conditions specified by the department. The water analysis shall be reported on a quarterly basis, unless the department finds that reasonable action requires either more or less frequent analysis.

116405. (a) In counties with a population not exceeding 500,000 persons as shown by the 1970 federal decennial census, any public water system supplying both domestic and untreated irrigation water in separate pressurized systems that were in existence prior to January 1, 1990, and that is operated by an incorporated or unincorporated association of users, shall not require protection against backflow into the domestic water system from premises receiving both the water services and having available no other source of water, except where interconnection between the systems has taken place. It shall be a misdemeanor for any person to knowingly interconnect the water services on a user's premises without installing a backflow protection device approved by the state department.

(b) Regulations of the state department requiring the installation of backflow protection shall not be continued to require the installation of the protection in any public water system described in subdivision (a), except as provided in that subdivision.

Article 4. Exemptions and Variances

116425. (a) The department may exempt any public water system from any maximum contaminant level or treatment technique requirement if it finds all the following:

(1) The public water system was in operation, or had applied for a permit to operate, on the effective date of the maximum contaminant level or treatment technique requirement.

(2) Due to compelling factors, which may include economic factors, the public water system is unable to comply with the maximum contaminant level or treatment technique requirement.

(3) The granting of the exemption will not result in an unreasonable risk to health.

(b) If the department grants a public water system an exemption for a primary drinking water standard under subdivision (a), the department shall prescribe, at the time an exemption is granted, a schedule for both of the following:

(1) Compliance by the public water system with each contaminant level or treatment technique requirement for which the exemption was granted.

(2) Implementation by the public water system of interim control measures the department may require for each contaminant or treatment technique requirement for which the exemption was granted.

(c) Any schedule prescribed by the department pursuant to this section shall require compliance by the public water system with each contaminant level or treatment technique requirement for which the exemption was granted within 12 months from the granting of the exemption.

(d) The final date for compliance with any schedule issued pursuant to this section may be extended by the department for a period not to exceed three years from the date of the granting of the exemption if the department finds all of the following:

(1) The system cannot meet the standard without capital improvements that cannot be completed within the period of the exemption.

(2) In the case of a system that needs financial assistance for the necessary improvements, the system has entered into an agreement to obtain the financial assistance or the system has entered into an enforceable agreement to become part of a regional public water system.

(3) The system is taking all practicable steps to meet the standard.

(e) In the case of a system that does not serve more than 500 service connections and that needs financial assistance for the necessary improvements, an exemption granted pursuant to paragraph (2) of subdivision (d) may be renewed for one or more additional two-year periods if the system establishes that it is taking all practicable steps to meet the requirements of subdivision (d).

(f) Prior to the granting of an exemption pursuant to this section, the department shall provide notice and an opportunity for a public hearing. Notice of any public hearing held pursuant to this section shall be given by the department in writing to the public water system seeking the exemption and to the public as provided in Section 6061 of the Government Code.

116430. (a) The department may grant a variance or variances from primary drinking water standards to a public water system. Any variance granted pursuant to this subdivision shall conform to the requirements established under the federal Safe Drinking Water Act, as amended (42 U.S.C. Sec. 300g-4).

(b) (1) In addition to the authority provided in subdivision (a), at the request of any public water system, the department shall grant a variance from the primary drinking water standard adopted by the department for fluoride. A variance granted by the department pursuant to this subdivision shall prohibit fluoride levels in excess of 75 percent of the maximum contaminant level established in the national primary drinking water regulation adopted by the United States Environmental Protection Agency for fluoride, or three milligrams per liter, whichever is higher, and shall be valid for a period of up to 30 years. The department shall review each variance granted pursuant to this section at least every five years. The variance may be withdrawn upon reasonable notice by the department if the department determines that the community served by the public water system no longer accepts the fluoride level authorized in the variance or the level of fluoride authorized by the variance poses an unreasonable risk to health. In no case may a variance be granted in excess of the United States Environmental Protection Agency maximum contaminant level.

(2) The department shall grant a variance pursuant to paragraph (1) only if it determines, after conducting a public hearing in the community served by the public water system, that there is no substantial community opposition to the variance and the variance does not pose an unreasonable risk to health. The public water system shall provide written notification, approved by the department, to all customers which shall contain at least the following information:

(A) The fact that a variance has been requested.

(B) The date, time and location of the public hearing that will be conducted by the department.

(C) The level of fluoride that will be allowed by the requested variance and how this level compares to the maximum contaminant

levels prescribed by the state primary drinking water standard, the federal national primary drinking water regulation, and the federal national secondary drinking water regulation.

(D) A discussion of the types of health and dental problems that may occur when the fluoride concentration exceeds the maximum contaminant levels prescribed by the state standard and the federal regulations.

(3) If, at any time after a variance has been granted pursuant to paragraph (1), substantial community concerns arise concerning the level of fluoride present in the water supplied by the public water system, the public water system shall notify the department, conduct a public hearing on the concerns expressed by the community, determine the fluoride level that is acceptable to the community, and apply to the department for an amendment to the variance which reflects that determination.

Article 5. Public Notification

116450. (a) When any primary drinking water standard specified in the department's regulations is not complied with, when a monitoring requirement specified in the department's regulations is not performed, or when a water purveyor fails to comply with the conditions of any variance or exemption, the person operating the public water system shall notify the department and shall give notice to the users of that fact in the manner prescribed by the department. When a variance or an exemption is granted, the person operating the public water system shall give notice to the users of that fact.

(b) When a person operating a public water system determines that a significant rise in the bacterial count of water has occurred in water he or she supplies, the person shall provide, at his or her expense, a report on the rise in bacterial count of the water, together with the results of an analysis of the water, within 24 hours to the department and, where appropriate, to the local health officer.

(c) When the department receives the information described in subdivision (b) and determines that it constitutes an immediate danger to health, the department shall immediately notify the person operating the public water system to implement the emergency notification plan required by this chapter.

(d) In the case of a failure to comply with any primary drinking water standard that represents an imminent danger to the health of water users, the operator shall notify each of his or her customers as provided in the approved emergency notification plan.

(e) In addition, the same notification requirement shall be required in any instance in which the department or the local health department recommends to the operator that it notify its customers to avoid internal consumption of the water supply and to use bottled

water due to a chemical contamination problem that may pose a health risk.

(f) The content of the notices required by this section shall be approved by the department. Notice shall be repeated at intervals, as required by the department, until the department concludes that there is compliance with its standards or requirements. Notices may be given by the department.

In any case where public notification is required by this section because a contaminant is present in drinking water at a level in excess of a primary drinking water standard, the notification shall include identification of the contaminant, information on possible effects of the contaminant on human health, and information on specific measures that should be taken by persons or populations who might be more acutely affected than the general population.

(g) Whenever a school or school system, the owner or operator of residential rental property, or the owner or operator of a business property receives a notification from a person operating a public water system under any provision of this section, the school or school system shall notify school employees, students and parents if the students are minors, the owner or operator of a residential rental property shall notify tenants, and the owner or operator of business property shall notify employees of businesses located on the property.

(1) The operator shall provide the customer with a sample notification form that may be used by the customer in complying with this subdivision and that shall indicate the nature of the problem with the water supply and the most appropriate methods for notification that may include, but is not limited to, the sending of a letter to each water user and the posting of a notice at each site where drinking water is dispensed.

(2) The notice required by this subdivision shall be given within 10 days of receipt of notification from the person operating the public water system.

(3) Any person failing to give notice as required by this subdivision shall be civilly liable in an amount not to exceed one thousand dollars ($1,000) for each day of failure to give notice.

(4) If the operator has evidence of noncompliance with this subdivision the operator shall report this information to the local health department and the department.

116455. (a) When a well, that is used as a source of drinking water for a public water system, is discovered to include, or is closed due to the presence of, a contaminant in excess of a maximum contaminant level or an action level established by the department, the person operating the public water system shall notify the governing body of the local agency in which users of the drinking water reside within 30 days of the discovery or closure.

(b) The notification required by subdivision (a) shall include the location of any affected well, its name, its type, the origin, if known, of the contaminant, the maximum contaminant level or action level for the contaminant detected and the operational status of the well immediately prior to its closure.

(c) For purposes of this section, the following terms have the following meanings:

(1) ''Action level'' means the concentration level of a contaminant in potable water that the department has determined, based on available scientific information, provides an adequate margin of safety to prevent potential risks to human health.

(2) ''Local agency'' means a city or county, or a city and county.

116460. No person shall operate a public water system without an emergency notification plan that has been submitted to and approved by the department. The emergency notification plan shall provide for immediate notice to the customers of the public water system of any significant rise in the bacterial count of water or other failure to comply with any primary drinking water standard that represents an imminent danger to the health of the water users.

No permit, variance, or exemption may be issued or amended under this chapter until an emergency notification plan has been approved by the department.

The department shall adopt regulations to implement the provisions of this section. The regulations may provide for the exclusion of public water systems from the requirements of this section when, in the judgment of the department, the exclusion will best serve the public interest.

116465. Upon formal complaint by the director alleging that additional facilities are necessary to provide the users of a public water system operated by a public utility under the jurisdiction of the Public Utilities Commission with a continuous and adequate supply of water or to bring the water system into conformity with secondary drinking water standards, the commission may, after hearing, direct the public utility to make the changes in its procedures or additions to its facilities as the commission shall determine are necessary to provide a continuous and adequate supply of water to the users thereof or to bring the system into conformity with secondary drinking water standards. Any proceeding of the commission pursuant to this article shall be conducted as provided in Chapter 9 (commencing with Section 1701) of Part 1 of Division 1 of the Public Utilities Code, and any order issued by the commission pursuant to this action shall be subject to judicial review as provided in Chapter 9.

116470. The department shall require every public water system, as a condition of operation, to report at least once annually to water consumers on the level of contaminants in drinking water which pose a potential risk to human health. The report shall include, but not be

limited to, information on source, content, and quality of water purveyed, a comparison between levels of contaminants and recommended public health goals; and information on compliance with primary drinking water standards.

116475. (a) The Emergency Clean Water Grant Fund is hereby established in the General Fund and, notwithstanding Section 13340 of the Government Code, is continuously appropriated to the department, without regard to fiscal years, to provide financial assistance to public water systems and to fund emergency actions by the department to ensure that safe drinking water supplies are available to all Californians who are served by public water systems.

(b) The department may expend funds in the Emergency Clean Water Grant Fund for the purposes specified in subdivision (a), including, but not limited to, payment for all of the following actions:

(1) The provision of alternative water supplies and bottled water.

(2) Improvements of the existing water supply system.

(3) Hookups with adjacent water systems.

(4) Design, purchase, installation, and operation and maintenance of water treatment technologies.

(c) The department shall develop and revise guidelines for the allocation and administration of moneys in the Emergency Clean Water Grant Fund. These guidelines shall include, but are not limited to, all of the following:

(1) A definition of what constitutes an emergency requiring an alternative or improved water supply.

(2) Priorities and procedures for allocating funds.

(3) Repayment provisions, as appropriate.

(4) Procedures for recovering funds from parties responsible for the contamination of public water supplies.

The guidelines are not subject to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

116480. (a) The department shall expend moneys available in the Emergency Clean Water Grant Fund only for the purpose of taking corrective action necessary to remedy or prevent an emergency or imminent threat to public health due to the contamination or potential contamination of the public water supply.

(b) Notwithstanding any other provision of law, the department may enter into written contracts for remedial action taken or to be taken pursuant to subdivision (a), and may enter into oral contracts, not to exceed five thousand dollars ($5,000) in obligation, when, in the judgment of the department, immediate remedial action is necessary to remedy or prevent an emergency specified in subdivision (a). The contracts, written or oral, may include provisions for the rental or purchase of tools and equipment, either with or without operators, for the furnishing of labor and materials and for engineering consulting necessary to accomplish the work.

116485. Any remedial action taken or contracted for by the department pursuant to Section 116480 shall be exempt from the following provisions:

(a) State Contract Act provided for pursuant to Chapter 1 (commencing with Section 10100) of Part 2 of Division 2 of the Public Contract Code.

(b) Chapter 10 (commencing with Section 4525) of Division 5 of Title 1 of the Government Code.

(c) Section 14780 of the Government Code and Article 5 (commencing with Section 10355) of Chapter 2 of Part 2 of Division 2 of the Public Contract Code.

(d) Article 4 (commencing with Section 10335) of Chapter 2 of Part 2 of Division 2 of the Public Contract Code.

Article 6. Enforcement Responsibility

116500. This chapter shall be enforced directly by the department for all public water systems, including state small water systems, in any county that does not have a local health officer, or contracts with the department for environmental health services pursuant to Section 1157 and elects not to enforce this chapter.

Article 7. Requirements and Compliance

116525. (a) No person shall operate a public water system unless he or she first submits an application to the department and receives a permit as provided in this chapter. A change in ownership of a public water system shall require the submission of a new application.

(b) The department may require a new application whenever a change in regulatory jurisdiction has occurred.

(c) The department may renew, reissue, revise, or amend any domestic water supply permit whenever the department deems it to be necessary for the protection of public health whether or not an application has been filed.

116530. A public water system shall submit a technical report to the department as part of the permit application or when otherwise required by the department. This report may include, but not be limited to, detailed plans and specifications, water quality information, and physical descriptions of the existing or proposed system, and financial assurance information.

116535. Upon determination that an application submitted pursuant to this chapter is complete, the department shall make a thorough investigation of the proposed or existing plant, works, system, or water supply, and all other circumstances and conditions that it deems material, including any required financial assurance information.

116540. Following completion of the investigation and satisfaction of the requirements of subdivisions (a) and (b), the department shall issue or deny the permit. The department may impose permit conditions, requirements for system improvements, and time schedules as it deems necessary to assure a reliable and adequate supply of water at all times that is pure, wholesome, potable, and does not endanger the health of consumers.

(a) No public water system that was not in existence on January 1, 1991, shall be granted a permit unless the system demonstrates to the department that the water supplier possesses adequate financial capability to assure the delivery of pure, wholesome, and potable drinking water. This section shall also apply to any change of ownership of a public water system that occurs after January 1, 1991.

(b) No permit under this chapter shall be issued to an association organized under Title 3 (commencing with Section 20000) of Division 3 of the Corporations Code. This section shall not apply to unincorporated associations that as of December 31, 1990, are holders of a permit issued under this chapter.

116545. Prior to the issuance of any new, revised, renewed, or amended permit, or the denial of a permit, the department may conduct a public hearing to obtain additional public comment. Notice of the hearing shall be provided to the applicant and interested persons at least 30 days prior to the hearing. The department may require the applicant to distribute the notice of the hearing to affected consumers.

116550. (a) No person operating a public water system shall modify, add to or change his or her source of supply or method of treatment of, or change his or her distribution system as authorized by a valid existing permit issued to him or her by the department unless the person first submits an application to the department and receives an amended permit as provided in this chapter authorizing the modification, addition, or change in his or her source of supply or method of treatment.

(b) Unless otherwise directed by the department, changes in distribution systems may be made without the submission of a permit application if the changes comply in all particulars with the waterworks standards.

116555. Any person who operates a public water system shall do all of the following:

(a) Comply with primary and secondary drinking water standards.

(b) Ensure that the system will not be subject to backflow under normal operating conditions.

(c) Provide a reliable and adequate supply of pure, wholesome, healthful, and potable water.

116560. (a) The department shall develop and publish a list of all existing or proposed maximum contaminant levels that are set at a

level substantially less stringent, as determined by the department, than their corresponding recommended public health goals due to limitations of technology or excessive costs.

(b) Public water systems that serve more than 10,000 service connections and that exceed, for organic contaminants on a running quarterly average basis, or for inorganic contaminants on a basis established by the department, a recommended public health goal listed by the department pursuant to subdivision (a), shall do the following:

(1) The water system shall evaluate in writing all reasonable means of reducing the level of the contaminant to as close to the recommended public health goal as feasible, and submit the written evaluation to the department at least once annually.

(2) After the written evaluation has been submitted and upon being notified by the department of the need to do so, the water system shall submit a water quality improvement plan to the department, based upon the evaluation. The water quality improvement plan shall identify all reasonable measures available to the water system to reduce the level of the contaminant, the costs to consumers and the water system of implementing the measures, and a proposed schedule of actions to be undertaken by the water system to reduce the level of the contaminant. If the water system determines that it is unable to reduce the level of the contaminant due to technical or economic limitations, the basis for that determination shall be described in the plan.

(c) The department shall review the water quality improvement plan and may approve it as submitted or may require additional information from the water system. Upon approval of the plan, the department shall amend or revise the domestic water supply permit issued to the water system pursuant to this chapter to include a time schedule for implementation of those measures which are technically and economically feasible.

116565. (a) Commencing January 1, 1993, until June 30, 1993, each public water system serving 200 or more service connections and any public water system that treats water on behalf of one or more public water systems for the purpose of rendering it safe for human consumption, shall reimburse the department pursuant to this section for actual costs incurred by the department for conducting those activities mandated by this chapter relating to the issuance of domestic water supply permits, inspections, monitoring, surveillance, and water quality evaluation that relate to that specific public water system. The amount of reimbursement shall be sufficient to pay, but in no event shall exceed, the department’s actual cost in conducting these activities.

(b) Commencing July 1, 1993, each public water system serving 1,000 or more service connections and any public water system that treats water on behalf of one or more public water systems for the

purpose of rendering it safe for human consumption, shall reimburse the department for actual cost incurred by the department for conducting those activities mandated by this chapter relating to the issuance of domestic water supply permits, inspections, monitoring, surveillance, and water quality evaluation that relate to that specific public water system. The amount of reimbursement shall be sufficient to pay, but in no event shall exceed, the department's actual cost in conducting these activities.

(c) Commencing July 1, 1993, each public water system serving less than 1,000 service connections shall pay an annual drinking water operating fee to the department as set forth in this subdivision for costs incurred by the department for conducting those activities mandated by this chapter relating to inspections, monitoring, surveillance, and water quality evaluation relating to public water systems. The total amount of fees shall be sufficient to pay, but in no event shall exceed, the department's actual cost in conducting these activities. Notwithstanding adjustment of actual fees collected pursuant to Section 100425 as authorized pursuant to subdivision (d) of Section 116590, the maximum amount that shall be paid annually by a public water system pursuant to this section shall not exceed the following:

Type of public water system	Fee
15–24 service connections	$250
25–99 service connections	$400
100–499 service connections	$500
500–999 service connections	$700
Noncommunity water systems pursuant to paragraph (1) of subdivision (h) of Section 116275	$350

(d) For purposes of determining the fees provided for in subdivisions (a) and (b), the department shall maintain a record of its actual costs for pursuing the activities specified in subdivisions (a) and (b) relative to each system required to pay the fees. The fee charged each system shall reflect the department's actual cost, or in the case of a local primacy agency the local primacy agency's actual cost, of conducting the specified activities.

(e) The department shall submit an invoice for cost reimbursement for the activities specified in subdivisions (a) and (b) to the public water system prior to September 1 of the fiscal year following the fiscal year in which the costs were incurred. The invoice shall indicate the total hours expended, the reasons for the expenditure, and the hourly cost rate of the department. Payment of the invoice shall be made within 120 days of the date of the invoice.

Failure to pay the amount of the invoice within 120 days shall result in a 10 percent late penalty that shall be paid in addition to the fee.

(f) Any public water system under the jurisdiction of a local primacy agency shall pay the fees specified in this section to the local primacy agency in lieu of the department. This section shall not preclude a local health officer from imposing additional fees pursuant to Section 101325.

116570. (a) Each public water system serving less than 1,000 service connections applying for a domestic water supply permit pursuant to Section 116525 or 116550 shall pay a permit application processing fee to the department. Payment of the fee shall accompany the application for the permit or permit amendment.

(b) The amount of the permit application fee required under subdivision (a) shall be as follows:

(1) A new community water system for which no domestic water supply permits have been previously issued by the department shall pay an application fee of five hundred dollars ($500).

(2) A new noncommunity water system for which no domestic water supply permits have been previously issued by the department shall pay an application fee of three hundred dollars ($300).

(3) An existing public water system applying for an amendment to a domestic water supply permit due to a change in ownership shall pay an application fee of one hundred fifty dollars ($150).

(4) An existing public water system applying for an amendment to a domestic water supply permit due to an addition or modification of the source of supply, or an addition or change in the method of treatment of the water supply shall pay an application fee of two hundred fifty dollars ($250).

(c) Any public water system under the jurisdiction of a local primacy agency shall pay the permit application fees specified in this section to the local primacy agency in lieu of the department.

116577. (a) Each public water system shall reimburse the department for actual costs incurred by the department for any of the following enforcement activities related to that water system:

(1) Preparing, issuing, and monitoring compliance with, an order or a citation.

(2) Preparing and issuing public notification.

(3) Conducting a hearing pursuant to Section 116625.

(b) The department shall submit an invoice for these enforcement costs to the public water system that requires payment prior to September 1 of the fiscal year following the fiscal year in which the costs were incurred. The invoice shall indicate the total hours expended, the reasons for the expenditure, and the hourly cost rate of the department. The costs set forth in the invoice shall not exceed the total actual costs to the department of enforcement activities specified in this section.

(c) Notwithstanding the reimbursement of enforcement costs of the local primacy agency pursuant to subdivision (a) of Section 116595 by public water systems under the jurisdiction of the local primacy agency, public water systems shall also reimburse enforcement costs, if any, incurred by the department pursuant to this section.

(d) ''Enforcement costs'' as used in this section does not include ''litigation costs'' pursuant to Section 116585.

(e) The department shall not be entitled to enforcement costs pursuant to this section if either a court or the department determines that enforcement activities were in error.

(f) The maximum reimbursement, pursuant to this section, by a public water system serving less than 1,000 service connections during any fiscal year shall not exceed one thousand dollars ($1,000) or twice the maximum for that public water system as set forth in subdivision (c) of Section 116565, whichever is greater.

116580. (a) Each public water system that requests an exemption, plan review, variance, or waiver of any applicable requirement of this chapter or any regulation adopted pursuant to this chapter, shall reimburse the department for actual costs incurred by the department in processing the request.

(b) The department shall submit an invoice to the water system within 90 days of the department's final decision with respect to the request for an exemption, variance, or waiver. The invoice shall indicate the number of hours expended by the department and the department's hourly cost rate. Payment of the fee shall be made within 120 days of the date of the invoice. The department may revoke any approval of a request for an exemption, variance, or waiver for failure to pay the required fees.

(c) Notwithstanding subdivisions (a) and (b), requests for, and reimbursement of actual costs for, an exemption, variance, or waiver for public water systems under the jurisdiction of the local primacy agency shall, instead, be submitted to the local primacy agency pursuant to subdivision (c) of Section 116595.

116585. In any court action brought to enforce this chapter, the prevailing party or parties shall be awarded litigation costs, including, but not limited to, salaries, benefits, travel expenses, operating equipment, administrative, overhead, other litigation costs, and attorney's fees, as determined by the court. Litigation costs awarded to the department by the court shall be deposited into the Safe Drinking Water Account. Litigation costs awarded to a local primacy agency by the court shall be used by that local primacy agency to offset the local primacy agency's litigation costs.

116590. (a) All funds received by the department pursuant to this chapter, including, but not limited to, all civil penalties collected by the department pursuant to Article 9 (commencing with Section 116650) and Article 11 (commencing with Section 116725), shall be

deposited into the Safe Drinking Water Account that is hereby established. Funds in the Safe Drinking Water Account may not be expended for any purpose other than as set forth in this chapter. Notwithstanding Section 13340 of the Government Code, funds collected by the department pursuant to Sections 116565 to 116600, inclusive, and deposited into the Safe Drinking Water Account are continuously appropriated without regard to fiscal year to pay the expenses of the department to administer this chapter.

(b) The department's hourly cost rate used to determine the reimbursement for actual costs pursuant to Sections 116565, 116577, and 116580 shall be based upon the department's salaries, benefits, travel expense, operating, equipment, administrative support, and overhead costs.

(c) Notwithstanding Section 6103 of the Government Code, each public water system operating under a permit issued pursuant to this chapter shall pay the fees set forth in this chapter. A public water system shall be permitted to collect a fee from its customers to recover the fees paid pursuant to this chapter.

(d) The fees collected pursuant to subdivision (c) of Section 116565 and subdivision (b) of Section 116570 shall be adjusted annually pursuant to Section 100425, and the adjusted fee amounts shall be rounded off to the nearest whole dollar.

(e) Fees assessed pursuant to this chapter shall not exceed actual costs to either the department or the local primacy agency, as the case may be, related to the public water systems assessed the fees.

(f) In no event shall the total amount of funds collected pursuant to subdivisions (a) and (b) of Section 116565, and subdivision (a) of Section 116577 from public water systems serving 1,000 or more service connections exceed the following:

(1) For the 1992–93 fiscal year, four million nine hundred thousand dollars ($4,900,000).

(2) For the 1993–94 fiscal year, four million seven hundred fifty thousand dollars ($4,750,000).

(3) For the 1994–95 fiscal year, five million dollars ($5,000,000).

(4) For the 1995–96 fiscal year, five million two hundred fifty thousand dollars ($5,250,000).

(g) The department shall develop a time accounting standard designed to do all of the following:

(1) Provide accurate time accounting.

(2) Provide accurate invoicing based upon hourly rates comparable to private sector professional classifications and comparable rates charged by other states for comparable services. These rates shall be applied against the time spent by the actual individuals who perform the work.

(3) Establish work standards that address work tasks, timing, completeness, limits on redirection of effort, and limits on the time spent in the aggregate for each activity.

(4) Establish overhead charge-back limitations, including, but not limited to, charge-back limitations on charges relating to reimbursement of services provided to the department by other departments and agencies of the state, that reasonably relate to the performance of the function.

(5) Provide appropriate invoice controls.

116595. (a) Any public water system under the jurisdiction of a local primacy agency shall reimburse the local primacy agency for any enforcement cost incurred by the local primacy agency related to any of the following relating to that water system:

(1) Preparing, issuing, and monitoring compliance with, an order or a citation.

(2) Preparing and issuing public notification.

(3) Conducting a hearing pursuant to Section 116625.

The local primacy agency shall submit an invoice to the public water system that requires payment, prior to September 1 of the fiscal year following the fiscal year in which the costs were incurred. The invoice shall indicate the total hours expended, the reasons for the expenditure, and the hourly cost rate of the local primacy agency. The invoice shall not exceed the total costs to the local primacy agency of enforcement activities specified in this subdivision. Notwithstanding the reimbursement to the department of enforcement costs, if any, pursuant to Section 116577, any public water system under the jurisdiction of the local primacy agency shall also reimburse the local primacy agency for enforcement costs incurred by the local primacy agency pursuant to this section. The local primacy agency shall not be entitled to enforcement costs pursuant to this subdivision if either a court or the local primacy agency determines that enforcement activities were in error. ''Enforcement costs'' as used in this subdivision does not include ''litigation costs'' as used in subdivision (d). The maximum reimbursement, pursuant to this subdivision, by a public water system serving less than 1,000 service connections during any fiscal year shall not exceed twice the maximum for that public water system as set forth in subdivision (c) of Section 116565.

(b) The local primacy agency may adopt a fee schedule for the processing of applications for a domestic water supply permit, submitted pursuant to subdivision (c) of Section 116570 by a public water system under the jurisdiction of the local primacy agency, in lieu of the fee schedule set forth in subdivision (b) of Section 116570, to recover its cost of processing the permit applications as specified in the primacy agreement. The fee shall not exceed the total costs to the local primacy agency of processing the permit application.

(c) Any public water system under the jurisdiction of a local primacy agency that requests an exemption, variance, or waiver of any applicable requirement of this chapter, or any regulation of the department adopted pursuant to this chapter, shall submit the

request to the local primacy agency and shall reimburse the local primacy agency for any costs incurred by the local primacy agency in processing the request.

116600. Except as otherwise specified, Sections 116565 to 116600, inclusive, shall become operative July 1, 1993. Sections 116565 to 116600, inclusive, shall remain in effect until January 1, 1997, and as of that date are repealed unless a later enacted statute that is enacted before January 1, 1997, deletes or extends that date.

Article 8. Violations

116625. (a) The department, after a hearing noticed and conducted as provided in Section 11500 of the Government Code, may suspend or revoke any permit issued pursuant to this chapter if the department determines pursuant to the hearing that the permittee is not complying with the permit, this chapter, or any regulation, standard, or order issued or adopted thereunder, or that the permittee has made a false statement or representation on any application, record, or report maintained or submitted for purposes of compliance with this chapter.

(b) The permittee may file with the superior court a petition for a writ of mandate for review of any decision of the department made pursuant to subdivision (a). Failure to file a petition shall not preclude a party from challenging the reasonableness or validity of a decision of the department in any judicial proceeding to enforce the decision or from pursuing any remedy authorized by this chapter.

(c) The department may temporarily suspend any permit issued pursuant to this chapter prior to any hearing when the action is necessary to prevent an imminent or substantial danger to health. The director shall notify the permittee of the temporary suspension and the effective date thereof and, at the same time, notify the permittee that a hearing has been scheduled. The hearing shall be held as soon as possible, but not later than 15 days after the effective date of the temporary suspension. The temporary suspension shall remain in effect until the hearing is completed and the director has made a final determination on the merits, that in any event shall be made within 15 days after the completion of the hearing. If the determination is not transmitted within 15 days after the hearing is completed, the temporary suspension shall be of no further effect.

Article 9. Remedies

116650. (a) If the department determines that a public water system is in violation of this chapter or any regulation, permit, standard, or order issued or adopted thereunder, the department may issue a citation to the public water system. The citation shall be served upon the public water system personally or by registered mail.

(b) Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the statutory provision, standard, order, or regulation alleged to have been violated.

(c) For continuing violations, the citation shall fix the earliest feasible time for elimination or correction of the condition constituting the violation where appropriate. If the public water system fails to correct a violation within the time specified in the citation, the department may assess a civil penalty as specified in subdivision (e).

(d) For a noncontinuing violation of primary drinking standards, other than turbidity, the department may assess in the citation a civil penalty as specified in subdivision (e).

(e) Citations issued pursuant to this section shall be classified according to the nature of the violation or the failure to comply. The department shall specify the classification in the citation and may assess civil penalties for each classification as follows:

(1) For violation of a primary drinking standard, other than turbidity, an amount not to exceed one thousand dollars ($1,000) for each day that the violation occurred for noncontinuing violations or for each day that the violation continues beyond the date specified for correction in the citation.

(2) For failure to comply with any citation or order issued for failure of the primary drinking water standard for turbidity or for violation of a secondary drinking water standard that the director determines may have a direct or immediate relationship to the welfare of the users, an amount not to exceed two hundred fifty dollars ($250) for each day that the violation continues beyond the date specified for correction in the citation.

(3) For failure to comply with any citation or order issued for noncompliance with any department regulation or order, other than a primary or secondary drinking water standard, an amount not to exceed two hundred dollars ($200) per day for each day the violation continues beyond the date specified for correction in the citation.

116655. (a) Whenever the department determines that any person has violated or is violating this chapter, or any permit, regulation, or standard issued or adopted pursuant to this chapter, the director may issue an order doing any of the following:

(1) Directing compliance forthwith.

(2) Directing compliance in accordance with a time schedule set by the department.

(3) Directing that appropriate preventive action be taken in the case of a threatened violation.

(b) An order issued pursuant to this section may include, but shall not be limited to, any or all of the following requirements:

(1) That the existing plant, works, or system be repaired, altered, or added to.

(2) That purification or treatment works be installed.
(3) That the source of the water supply be changed.
(4) That no additional service connection be made to the system.
(5) That the water supply, the plant, or the system be monitored.
(6) That a report on the condition and operation of the plant, works, system, or water supply be submitted to the department.

116660. (a) Any person who operates a public water system without having an unrevoked permit to do so, may be enjoined from so doing by any court of competent jurisdiction at the suit of the department.

(b) When the department determines that any person has engaged in or is engaged in any act or practice that constitutes a violation of this chapter, or any regulation, permit, standard, or order issued or adopted thereunder, the department may bring an action in the superior court for an order enjoining the practices or for an order directing compliance.

(c) Upon a showing by the department of any violation set forth in subsection (b); the superior court shall enjoin the practices and may do any of the following:

(1) Enforce a reasonable plan of compliance, including the appointment of a competent person, to be approved by the department, and paid by the operator of the public water system, who shall take charge of and operate the system so as to secure compliance.
(2) Enjoin further service connections to the public water system.
(3) Afford any further relief that may be required to insure compliance with this chapter.

116665. Whenever the department determines that any public water system is unable or unwilling to adequately serve its users, has been actually or effectively abandoned by its owners, or is unresponsive to the rules or orders of the department, the department may petition the superior court for the county within which the system has its principal office or place of business for the appointment of a receiver to assume possession of its property and to operate its system upon such terms and conditions as the court shall prescribe. The court may require, as a condition to the appointment of the receiver, that a sufficient bond be given by the receiver and be conditioned upon compliance with the orders of the court and the department, and the protection of all property rights involved. The court may provide, as a condition of its order, that the receiver appointed pursuant to the order shall not be held personally liable for any good faith, reasonable effort to assume possession of, and to operate, the system in compliance with the order.

116670. Anything done, maintained, or suffered as a result of failure to comply with any primary drinking water standard is a public nuisance dangerous to health, and may be enjoined or summarily abated in the manner provided by law. Every public

officer or body lawfully empowered to do so shall abate the nuisance immediately.

116675. Notwithstanding Sections 116340 and 116500, the department shall, after adequate notification of the local health officer, take action authorized by this chapter against a public water system under the jurisdiction of the local health officer if any of the following occur:

(a) The public water system has been in violation of any provision of this chapter or the regulations adopted hereunder, including any violation of compliance with drinking water standards or waterworks standards, for a period of at least 90 days within the previous year.

(b) A contaminant is present in, or likely to enter, a public water system and presents an imminent and substantial danger to the health of the users of the system.

Article 10. Judicial Review

116700. (a) Within 30 days after service of a copy of an order issued by the department, any aggrieved party may file with the superior court a petition for a writ of mandate for review thereof. Failure to file an action shall not preclude a party from challenging the reasonableness and validity of a decision or order of the department in any judicial proceedings brought to enforce the decision or order or for any civil or criminal remedy authorized by this chapter.

(b) The evidence before the court shall consist of all relevant evidence that, in the judgment of the court, should be considered to effectuate and implement the provisions of this chapter. In every case, the court shall exercise its independent judgment on the evidence.

(c) Except as otherwise provided in this section, subdivisions (e) and (f) of Section 1094.5 of the Code of Civil Procedure shall govern proceedings pursuant to this section.

Article 11. Crimes and Penalties

116725. (a) Any person who knowingly makes any false statement or representation in any application, record, report, or other document submitted, maintained, or used for purposes of compliance with this chapter, may be liable, as determined by the court, for a civil penalty not to exceed five thousand dollars ($5,000) for each separate violation or, for continuing violations, for each day that violation continues.

(b) Any person who violates a citation schedule of compliance for a primary drinking water standard, other than turbidity, or any order regarding a primary drinking water standard other than turbidity, or the requirement that a reliable and adequate supply of pure,

wholesome, healthful, and potable water be provided may be liable, as determined by the court, for a civil penalty not to exceed twenty-five thousand dollars ($25,000) for each separate violation or, for continuing violations, for each day that violation continues.

(c) Any person who violates any order, other than one specified in subdivision (b), issued pursuant to this chapter may be liable, as determined by the court, for a civil penalty not to exceed five thousand dollars ($5,000) for each separate violation or, for continuing violations, for each day that violation continues.

(d) Any person who operates a public water system without a permit issued by the department pursuant to this chapter may be liable, as determined by the court, for a civil penalty not to exceed twenty-five thousand dollars ($25,000) for each separate violation or, for continuing violations, for each day that violation continues.

(e) Each civil penalty imposed for any separate violation pursuant to this section shall be separate and in addition to any other civil penalty imposed pursuant to this section or any other provision of law.

116730. (a) Any person who knowingly does any of the following acts may, upon conviction, be punished by a fine of not more than twenty-five thousand dollars ($25,000) for each day of violation, or by imprisonment in the county jail not to exceed one year, or by both the fine and imprisonment:

(1) Makes any false statement or representation in any application, record, report, or other document submitted, maintained, or used for the purposes of compliance with this chapter.

(2) Has in his or her possession any record required to be maintained pursuant to this chapter that has been altered or concealed.

(3) Destroys, alters, or conceals any record required to be maintained pursuant to this chapter.

(4) Withholds information regarding an imminent and substantial danger to the public health or safety when the information has been requested by the department in writing and is required to carry out the department’s responsibilities pursuant to this chapter in response to an imminent and substantial danger.

(5) Violates an order issued by the department pursuant to this chapter that has a substantial probability of presenting an imminent danger to the health of persons.

(6) Operates a public water system without a permit issued by the department pursuant to this chapter.

(b) If the conviction under subdivision (a) is for a violation committed after a first conviction of the person under this section, the person may be punished by imprisonment in the state prison for up to 24 months, or in the county jail for not to exceed one year, or by a fine of not less than two thousand dollars ($2,000) or more than

fifty thousand dollars ($50,000) per day of violation, or by both the fine and imprisonment.

116735. (a) In order to carry out the purposes of this chapter, any duly authorized representative of the department may, at any reasonable hour of the day, do any of the following:

(1) Enter and inspect any public water system or any place where the public water system records are stored, kept, or maintained.

(2) Inspect and copy any records, reports, test results, or other information required to carry out this chapter.

(3) Set up and maintain monitoring equipment for purposes of assessing compliance with this chapter.

(4) Obtain samples of the water supply.

(5) Photograph any portion of the system, any activity, or any sample taken.

(b) The department shall inspect each public water system at least annually, and shall provide an opportunity for a representative of the public water system to accompany the representative of the department during the inspection of the water system.

(c) It shall be a misdemeanor for any person to prevent, interfere with, or attempt to impede in any way any duly authorized representative of the department from undertaking the activities authorized by subdivision (a).

116740. If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, the Attorney General or the district attorney shall recover the amount for which the person is liable in the superior court. In this action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

116745. The remedies provided by this chapter are cumulative and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

116750. (a) Any person who tampers with a public water system is guilty of a felony and shall be punished by imprisonment in the state prison for three, four, or five years, subject to a fine not to exceed thirty thousand dollars ($30,000), or both.

(b) Any person who tampers with or makes a threat to tamper with a public water system is guilty of a felony and shall be punished by imprisonment in the state prison for 16 months, two, or three years, subject to a fine not to exceed twenty thousand dollars ($20,000), or both.

(c) For purposes of this section, the term ‘‘tamper’’ means either of the following:

(1) To introduce a contaminant into a public water system with the intention of harming persons.

(2) To otherwise interfere with the operation of a public water system with the intention of harming persons.

CHAPTER 5. WATER EQUIPMENT AND CONTROL

Article 1. Water Softeners

116775. The Legislature hereby finds and declares that the utilization of the waters of the state by residential consumers for general domestic purposes, including drinking, cleaning, washing, and personal grooming and sanitation of the people is a right that should be interfered with only when necessary for specified health and safety purposes. The Legislature further finds that variation in water quality, and particularly in water hardness, throughout the state requires that on-site water softening or conditioning be available throughout the state to insure to domestic consumers their right to a water supply that is effective and functional for domestic requirements of the residential household, but that the on-site water softening or conditioning shall be available only as hereinafter set forth.

116780. (a) Unless the context otherwise requires the definitions in this section govern the construction of this article.

(b) ''Clock control'' means the system controlling the periodic automatic regeneration of a residential water softening or conditioning appliance that is based upon a predetermined and preset time schedule.

(c) ''Demand control'' means the system controlling the periodic automatic regeneration of a residential water softening or conditioning appliance that is based either upon a sensor that detects imminent exhaustion of the active softening or conditioning material or upon the measurement of the volume of water passing through the appliance. A demand control system activates regeneration based upon the state of the equipment and its ability to continue the softening process.

(d) ''Fully manual regeneration'' means the method of regeneration of a residential water softening or conditioning appliance in which operations are performed manually and in which dry salt is added directly to the ion-exchanger tank after sufficient water is removed to make room for the salt.

(e) ''Hardness'' means the total of all dissolved calcium, magnesium, iron and other heavy metal salts, that interact with soaps and detergents in a manner that the efficiency of soaps and detergents for cleansing purposes is impaired. Hardness is expressed in grains per gallon or milligrams per liter as if all such salts were present as calcium carbonate.

(f) ''Manually-initiated control'' means the system controlling the periodic regeneration of a residential water softening or conditioning

appliance in which all operations, including bypass of hard water and return to service, are performed automatically after manual initiation.

(g) ''Regeneration'' means the phase of operation of a water softening or conditioning appliance whereby the capability of the appliance to remove hardness from water is renewed by the application of a brine solution of sodium chloride salt to the active softening or conditioning material contained therein followed by a subsequent rinsing of the active softening or conditioning material.

(h) ''Salt efficiency rating'' means the efficiency of the use of sodium chloride salt in the regeneration of a water softening appliance, expressed in terms of hardness removal capacity of the appliance per pound of salt used in the regeneration process. The units of salt efficiency rating are grains of hardness removed per pound of salt used. One grain of hardness per gallon is approximately equivalent to 17.1 milligrams of hardness per liter.

116785. No residential water softening or conditioning appliance shall be installed except in either of the following circumstances:

(a) The regeneration of the appliance is performed at a nonresidential facility separate from the location of the residence where the appliance is used.

(b) The regeneration of the appliance discharges to the waste disposal system of the residence where the appliance is used and both of the following conditions are satisfied:

(1) The appliance is certified to control the quantity of salt used per regeneration by a pre-set device and the settings of the device are limited so that a salt efficiency rating of no less than 2850 grains of hardness removed per pound of salt used in regeneration is achieved with a clock control, manually-initiated control, or demand control.

(2) The installation of the appliance is accompanied by the simultaneous installation of the following softened or conditioned water conservation devices on all fixtures using softened or conditioned water, unless the devices are already in place or are prohibited by local and state plumbing and building standards or unless the devices will adversely restrict the normal operation of the fixtures:

(A) Faucet flow restrictors.

(B) Shower head restrictors.

(C) Toilet reservoir dams.

(D) A piping system installed so that untreated (unsoftened or unconditioned) supply water is carried to hose bibs and sill cocks that serve water to the outside of the house, except that bypass valves may be installed on homes with slab foundations constructed prior to the date of installation; or condominiums constructed prior to the date of installation; or otherwise where a piping system is physically inhibited.

116790. Any water softening appliance in place at a residential dwelling prior to January 1, 1980, in those areas being served by sewage treatment facilities that have been limited with regard to salt loading pursuant to Division 7 (commencing with Section 13000) of the Water Code and for which the appropriate regional water quality control board makes a finding, after adoption of waste discharge requirements and subject to a public hearing, that the control of residential salinity input is necessary to provide compliance with those limitations, may be continued in operation for a period no longer than four years after the regional water quality control board has made its findings. After the four-year period has elapsed, any water softening appliance at that site shall be set at a salt efficiency rating of no less than 2850 grains of hardness removed per pound of salt used in regeneration when regeneration is initiated with clock controls or manually-initiated controls, or shall have regenerations initiated with demand devices. Also, after the four-year period has elapsed, those water-saving devices in shower heads, on faucets, and in toilet reservoirs, as recited in paragraph (2) of subdivision (b) of Section 116785, shall be installed unless already in place or prohibited by local and state plumbing and building standards. The salt efficiency rating of the water softening or conditioning appliance and the installation of water-saving devices shall be certified in accordance with Section 116795.

116795. The certification required by this article shall be provided by the new user of the appliance and shall be completed by a contractor having a valid Class C-55 water conditioning contractor's license or Class C-36 plumbing contractor's license and filed with the local agency responsible for issuing plumbing permits.

The certification form shall contain all of the following information:

(a) Name and address of homeowner.

(b) Manufacturer of the water softening or conditioning appliance, model number of the appliance, pounds of salt used per regeneration, and salt efficiency rating at the time of certification.

(c) Manufacturer of the water-saving devices installed, model number, and number installed.

(d) Name, address, and the specialty contractor's license number of the C-55 and C-36 licensee making the certification.

Article 2. Cross-Connection Control by Water Users

116800. Local health officers may maintain programs for the control of cross-connections by water users, within the users' premises, where public exposure to drinking water contaminated by backflow may occur. The programs may include inspections within water users premises for the purpose of identifying cross-connection hazards and determining appropriate backflow protection. Water users shall comply with all orders, instructions, regulations, and

notices from the local health officer with respect to the installation, testing, and maintenance of backflow prevention devices. The local health officer may collect fees from those water users subject to inspection to offset the costs of implementing cross-connection control programs.

116805. (a) Local health officers may maintain programs, in cooperation with water suppliers, to protect against backflow through service connections into the public water supply, and, with the consent of the water supplier, may collect fees from the water supplier to offset the costs of implementing these programs.

(b) The fees authorized under this section and under Section 116800 shall be limited to the costs of administering these programs. At the discretion of the water supplier, the fees collected from the water supplier by the local health officer may be passed through to water users.

(c) Programs authorized under this section and Section 116800 shall be conducted in accordance with backflow protection regulations adopted by the department.

(d) Nothing in this article shall prevent a water supplier from directly charging those water users required to install backflow prevention devices for the costs of the programs authorized in this section and Section 116800.

116810. To assure that testing and maintenance of backflow prevention devices are performed by persons qualified to do testing and maintenance, local health officers may maintain programs for certification of backflow prevention device testers. The local health officer may suspend, revoke, or refuse to renew the certificate of a tester, if, after a hearing before the local health officer or his or her designee, the local health officer or his or her designee finds that the tester has practiced fraud or deception or has displayed gross negligence or misconduct in the performance of his or her duties as a certified backflow prevention device tester. The local health officer may collect fees from certified testers to offset the cost of the certification program provided pursuant to this section. The certification standards shall be consistent with the backflow protection regulations adopted by the department.

116815. (a) All pipes installed above or below the ground, on and after June 1, 1993, that are designed to carry reclaimed water, shall be colored purple or distinctively wrapped with purple tape.

(b) Subdivision (a) shall apply only in areas served by a water supplier delivering water for municipal and industrial purposes, and in no event shall apply to any of the following:

(1) Municipal or industrial facilities that have established a labeling or marking system for reclaimed water on their premises, as otherwise required by a local agency, that clearly distinguishes reclaimed water from potable water.

(2) Water delivered for agricultural use.

(c) For purposes of this section, ‘‘reclaimed water’’ has the same meaning as defined in subdivision (n) of Section 13050 of the Water Code.

116820. Any person who violates any provision of this article, violates any order of the local health officer pursuant to this article, or knowingly files a false statement or report required by the local health officer pursuant to this article is guilty of a misdemeanor punishable by a fine not exceeding five hundred dollars ($500) or by imprisonment not exceeding 30 days in the county jail or by both such fine and imprisonment. Each day of a violation of any provision of this article or of any order of the local health officer beyond the time stated for compliance of the order shall be a separate offense.

Article 3. Water Treatment Devices

116825. Unless the context otherwise requires, the following definitions shall govern construction of this article:

(a) ‘‘Water treatment device’’ means any point of use or point of entry instrument or contrivance sold or offered for rental or lease for residential use, and designed to be added to the plumbing system, or used without being connected to the plumbing of a water supply intended for human consumption in order to improve the water supply by any means, including, but not limited to, filtration, distillation, adsorption, ion exchange, reverse osmosis, or other treatment. ‘‘Water treatment device’’ does not include any device that is regulated pursuant to Article 12 (commencing with Section 111070) of Chapter 5 of Part 5.

(b) ‘‘Department’’ means the Department of Health Services.

(c) ‘‘Person’’ means any individual, firm, corporation, or association, or any employee or agent thereof.

(d) ‘‘Contaminants’’ means any health-related physical, chemical, biological, or radiological substance or matter in water.

116830. (a) The department shall adopt regulations setting forth the criteria and procedures for certification of water treatment devices that are claimed to affect the health or safety of drinking water. The regulations shall include appropriate testing protocols and procedures to determine the performance of water treatment devices in reducing specific contaminants from public or private domestic water supplies. The regulations may adopt, by reference, the testing procedures and standards of one or more independent testing organizations if the department determines that the procedures and standards are adequate to meet the requirements of this section. The regulations may specify any testing organization that the department has designated to conduct the testing of water treatment devices.

(b) The regulations required by subdivision (a) shall include minimum standards for the following:

(1) Performance requirements.
(2) Types of tests to be performed.
(3) Types of allowable materials.
(4) Design and construction.
(5) Instruction and information requirements, including operational, maintenance, replacement, and estimated cost of these items.
(6) Any additional requirements, not inconsistent with this article, as may be necessary to carry out this article.

(c) The department or any testing organization designated by the department pursuant to this section may agree to evaluate test data on a water treatment device offered by the manufacturer of the water treatment device, in lieu of the requirements of this section, if the department or the testing organization determines that the testing procedures and standards used to develop the data are adequate to meet the requirements of this section.

116835. (a) No water treatment device that makes product performance claims or product benefit claims that the device affects health or the safety of drinking water, shall be sold or otherwise distributed that has not been certified by the department or by another entity in accordance with subdivision (b). Water treatment devices not offered for sale or distribution based on claims of improvement in the healthfulness of drinking water need not be certified pursuant to this section.

(b) The department may accept a water treatment device certification issued by an agency of another state, by an independent testing organization, or by the federal government in lieu of its own, if the department determines that certification program meets the requirements of this article.

(c) A water treatment device initially installed prior to the operative date of this section shall not require certification pursuant to Section 116830.

(d) Subdivisions (a), (b), and (c) shall become operative one year after the effective date of the regulations adopted pursuant to Section 116830. Regulations adopted pursuant to that section shall be transmitted to the Legislature upon adoption.

116840. (a) The department, or any local health officer with the concurrence of the department, shall enforce this article.

(b) The department may suspend, revoke, or deny a certificate upon its determination of either of the following:

(1) That the water treatment device does not perform in accordance with the claims made under the standard.

(2) That the manufacturer, or any employee or agent thereof, has violated this article, any regulation adopted pursuant to this article, or Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

(c) Any person, corporation, firm, partnership, joint stock company, or any other association or organization that violates any provision of this article shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of the conduct is a separate and distinct violation. The civil penalty shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General, or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction.

(d) If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the State Treasurer. If brought by a district attorney or county counsel, the entire amount of penalties collected shall be paid to the treasurer of the county in which the judgment was entered. If brought by a city attorney or city prosecutor, one-half of the penalty shall be paid to the treasurer of the county and one-half to the city.

(e) Unless otherwise provided, the remedies or penalties provided by this article are cumulative to each other and to remedies or penalties available under all other laws of this state.

116845. The department shall publish a list of water treatment devices certified under this article, including the specific standard under which the device is certified.

116850. The department shall charge and collect a fee for each certificate applied for which shall be an amount reasonably necessary to produce sufficient revenue to effectively implement this article.

116855. In developing regulations pursuant to this article, the department shall seek the consultation of representatives from the industry regulated under the article, from drinking water purveyors, and from persons with expertise and experience in promoting public health.

116860. There is in the State Treasury the Water Device Certification Special Account. Fees collected pursuant to Section 116850 shall be deposited in the account created by this section.

116865. The Director of Finance may authorize the department to borrow up to two hundred thousand dollars ($200,000) for the purpose of implementing this article from any fund or account deemed appropriate by the Director of Finance. The department shall repay the loan with interest to be determined in accordance with Section 16314 of the Government Code.

Article 4. Lead Materials

116875. (a) Solders containing more than 0.20 percent lead shall not be used in making joints and fittings in any private or public potable water supply system or any water user’s pipelines.

(b) No solder containing more than 0.20 percent lead shall be sold in California on and after July 1, 1986, unless it contains a warning label that states: ''Contains lead. California law prohibits the use of this solder in making joints and fittings in any private or public potable water supply system or any water user's pipelines.''

(c) On and after January 1, 1986, lead pipe shall not be used in the construction of private or public potable water supply systems.

(d) The requirements of subdivision (a) shall not be applicable to potable water supply pipelines in any building where the date of application for a building permit is prior to the effective date of the standards adopted pursuant to Section 116880.

116880. The department shall adopt building standards that will limit the use of lead materials in public and private water systems. The standards shall be adopted in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code and shall be published in the State Building Standards Code located in Title 24 of the California Code of Regulations. The standards shall be enforced by the appropriate state and local building and health officials.

CHAPTER 6. OPERATION OF WATER TREATMENT PLANTS

Article 1. Definitions

116900. Unless the context otherwise requires, the definitions in this article govern the interpretation of this chapter and Article 3 (commencing with Section 106875) of Chapter 4 of Part 1.

116905. ''Advisory committee'' means the committee established by former Section 116925.

116910. ''Certificate'' means a certificate of competency issued by the director stating that the operator has met the requirements for a specific operator classification of the certification program.

116915. ''Operator'' means any person who is responsible for the operation of a water treatment plant.

116920. ''Water treatment plant'' means a group or assemblage of structures, equipment, and processes that treat or condition a water supply, affecting the physical, chemical, or bacteriological quality of water distributed or otherwise offered to the public for domestic use.

Article 2. Administration

116950. The director shall adopt regulations and certification standards necessary to carry out this chapter and Article 3 (commencing with Section 106875) of Chapter 4 of Part 1, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, and shall submit those regulations to the board for its review and approval.

CHAPTER 7. WATER SUPPLY

Article 1. Water Supply Provisions

116975. No person shall put the carcass of any dead animal, or the offal from any slaughter pen, corral, or butcher shop, into any river, creek, pond, reservoir, or stream.

116980. No person shall put any water closet, privy, cesspool or septic tank, or the carcass of any dead animal, or any offal of any kind, in, or upon the borders of, any stream, pond, lake, or reservoir from which water is drawn for the supply of any portion of the inhabitants of this state, in a manner that the drainage of the water closet, privy, cesspool or septic tank, or carcass, or offal may be taken up by or in the water.

116985. No person shall allow any water closet, privy, cesspool, or septic tank, or carcass of any dead animal, or any offal of any kind, to remain in or upon the borders of any stream, pond, lake, or reservoir within the boundaries of any land owned or occupied by him or her, in a manner that the drainage from the water closet, privy, cesspool or septic tank, or carcass, or offal, may be taken up by or in the stream, pond, lake, or reservoir, if water is drawn therefrom for the supply of any portion of the inhabitants of this state.

116990. No person shall keep any horses, mules, cattle, swine, sheep, or live stock of any kind, penned, corralled, or housed on, over, or on the borders of any stream, pond, lake, or reservoir, in a manner that the waters become polluted, if water is drawn therefrom for the supply of any portion of the inhabitants of this state.

116995. No person shall cause or permit any horses, cattle, sheep, swine, poultry, or any kind of live stock or domestic animals, to pollute the waters, or tributaries of waters, used or intended for drinking purposes by any portion of the inhabitants of this state.

117000. No person shall bathe, except as permitted by law, in any stream, pond, lake, or reservoir from which water is drawn for the supply of any portion of the inhabitants of this state, or by any other means foul or pollute the waters of any such stream, pond, lake, or reservoir.

117005. Nothing in this article shall be held to prevent the grazing of livestock in areas embracing any stream or watershed where the grazing would not tend to render the waters unwholesome or injurious to the public health.

117010. Every person who washes clothes in any spring, stream, river, lake, reservoir, well, or other waters that are used or intended for drinking purposes by the inhabitants of the vicinage or of any city, county, or town, of this state, is guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 90 days, or a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or by both such fine and imprisonment.

Each day's violation of this section is a separate offense.

117015. Every person who violates, or refuses or neglects to conform to, any sanitary rule, order, or regulation prescribed by the department for the prevention of the pollution of springs, streams, rivers, lakes, wells, or other waters used or intended to be used for human or animal consumption, is guilty of a misdemeanor.

117020. No person shall construct, maintain, or use any waste well extending to or into a subterranean water-bearing stratum that is used or intended to be used as, or is suitable for, a source of water supply for domestic purposes, except pursuant to Article 6 (commencing with Section 13540) of Chapter 7, Division 7 of the Water Code.

117025. It is unlawful for the owner, tenant, lessee, or occupant of any houseboat or boat intended for or capable of being used as a residence, house, dwelling, or habitation, or agent of the owner, tenant, lessee, or occupant to moor or anchor it or permit it to be moored or anchored in or on any river or stream, the waters of which are used for drinking or domestic purposes by any city, town, or village, within a distance of two miles above the intake or place where the city, town, or village water system takes water from the river or stream. This section does not apply to the mooring or anchoring of a houseboat when necessary, during transportation, for a period of not longer than one day.

117030. Violation of this article may be enjoined by any court of competent jurisdiction at the suit of any person whose supply of water for human or animal consumption or for domestic purposes is or may be affected, or by the state department.

117035. Anything done, maintained, or suffered, in violation of any of the provisions of this article is a public nuisance, dangerous to health, and may be summarily abated as such.

117040. A city, city and county, district or other public agency, owning or operating a reservoir used for domestic or drinking water purposes, may open to public fishing all or any part of the reservoir and its surrounding land.

117045. Before the reservoir and its surrounding land are opened to public fishing the public agency owning or operating the reservoir shall determine that the public fishing will not affect the purity and safety for drinking and domestic purposes of the water collected in the reservoir, and shall obtain from the department a valid water supply permit setting forth the terms and conditions upon which public fishing may be conducted in the reservoir and on its surrounding land.

117050. Public fishing shall not be conducted in a reservoir or on its surrounding land if the reservoir is used as a regulating reservoir to meet daily or peak consumption demands and as a terminal reservoir to a water collecting facility and as a distribution reservoir from which water may be supplied for drinking or domestic purposes

without full purification treatment after withdrawal from the reservoir.

117055. The department may allow public fishing on any terminal reservoir if it finds that adequate means are being used to protect drinking water quality and that public fishing will have no significant effect on water quality. The department shall examine all feasible means of protecting water quality on terminal reservoirs and other reservoirs where public fishing may be allowed. The department may close any terminal water supply reservoir to public angling on an emergency basis, if water quality is threatened by public use.

117060. The public agency owning or operating the reservoir may establish and collect fees, including charges for motor vehicle parking, for the construction and operation of structures, facilities and equipment and the operation and use of the reservoir and its surrounding lands for public fishing. The public agency may contract with any agency or department of the federal government or the state, with other public agencies or with private individuals for the construction, operation and use of structures, facilities and equipment and the performance of services necessary or convenient to public fishing in the reservoir and on its surrounding land, including the rental, lease or permission to use portions of the reservoir and its surrounding lands for structures, facilities and equipment necessary or convenient for the use of the public. The public agency may establish and enforce all rules and regulations necessary or convenient to the conducting of public fishing on the reservoir and its surrounding land and for the control, operation and protection of the reservoir, its surrounding land and all structures, facilities and equipment in connection with the reservoir.

117065. The public agency shall cause a copy of the rules and regulations to be posted upon the area opened to public fishing and other recreational uses, and it shall cause the rules and regulations to be published at least once in a newspaper of general circulation published in the county in which the reservoir is in whole or in part situated, if there be a newspaper, otherwise in a newspaper of general circulation published within the area of the public agency. Such posting and publication shall be sufficient notice to all persons. The affidavit of the secretary, clerk, or corresponding officer of the public agency that the rules and regulations have been so posted and published is prima facie evidence thereof. A copy of the rules and regulations, attested by the secretary, clerk, or corresponding officer of the public agency shall be prima facie evidence that the regulations have been made by the public agency as provided by law.

117070. Any violation of any such rule or regulation lawfully made by the public agency is a misdemeanor. Any judge of a justice court within any judicial district within which the reservoir lies in whole or in part, or any municipal court within the district, shall have

jurisdiction of all prosecutions for violations of any rules and regulations adopted by the public agency.

117075. Sections 117040 to 117070, inclusive, shall not apply to reservoirs used for domestic or drinking water purposes that are open to fishing or recreational uses on September 11, 1957, or that have been open to fishing or recreational uses prior to that date.

Article 2. Additional Water Supply Provisions

117080. ''Governmental agency,'' as used in this article, includes a city, city and county, and district, but does not include a chartered city or city and county.

''Body of water'' means a reservoir or lake.

''Owned'' means owned or controlled.

117085. The board of supervisors of any county wherein is located a body of water owned by a governmental agency, that is used to supply water for human consumption may by resolution request the governmental agency owning the body of water to open the body of water to public fishing and the surrounding land area for other recreational use. The governmental agency owning the body of water shall thereupon make and file with said board of supervisors an estimate of the cost of preparing a coordinated plan for public fishing in said body of water and other recreational uses in the surrounding land area. The board of supervisors thereupon may deposit with the governmental agency owning the body of water the amount of the estimate not exceeding two thousand five hundred dollars ($2,500), and the governmental agency owning said body of water thereupon shall proceed promptly with and complete the coordinated plan. In event the cost of preparing the plan shall be less than the amount deposited by the board of supervisors, the excess shall be repaid by the governmental agency owning the body of water to the board of supervisors that made the deposit. The plan may provide for development of the area by stages and may exclude from public access structures, facilities or works of the agency necessary in supplying water for human consumption and the portions of the body of water and surrounding land area as may be reasonably required for the protection, maintenance or operation of the structures, facilities, or works. The plan may exclude portions of the surrounding area as are unsuitable for public recreational use. The coordinated plan may also include an estimate of the cost of the capital improvements necessary or convenient for public fishing and recreational uses, an estimate of the annual cost of maintenance and operation of the plan, and a recommendation as to the manner in which the plan may be financed.

After completion of the coordinated plan the governmental agency shall promptly make application to the department for an amendment to its water supply permit, that would allow the opening

of the body of water to public fishing and the surrounding land area for other recreational use pursuant to the coordinated plan.

117090. Upon receipt of the amended permit, if the agency does not allow such use, it shall call for a vote of its constituents at the next statewide primary election or general election, or if the agency is a municipal corporation at the next general municipal election, to determine whether or not the use shall be allowed and if a majority vote is in favor the public agency shall allow public fishing in the body of water and other recreational uses in the surrounding area in compliance with the amended permit.

117095. Nothing herein contained shall permit or require fishing or other recreational uses in a secondary reservoir from which water is supplied for domestic use without purification treatment after withdrawal from said reservoir.

117100. The ballot for the election authorized by Section 117090 shall contain the instructions required by law to be printed thereon and in addition thereto the following:

Shall the (insert name of governmental agency) allow fishing in the (name of body of water) and other recreational uses in the surrounding area subject to the regulations of the State Deparment of Health Services?	YES	
	NO	

If the governmental agency concludes that a bond issue is required to pay for the capital improvements included in the coordinated plan as approved by the amended permit, there shall also be printed on the ballot, immediately following the ballot proposition aforesaid, the following proposition to be voted on by the constituents of the governmental agency:

Shall the (insert name of governmental agency) incur a bonded indebtedness in the principal amount of $____ for providing the capital improvements for fishing in the (name of body of water) and other recreational uses in the surrounding land area, subject to the regulations of the State Department of Health Services?	YES	
	NO	

117105. The governmental agency owning the body of water may fix and collect fees, including charges for motor vehicle parking, for the construction of facilities, operation, and use of the area opened for public fishing and other recreational uses. The governmental agency shall have the power to contract with others for the rendering of any or all of the services required in connection with the operation of the area including the right to rent or lease the whole or any part of the area to provide necessary or convenient facilities for the use of the public. The governmental agency shall have the power to make and enforce regulations that it may find necessary or convenient for proper control of the areas opened to public fishing and other recreational uses. The department shall make recurring inspections of all recreational areas approved under this article to ensure the continued purity of drinking water.

117110. The governmental agency shall cause a copy of the rules and regulations to be posted upon the area opened to public fishing and other recreational uses, and it shall cause the rules and regulations to be published at least once in a newspaper of general circulation published in the county in which the reservoir is in whole or in part situated, if there be such a newspaper, otherwise in a newspaper of general circulation published within the area of the governmental agency. The posting and publication shall be sufficient notice to all persons. The affidavit of the secretary, clerk, or corresponding officer of the governmental agency that the rules and regulations have been so posted and published is prima facie evidence thereof. A copy of the rules and regulations, attested by the secretary, clerk, or corresponding officer of the governmental agency shall be prima facie evidence that the rules and regulations have been made by the governmental agency as provided by law.

117115. As far as possible the development and operation of the recreational uses authorized by this article shall be financed out of the revenues authorized by this article; provided, however, that the governmental agency owning the body of water is not required to fix fees that are unreasonably high and in its discretion may make use of any means of financing that it is otherwise authorized to use for any purpose.

117120. Any violation of any rule or regulation lawfully made by the governmental agency is a misdemeanor. Any judge of a justice court within any judicial district within which the reservoir lies in whole or in part, or any municipal court that may be established within the district, shall have jurisdiction of all prosecutions for violations of any such rules and regulations adopted by the governmental agency.

117125. Notwithstanding any other provision of law, the Department of Fish and Game may stock with fish any body of water opened to public fishing pursuant to this article.

Article 3. Punishment or Violations

117130. Violation of any provision of this chapter is a misdemeanor.

PART 13. GARBAGE AND ONSITE SEWAGE DISPOSAL

CHAPTER 1. DEFINITIONS (Reserved)

CHAPTER 2. POWERS AND DUTIES (Reserved)

CHAPTER 3. ENFORCEMENT AND PENALTIES (Reserved)

CHAPTER 4. WASTE AND WASTE DISPOSAL

Article 1. Septic Tanks

117400. This article shall not apply to any city, town, county, sanitary district, sanitation district, sewer maintenance district or to any agency or institution of the state or the federal government by reason of the cleaning of septic tanks, chemical toilets, cesspools, sewage seepage pits or sewage works that are owned and operated by any of these governmental agencies or institutions.

117405. It is unlawful for any person or firm to carry on or engage in the business of the cleaning of septic tanks, chemical toilets, cesspools or sewage seepage pits or to dispose of the cleanings therefrom in any city, town, county, or city and county unless he or she or it shall hold an unrevoked registration issued by the local health officer or his or her duly authorized representative of the city, town, county, or city and county for the carrying on of the business.

117410. Except as provided in Section 25163, it is unlawful for any person to clean septic tanks, chemical toilets, cesspools or sewage seepage pits or to dispose or aid in the disposal of the cleanings thereof, for any person or firm engaged in the business of cleaning out septic tanks, chemical toilets, cesspools or sewage seepage pits or disposing of the cleanings thereof who does not hold an unrevoked registration as provided in this article.

117415. All applications for registration under this article shall be filed with the local health officer in the city, town, county, or city and county in which it is desired to carry on the business. The application shall state the name in full, if a partnership then names of each of the partners, the relation of the applicant to the firm or partnership, the place of business and place of residence of the applicant for registration and of each of the partners in the business, if a partnership, and shall state the exact location of the place at which it is proposed to dispose of cleanings. The application shall be signed

by the authorized officer of a corporation, if a corporation; or by the managing partner, if a partnership.

117420. Registration shall be issued only after a satisfactory examination by the health officer or his or her duly authorized representative covering the equipment to be used, the applicant's knowledge of sanitary principles and of the laws and ordinances affecting human health or nuisances, and the reliability of the applicant in observing sanitary laws, ordinances and directions, and in selecting laborers and employees who may clean out septic tanks, chemical toilets, cesspools and sewage seepage pits without endangering human health or comfort; and only after examination of the place or places and manner of disposal of the cleanings proposed by the applicant.

117425. The health officer is required to act upon each application within thirty (30) days of the date of filing same.

117430. Registration shall be only for the unexpired portion of the calendar year in which application is made, and at the end of the calendar year all registrations shall become void and of no effect.

117435. (a) Applicants may be registered under any terms, conditions, orders, and directions as the health officer or his or her duly authorized representative may deem necessary for the protection of human health and comfort. Each health officer and his or her duly authorized representative may require any and all persons who are registered with the health officer to clean septic tanks, cesspools, or sewage seepage pits or to dispose of the cleanings therefrom, to file with the health officer at any time and at any frequency or intervals as the health officer or duly authorized representative may desire, a statement specifying all of the following:

(1) The name and address of the owner or tenant of each and every one of the premises where a septic tank, cesspool, or sewage seepage pit has been cleaned out by the registrant or his or her employees or by others on his or her behalf and the date of each cleaning.

(2) The location where the cleanings are disposed of and by whom.

(3) Discharges of waste that may result in violation of laws or ordinances required to be known by the registrant pursuant to Section 117420.

(b) The health officer may require the statement to be sworn to before a notary.

(c) Any and all persons registered with the health officer to clean septic tanks, cesspools, or sewage seepage pits, or to dispose of the cleanings therefrom, shall also provide a statement as required pursuant to paragraph (3) of subdivision (a) to a regional board as defined pursuant to Section 13050 of the Water Code.

117440. A change of address of any registrant including a member of a partnership that is registered and of the place of business thereof

shall be reported in writing by registered mail by the registrant within two days after the change of address.

117445. Any registration issued under this article may be revoked by the issuing health officer for cause on 10 days' notice to the applicant. The notice shall be served by registered mail or in person at the latest place of residence or of business reported by the applicant.

117450. Violation of any of the provisions of this article or of any order or orders of a health officer made pursuant to this article for the protection of human health and comfort shall constitute a misdemeanor and shall be punishable by a fine of not less than two hundred dollars ($200) for each offense or by imprisonment for not less than thirty (30) days or by both the fine and imprisonment.

Article 2. Pollution of Navigable Waters with Garbage

117475. For the purpose of this article the term ''garbage'' includes any or all of the following:

(a) Garbage.
(b) Swill.
(c) Refuse.
(d) Cans.
(e) Bottles.
(f) Paper.
(g) Vegetable matter.
(h) Carcass of any dead animal.
(i) Offal from any slaughter pen or butcher shop.
(j) Trash.
(k) Rubbish.
(*l*) Radioactive waste materials.
(m) Discarded, nonbiodegradable materials including plastics or damaged or broken marine equipment.

117480. Every person who places, deposits, or dumps any garbage in or upon the navigable waters of this state, or who places, deposits, or loads it upon any vessel, with intent that it shall be dumped or deposited in or upon the navigable waters of this state, or at any point in the ocean within twenty miles of any point on the coast line of the state, is guilty of a misdemeanor.

117485. Every person in charge of any vessel who permits it to be loaded with any garbage with intent that it shall be dumped or deposited from the vessel in or upon any of the navigable waters of this state, or at any point in the ocean, within twenty miles of any point on the coast line of the state, is guilty of a misdemeanor.

117490. A vessel upon which any garbage has been loaded with the intent that it shall be dumped or deposited upon any of the waters of the ocean where permitted by this article, shall not leave any point within the state unless it shall carry for the entire trip an inspector

appointed by the department, or where the point of departure is in a city, then by the city. The inspector shall enforce this article.

Every person in charge of a vessel that is required to have an inspector on board by this article, and that does not carry an inspector during the entire trip, is guilty of a misdemeanor.

117495. Every person in charge of a vessel that is to dump or deposit radioactive waste materials upon any of the waters of the ocean where permitted by this article shall notify the department in writing at least five days in advance of the dumping or depositing, specifying the intended date of departure and giving other information as may be required by the department. The department may permit the vessel to leave without the inspector required by Section 117490 if it determines that the public health and welfare will not be endangered thereby. If this permission is granted, the department may require the person in charge of the vessel to submit a certified statement to it, at a time as the department determines, setting forth the time, location, and manner of the dumping or disposal and other information as the department may require.

117500. This article shall not be construed to affect the discharge of any sewer system.

Article 3. Vessel Sanitation

117505. No person shall maintain or operate in or upon the navigable waters of any lake, reservoir, or fresh water impoundment of this state any vessel that is equipped with a toilet unless the toilet is sealed or otherwise rendered inoperable or designed so that no human excreta can be discharged into the waters.

Article 4. Pollution by Vessels

117510. As used in this article:

(a) ''Vessel'' means every description of craft or other contrivance used, or capable of being used, as a means of transportation in or on water.

(b) ''Navigable waters'' means all public waters of the state in any river, stream, lake, reservoir, or other body of water, including all salt water bays, inlets, and estuaries within the jurisdiction of the state.

117515. No person shall place, deposit, or dump any human excreta in or upon the navigable waters of this state, that are within any marina, yacht harbor, fresh water lake, or fresh water impoundment, from any vessel tied to any dock, slip, or wharf that has toilet facilities available for the use of persons on the vessel.

117520. It is not the intent of the Legislature in enacting this article to preempt the field of pollution by vessels, and the provisions of this article do not prohibit the enactment or enforcement of any ordinance by any city, county, or district having the power to

regulate pollution by vessels, that is stricter than the provisions of this article.

117525. Any violation of this article is a misdemeanor.

Article 5. Violations

117530. Violation of any provision of Article 2 (commencing with Section 117475), Article 3 (commencing with Section 117505), Article 4 (commencing with Section 117510), and Article 6 (commencing with Section 117550) is a misdemeanor.

Article 6. Prohibited Waste Disposal in Public Places

117550. As used in this article, ''garbage'' includes any or all of the following:

(a) Garbage.
(b) Swill.
(c) Refuse.
(d) Cans.
(e) Bottles.
(f) Paper.
(g) Vegetable matter.
(h) Carcass of any dead animal.
(i) Offal from any slaughterpen or butcher shop.
(j) Trash.
(k) Rubbish.
(*l*) Abandoned and unidentifiable vehicles or vehicle bodies.
(m) Abandoned iceboxes and refrigerators.

117555. Every person who places, deposits, or dumps, or who causes to be placed, deposited or dumped, or who causes or allows to overflow, any sewage, sludge, cesspool or septic tank effluent, or accumulation of human excreta, or any garbage, in or upon any street, alley, public highway, or road in common use or upon any public park or other public property other than property designated or set aside for that purpose by the governing board or body having charge thereof, or upon any private property into or upon which the public is admitted by easement, license or otherwise, is guilty of a misdemeanor.

This section does not apply to the placing, depositing, or dumping of any garbage upon private property by the owner, or any person authorized by the owner, of the private property, except that the placing, depositing or dumping of the garbage shall not create a public health and safety hazard or a fire hazard, as determined by a local health department, local fire department or fire district, or the Division of Forestry.

117560. Every state fish and game warden, police officers of cities, sheriffs and their deputies and other peace officers of the State of

California, within their respective jurisdictions, shall enforce the provisions of this article.

Article 7. Solid Waste Handling and Disposal

117575. Unless the context otherwise requires, the definitions in Article 2 (commencing with Section 66710) of Chapter 1 of Title 7.3 of the Government Code govern the construction of this article.

117580. The department insofar as presently or hereafter provided by law, shall continue to be responsible for all aspects of solid waste management and resource recovery as they directly affect human health, including, but not limited to, the contamination of air, water, and land, propagation of vertebrates and invertebrates that may transmit disease to man, handling and disposal of hazardous wastes, and management practices that threaten the health of solid waste employees or the general public.

117585. The department shall continue to administer and enforce the laws, other than matters covered by Title 7.3 (commencing with Section 66700) of the Government Code, that are within its jurisdiction as they apply directly to solid wastes. The department also, as it relates directly to human health, shall:

(a) Evaluate and study, as appropriate, the characteristics of solid wastes and methods for their handling and disposal for health protection.

(b) Render technical assistance to the board, local agencies, and others in the planning and operation of solid waste management programs and resources recovery programs.

(c) Formulate technical criteria and suggested guidelines for use by state and local agencies in development, planning, implementation, and operation of programs for the local handling of solid waste.

(d) Stimulate and participate in research and development projects conducted by other public or private agencies, especially those intended to reduce, effectively reuse, or decontaminate waste products.

117590. The department, not later than January 1, 1975, shall prepare and shall submit minimum standards for solid waste handling and disposal for the protection of the public health to the board for inclusion in the state policy for solid waste management required to be adopted pursuant to Section 66770 of the Government Code. The department may adopt varying standards for different areas of the state depending on population density, climate, geology, and other factors relevant to solid waste handling and disposal, and may revise the standards when appropriate.

PART 14. MEDICAL WASTE

CHAPTER 1. GENERAL PROVISIONS

117600. This part shall be known and may be cited as the Medical Waste Management Act.

117605. This part does not preempt any local ordinance regulating infectious waste, as that term was defined by Section 25117.5 as it read on December 31, 1990, if the ordinance was in effect on January 1, 1990, and regulated both large and small quantity generators. Any ordinance may be amended in a manner that is consistent with this part.

117610. The department shall adopt regulations that will establish and ensure statewide standards for uniformity in the implementation and administration of this part and that will promote waste minimization and source reduction.

117615. Notwithstanding Section 117605, with the approval of the director, and in the interest of public health, a local ordinance providing more stringent requirements than specified in this part may be implemented for a specified time period.

117620. The department and any local enforcement agency initially electing to implement a medical waste management program pursuant to this part shall initiate that program and begin enforcement of its provisions on or before April 1, 1991, except for medical waste programs operating under Section 117605.

CHAPTER 2. DEFINITIONS

117625. Unless the context requires otherwise, the definitions in this article govern the construction of this part.

117630. ''Biohazard bag'' means a disposable red bag that is impervious to moisture and has a strength sufficient to preclude ripping, tearing, or bursting under normal conditions of usage and handling of the waste-filled bag. A biohazard bag shall be constructed of material of sufficient single thickness strength to pass the 165-gram dropped dart impact resistance test as prescribed by Standard D 1709-85 of the American Society for Testing and Materials and certified by the bag manufacturer.

117635. ''Biohazardous waste'' means any of the following:

(a) Laboratory waste, including, but not limited to, all of the following:

(1) Human or animal specimen cultures from medical and pathological laboratories.

(2) Cultures and stocks of infectious agents from research and industrial laboratories.

(3) Wastes from the production of bacteria, viruses, or the use of spores, discarded live and attenuated vaccines used in human health

care or research, discarded animal vaccines, including only Brucellosis, Contagious Ecthyma, and other animal vaccines, as identified by the department, and culture dishes and devices used to transfer, inoculate, and mix cultures.

(b) Waste containing any microbiologic specimens.

(c) Human surgery specimens or tissues removed at surgery or autopsy, that are suspected by the attending physician and surgeon or dentist of being contaminated with infectious agents known to be contagious to humans.

(d) Animal parts, tissues, fluids, or carcasses suspected by the attending veterinarian of being contaminated with infectious agents known to be contagious to humans.

(e) Waste, that at the point of transport from the generator's site, at the point of disposal, or thereafter, contains recognizable fluid blood, fluid blood products, containers, or equipment containing blood that is fluid or blood from animals known to be infected with diseases that are highly communicable to humans.

(f) Waste containing discarded materials contaminated with excretion, exudate, or secretions from humans who are required to be isolated by the infection control staff, the attending physician and surgeon, the attending veterinarian, or the local health officer, to protect others from highly communicable diseases or isolated animals known to be infected with diseases that are highly communicable to humans.

(g) Waste that is hazardous only because it is comprised of human surgery specimens or tissues that have been fixed in formaldehyde or other fixatives, or only because the waste is contaminated through contact with, or having previously contained, trace amounts of chemotherapeutic agents, including, but not limited to, gloves, disposable gowns, towels, and intravenous solution bags and attached tubing that are empty. A biohazardous waste that meets the conditions of this subdivision is not subject to Chapter 6.5 (commencing with Section 25100). These wastes shall be managed as medical waste in accordance with the applicable provisions of this part and shall be disposed of in accordance with subdivision (a) of Section 118215.

(1) For purposes of this subdivision, ''chemotherapeutic agent'' means an agent that kills or prevents the reproduction of malignant cells.

(2) For purposes of this subdivision, a container, or inner liner removed from a container, that previously contained a chemotherapeutic agent, is empty if the container or inner liner removed from the container has been emptied by the generator as much as possible, using methods commonly employed to remove waste or material from containers or liners, so that the following conditions are met:

(A) If the material that the container or inner liner held is pourable, no material can be poured or drained from the container or inner liner when held in any orientation, including, but not limited to, when tilted or inverted.

(B) If the material that the container or inner liner held is not pourable, no material or waste remains in the container or inner liner that can feasibly be removed by scraping.

117640. ''Common storage facility'' means any designated accumulation area that is onsite and is used by small quantity generators otherwise operating independently for the storage of medical waste for collection by a registered hazardous waste hauler.

117645. ''Container'' means the rigid container in which the medical waste is placed prior to transporting for purposes of storage or treatment.

117650. ''Enforcement agency'' means the department or the local agency administering this part.

117655. ''Enforcement officer'' means the director, or agents or registered environmental health specialists appointed by the director, and all local health officers, directors of environmental health, and their duly authorized registered environmental health specialists and environmental health specialist trainees, or the designees of the director, local health officers, or the directors of environmental health.

117660. ''Hazardous waste hauler'' means a person registered as a hazardous waste hauler pursuant to Article 6 (commencing with Section 25160) and Article 6.5 (commencing with Section 25167.1) of Chapter 6.5 of Division 20 and Chapter 30 (commencing with Section 66001) of Division 4 of Title 22 of the California Code of Regulations.

117665. ''Highly communicable diseases'' means diseases, such as those caused by organisms classified by the federal Centers for Disease Control as Biosafety Level IV organisms, that, in the opinion of the infection control staff, the department, local health officer, attending physician and surgeon, or attending veterinarian, merit special precautions to protect staff, patients, and other persons from infection.

''Highly communicable diseases'' does not include diseases such as the common cold, influenza, or other diseases not representing a significant danger to nonimmunocompromised persons.

117670. ''Household waste'' means any material, including garbage, trash, and sanitary wastes in septic tanks and medical waste, that is derived from households, farms, or ranches.

117675. ''Infectious agent'' means a type of microorganism, bacteria, mold, parasite, or virus that normally causes, or significantly contributes to the cause of, increased morbidity or mortality of human beings.

117680. ‘‘Large quantity generator’’ means a medical waste generator that generates 200 or more pounds per month of medical waste.

117685. ‘‘Local agency’’ means the local health department, as defined in Section 101185, or the local comprehensive environmental agency established in accordance with Section 101275, of a county that has elected to adopt a local ordinance to administer and enforce this part, pursuant to Chapter 3 (commencing with Section 117800).

117690. (a) ‘‘Medical waste’’ means waste that meets both of the following requirements:

(1) The waste is composed of waste that is generated or produced as a result of any of the following:

(A) Diagnosis, treatment, or immunization of human beings or animals.

(B) Research pertaining to the activities specified in subparagraph (A).

(C) The production or testing of biologicals.

(2) The waste is any of the following:

(A) Biohazardous waste.

(B) Sharps waste.

(b) Medical waste may contain infectious agents.

(c) For purposes of this section, ‘‘biologicals’’ means medicinal preparation made from living organisms and their products, including, but not limited to, serums, vaccines, antigens, and antitoxins.

117695. Medical waste that has been treated in accordance with Chapter 8 (commencing with Section 118215) and that is not otherwise hazardous, shall thereafter be considered solid waste as defined in Section 40191 of the Public Resources Code and not medical waste.

117700. Medical waste does not include any of the following:

(a) Waste containing microbiological cultures used in food processing and biotechnology and any containers or devices used in the preparation and handling of these cultures, that is not considered to be an infectious agent pursuant to Section 117675.

(b) Urine, feces, saliva, sputum, nasal secretions, sweat, tears, and vomitus, unless they contain fluid blood, except as defined in subdivision (f) of Section 117635.

(c) Waste that is not biohazardous, such as paper towels, paper products, articles containing nonfluid blood, and other medical solid waste products commonly found in the facilities of medical waste generators.

(d) Hazardous waste, radioactive waste, or household waste.

(e) Waste generated from normal and legal veterinarian, agricultural, and animal livestock management practices on a farm or ranch.

117705. ‘‘Medical waste generator’’ means any person, whose act or process produces medical waste and includes, but is not limited to, a provider of health care as defined in subdivision (a) of Section 56.05 of the Civil Code. All of the following are examples of businesses that generate medical waste:

(a) Medical and dental offices, clinics, hospitals, surgery centers, laboratories, research laboratories, unlicensed health facilities, those facilities required to be licensed pursuant to Division 2 (commencing with Section 1200), chronic dialysis clinics, as regulated pursuant to Division 2 (commencing with Section 1200), and education and research facilities.

(b) Veterinary offices, veterinary clinics, and veterinary hospitals.

(c) Pet shops.

117710. ‘‘Medical waste management plan’’ means a document that is completed by generators of medical waste pursuant to Sections 117935 and 117960, on forms prepared by the enforcement agency.

117715. ‘‘Medical waste permit’’ means a permit issued by the enforcement agency to a medical waste treatment facility.

117720. ‘‘Medical waste registration’’ means a registration issued by the enforcement agency to a medical waste generator.

117725. (a) ‘‘Medical waste treatment facility’’ means all adjacent land and structures, and other appurtenances or improvements on the land, used for treating medical waste or for associated handling and storage of medical waste. Medical waste treatment facilities are those facilities treating waste pursuant to subdivision (a) or (c) of Section 118215. A medical waste treatment method approved pursuant to subdivision (d) of Section 118215 may be designated as a medical waste treatment facility by the department.

(b) ‘‘Adjacent,’’ for purposes of subdivision (a), means real property within 400 yards from the property boundary of the existing medical waste treatment facility.

117730. ‘‘Mixed waste’’ means mixtures of medical and nonmedical waste. Mixed waste is medical waste, except for all of the following:

(a) Medical waste and hazardous waste is hazardous waste and is subject to regulation as specified in the statutes and regulations applicable to hazardous waste.

(b) Medical waste and radioactive waste is radioactive waste and is subject to regulation as specified in the statutes and regulations applicable to radioactive waste.

(c) Medical waste, hazardous waste, and radioactive waste is radioactive mixed waste and is subject to regulation as specified in the statutes and regulations applicable to hazardous waste and radioactive waste.

117735. ‘‘Offsite’’ means any location that is not onsite.

117740. (a) ‘‘Onsite’’ means a medical waste treatment facility, or common storage facility on the same or adjacent property as the generator of the medical waste being treated.

(b) ‘‘Adjacent,’’ for purposes of subdivision (a), means real property within 400 yards from the property boundary of the existing medical waste treatment facility.

117745. ‘‘Person’’ means an individual, trust, firm, joint stock company, business concern, partnership, association, limited liability company, and corporation, including, but not limited to, a government corporation. ‘‘Person’’ also includes any city, county, district, commission, the state or any department, agency, or political subdivision thereof, the Regents of the University of California, any interstate body, and the federal government or any department or agency thereof to the extent permitted by law.

117750. ‘‘Sharps container’’ means a rigid puncture-resistant container that, when sealed, is leak resistant and cannot be reopened without great difficulty.

117755. ‘‘Sharps waste’’ means any device having acute rigid corners, edges, or protuberances capable of cutting or piercing, including, but not limited to, all of the following:

(a) Hypodermic needles, hypodermic needles with syringes, blades, needles with attached tubing, syringes contaminated with biohazardous waste, acupuncture needles, and root canal files.

(b) Broken glass items, such as Pasteur pipettes and blood vials contaminated with biohazardous waste.

117760. ‘‘Small quantity generator’’ means a medical waste generator that generates less than 200 pounds per month of medical waste.

117765. ‘‘Storage’’ means the holding of medical wastes at a designated accumulation area, as specified in Chapter 9 (commencing with Section 118275).

117770. ‘‘Tracking document’’ means the medical waste tracking document specified in Section 118040.

117775. ‘‘Transfer station’’ means any offsite location where medical waste is loaded, unloaded, or stored by a registered hazardous waste hauler during the normal course of transportation of the medical waste. ‘‘Transfer station’’ does not include common storage facilities, large quantity generators used for the purpose of consolidation, or onsite treatment facilities.

117780. ‘‘Treatment’’ means any method, technique, or process designed to change the biological character or composition of any medical waste so as to eliminate its potential for causing disease, as specified in Chapter 8 (commencing with Section 118215).

CHAPTER 3. POWERS AND DUTIES

117800. A local agency may implement a medical waste management program by the adoption of an ordinance or resolution by the local governing body, in accordance with this part.

117805. Except as provided in subdivision (a) of Section 117810, a local agency that elects to implement a medical waste management program shall notify the department within 90 days from the effective date of the act enacting this part.

117810. (a) If a local agency does not elect to implement a medical waste management program, the local agency may elect to contract with another local agency to implement a medical waste management program or to implement it at a later date.

This election shall be made by the local governing body, that shall take effect 90 days after a notice of election is filed with the department.

(b) A local agency that elects to implement a medical waste management program shall continue to implement that program until the local governing body terminates the election by resolution or ordinance or the department revokes the authority of the local agency to administer a medical waste management program. The local agency shall file the notice of termination with the department at least 180 days prior to the termination date.

117815. Any local agency that has elected to implement a medical waste management program shall maintain a program that is consistent with Section 117820 and the regulations adopted pursuant to that section. With the approval of the department, the local agency may administer or enforce this part with respect to any person.

117820. A medical waste management program shall include, but not be limited to, all of the following:

(a) Issuing medical waste registrations pursuant to Chapter 5 (commencing with Section 117950) and permits pursuant to Chapter 7 (commencing with Section 118130).

(b) Processing and reviewing the medical waste management plans and inspecting onsite treatment facilities in accordance with Chapter 4 (commencing with Section 117925) for all small quantity medical waste generators required to be registered.

(c) Conducting an evaluation, inspection, or records review for all facilities or persons issued a large quantity medical waste registration pursuant to Chapter 5 (commencing with Section 117950) or issued a permit for an onsite medical waste treatment facility pursuant to Section 118130.

(d) Inspecting medical waste generators in response to complaints or emergency incidents, or as part of an investigation or evaluation of the implementation of the medical waste management plan.

(e) Inspecting medical waste treatment facilities in response to a complaint or as part of an investigation or emergency incident.

(f) Taking enforcement action for the suspension or revocation of medical waste permits issued by the local agency pursuant to this part.

(g) Referring or initiating proceedings for civil or criminal prosecution of violations specified in Chapter 10 (commencing with Section 118335).

(h) Reporting in a manner determined by the department so that the statewide effectiveness of the program can be determined.

117825. Each local enforcement agency that elects to implement the medical waste management program may prescribe, by resolution or ordinance, the registration and permit fees necessary to pay its reasonable expenses to administer the program.

117830. (a) A local agency electing to implement a medical waste management program is the enforcement agency for the jurisdiction where it is located and so designated by the department.

(b) In any local jurisdiction where the local agency does not elect to implement a medical waste management program, the department is the enforcement agency.

(c) Nothing in this chapter shall prevent a district attorney, city attorney, or city prosecutor from bringing any enforcement action for violation of this chapter.

117835. The department shall establish and maintain a data base of persons registered under Chapter 4 (commencing with Section 117925) and persons registered under Chapter 5 (commencing with Section 117950) for whom the department is the enforcement agency.

117840. It is the intent of the Legislature that the program carried out pursuant to this part be fully supported from the fees received pursuant to this part.

117845. The department shall implement this part so as to maximize the funds that may be received from the federal government.

117850. Information may be shared between the department and the Environmental Protection Agency.

117855. If the department finds that a local enforcement agency is not consistently fulfilling its responsibilities, the department shall notify the agency of the particular reasons for finding that the agency is not fulfilling its responsibilities and of the department’s intention to withdraw its designation if, within a time to be specified in that notification, but in no event less than 30 days, the agency does not take the corrective action specified by the department.

117860. If the department withdraws its designation of a local enforcement agency, the department shall become the enforcement agency within the jurisdiction of the local enforcement agency.

117870. If the department identifies significant violations of minimum requirements that were not identified and resolved through previous inspections by the local enforcement agency, the department shall do all of the following:

(a) Conduct a performance review of the agency within 120 days.

(b) Prepare a written performance report within 60 days of the review.

(c) Require the submission of a plan of correction by the agency within 90 days of receiving the report.

117875. The department shall withdraw a local enforcement agency's designation pursuant to Section 117860 if it determines that the enforcement agency has failed to submit an adequate plan of correction or has failed to implement the plan.

117880. If the department becomes the enforcement agency, it may charge the fees specified in this part.

117885. (a) There is in the State Treasury the Medical Waste Management Fund, that shall be administered by the director. Money deposited in the fund shall be available to the department, upon appropriation by the Legislature, for the purposes of this part.

(b) In addition to any other funds transferred by the Legislature to the Medical Waste Management Fund, the following shall be deposited in the fund:

(1) Fees, penalties, interest earned, and fines collected by, or on behalf of, the department pursuant to this part.

(2) Funds granted by the federal government for purposes of carrying out this part.

(c) This section shall become operative on July 1, 1993.

117890. No large quantity generator shall generate medical waste unless the large quantity generator is registered with the enforcement agency pursuant to this part.

117895. A small quantity generator that treats medical waste onsite by steam sterilization, incineration, or microwave technology shall register with the enforcement agency pursuant to this part.

117900. No person shall haul medical waste unless the person meets either of the following requirements:

(a) The person is registered pursuant to Article 6 (commencing with Section 25160) and Article 6.5 (commencing with Section 25167.1) of Chapter 6.5 of Division 20 and Chapter 30 (commencing with Section 66001) of Division 4 of Title 22 of the California Code of Regulations.

(b) The person has an approved limited-quantity exemption granted pursuant to Section 118030.

117903. No person shall treat medical waste unless the person is permitted by the enforcement agency as required by this part or unless the treatment is performed by a medical waste generator and is a treatment method approved pursuant to subdivision (d) of Section 118215.

117905. The department is the enforcement agency for offsite treatment facilities.

117908. The accumulated medical waste of more than one medical waste generator shall not be stored in a common storage facility unless that facility is registered with the enforcement agency.

117910. The department shall provide ongoing technical assistance and guidance to local enforcement agencies to assist them in their decisionmaking processes. This assistance shall include, but is not limited to, providing all of the following:

(a) Technical studies and reports.

(b) Copies of innovative facility operation plans.

(c) Investigative findings and analysis of new waste management practices and procedures.

CHAPTER 4. SMALL QUANTITY GENERATOR REQUIREMENTS

117915. Containment and storage of medical waste shall be in accordance with Chapter 9 (commencing with Section 118275).

117918. Treatment of medical waste shall be in accordance with Chapter 8 (commencing with Section 118215).

117920. The fee schedule specified in Section 117923 shall be for the issuance of medical waste registrations and for conducting inspections pursuant to this chapter when the department serves as the enforcement agency for small quantity generators. This fee schedule shall be adjusted annually in accordance with Section 100425. On or before January 1, 1993, the department may adjust by regulation the fees specified in Section 117923 to reflect the actual costs of implementing this chapter. Local enforcement agencies shall set fees that shall be sufficient to cover their costs in implementing this part with regard to small quantity generators required to be registered pursuant to Section 117925.

117923. (a) The registration and inspection fee for small quantity generators using onsite treatment, including an autoclave, incinerator, or microwave technology, to treat medical waste is one hundred dollars ($100), that shall be paid once every two years.

(b) The annual permit fee for a common storage facility permitted pursuant to Section 117928 is the amount specified in the following schedule:

(1) For storage facilities serving 10 or fewer generators, the permit fee is one hundred dollars ($100).

(2) For storage facilities serving 11 or more generators, but not more than 50 generators, the permit fee is two hundred fifty dollars ($250).

(3) For storage facilities serving more than 50 generators, the permit fee is five hundred dollars ($500).

117925. (a) Each small quantity generator using onsite steam sterilization, incineration, or microwave technology to treat medical

waste shall register with the enforcement agency. Small quantity generators owning or operating a medical waste treatment facility shall also apply for a permit for that treatment facility pursuant to Chapter 7 (commencing with Section 118130).

(b) Small quantity generators using onsite treatment, as specified in subdivision (a), that operate as a business in the same building, or that are associated with a group practice in the same building, may register as one generator.

(c) Small quantity generators using onsite treatment, as specified in subdivision (a), as specified in subdivision (b), operating in different buildings on the same or adjacent property, or as approved by the enforcement agency, may register as one generator.

(d) ''Adjacent,'' for purposes of subdivision (c), means real property within 400 yards from the property boundary of the primary registration site.

117928. (a) Any common storage facility for the collection of medical waste produced by small quantity generators operating independently, but sharing common storage facilities, shall have a permit issued by the enforcement agency.

(b) A permit for any common storage facility specified in subdivision (a) may be obtained by any one of the following:

(1) A provider of health care as defined in subdivision (d) of Section 56.05 of the Civil Code.

(2) The registered hazardous waste transporter.

(3) The property owner.

(4) The property management firm responsible for providing tenant services to the medical waste generators.

117930. Small quantity generators subject to Section 117925 shall register with the enforcement agency on or before April 1, 1991, where the generation of medical waste began prior to that date.

In those cases where the generation of medical waste begins after April 1, 1991, registration shall be completed pursuant to this chapter prior to commencement of the generation of medical waste.

117933. Common storage facilities subject to Section 117928 shall obtain a permit from the enforcement agency on or before April 1, 1991, where the storage of medical waste in the common storage facility began prior to that date.

In those cases where the storage of medical waste begins after April 1, 1991, permits shall be obtained pursuant to this chapter prior to commencement of storage of medical waste in the common storage facility.

117935. Any small quantity generator required to register with the enforcement agency pursuant to Section 117930 shall file with the enforcement agency a medical waste management plan, on forms prescribed by the enforcement agency containing, but not limited to, all of the following:

(a) The name of the person.

(b) The business address of the person.

(c) The type of business.

(d) The types, and the estimated average monthly quantity, of medical waste generated.

(e) The type of treatment used onsite.

(f) The name and business address of the registered hazardous waste hauler used by the generator for backup treatment and disposal, for waste when the onsite treatment method is not appropriate due to the hazardous or radioactive characteristics of the waste, or the name of the registered hazardous waste hauler used by the generator to have untreated medical waste removed for treatment and disposal.

(g) A statement indicating that the generator is hauling the medical waste generated in his or her business pursuant to Section 118030 and the name and any business address of the treatment and disposal facilities to which the waste is being hauled, if applicable.

(h) The name and business address of the registered hazardous waste hauler service provided by the building management to which the building tenants may subscribe or are required by the building management to subscribe and the name and business address of the treatment and disposal facilities used, if applicable.

(i) A statement certifying that the information provided is complete and accurate.

117938. (a) Small quantity generators using onsite steam sterilization, incineration, or microwave technology to treat medical waste are subject to biennial inspection of that onsite treatment facility by the enforcement agency and may be subject to the permitting requirements for onsite medical waste treatment facilities as determined by the enforcement agency.

(b) The inspection and permitting requirements of subdivision (a) do not apply when onsite steam sterilization is not used for the treatment or disposal of medical waste.

117940. (a) Each enforcement agency shall follow procedures consistent with this chapter in registering medical waste generators.

(b) Each medical waste generator registration issued by the enforcement agency shall be valid for two years.

(c) An application for renewal of the registration shall be filed with the enforcement agency on or before the expiration date.

(d) Generators shall submit within 30 days an updated application form when any of the information specified in subdivisions (a) to (i), inclusive, of Section 117935 changes.

117943. A medical waste generator required to register pursuant to this chapter shall maintain individual treatment, and tracking records, if applicable, for three years, or for the period specified in the regulations, and shall report or submit to the enforcement agency, upon request, both of the following:

(a) Treatment operating records.

(b) An emergency action plan complying with regulations adopted by the department.

117945. Small quantity generators who are not required to register pursuant to this chapter shall maintain on file in their office all of following:

(a) An information document stating how the generator contains, stores, treats, and disposes of any medical waste generated through any act or process of the generator.

(b) Records of any medical waste transported offsite for treatment and disposal, including the quantity of waste transported, the date transported, and the name of the registered hazardous waste hauler or individual hauling the waste pursuant to Section 118030. The small quantity generator shall maintain these records for not more than two years.

CHAPTER 5. LARGE QUANTITY GENERATOR REQUIREMENTS

117950. (a) Each large quantity generator, except as specified in subdivisions (b) and (c), shall register with the enforcement agency. Large quantity generators owning or operating a medical waste treatment facility shall also apply for a permit for that treatment facility pursuant to Chapter 7 (commencing with Section 118130).

(b) Large quantity generators operating as a business in the same building, or that are associated with a group practice in the same building, may register as one generator.

(c) Large quantity generators as specified in subdivision (a), operating in different buildings on the same or adjacent property, or as approved by the enforcement agency, may register as one generator.

(d) ''Adjacent,'' for purposes of subdivision (c), means real property within 400 yards from the property boundary of the primary registration site.

117955. Large quantity generators subject to Section 117950 shall register with the enforcement agency on or before April 1, 1991, if the generation of medical waste began prior to that date. In those cases where the generation of medical waste begins after April 1, 1991, registration shall be completed pursuant to this chapter prior to commencement of the generation of medical waste.

117960. Any large quantity generator required to register with the enforcement agency pursuant to Section 117950 shall file with the enforcement agency a medical waste management plan, on forms prescribed by the enforcement agency containing, but not limited to, all of the following:

(a) The name of the person.

(b) The business address of the person.

(c) The type of business.

(d) The types, and the estimated average monthly quantity, of medical waste generated.

(e) The type of treatment used onsite, if applicable. For generators with onsite medical waste treatment facilities, including incinerators or steam sterilizers or other treatment facilities as determined by the enforcement agency, the treatment capacity of the onsite treatment facility.

(f) The name and business address of the registered hazardous waste hauler used by the generator to have untreated medical waste removed for treatment, if applicable.

(g) The name and business address of the registered hazardous waste hauler service provided by the building management to which the building tenants may subscribe or are required by the building management to subscribe, if applicable.

(h) The name and business address of the offsite medical waste treatment facility to which the medical waste is being hauled, if applicable.

(i) An emergency action plan complying with regulations adopted by the department.

(j) A statement certifying that the information provided is complete and accurate.

117965. Large quantity generators shall be subject to at least annual inspection by the enforcement agency.

117970. (a) Each enforcement agency shall follow procedures consistent with this chapter in registering medical waste generators.

(b) Each medical waste registration issued by the enforcement agency shall be valid for one year.

(c) An application for renewal of the registration shall be filed with the enforcement agency not less than 90 days prior to the expiration date. Failure to meet this requirement shall result in an assessment of a late fee.

(d) Generators shall submit within 30 days an updated application form when any of the information specified in subdivisions (a) to (j), inclusive, of Section 117960 changes.

117975. A medical waste generator required to register pursuant to this chapter shall maintain individual treatment, and tracking records, if applicable, for three years or for the period specified in the regulations.

117980. Containment and storage of medical waste shall be in accordance with Chapter 9 (commencing with Section 118275).

117985. Treatment of medical waste shall be in accordance with Chapter 8 (commencing with Section 118215).

117990. The fee schedule specified in Section 117995 shall be for the issuance of medical waste registrations and onsite medical waste treatment facility permits when the department serves as the enforcement agency for large quantity generators. This fee schedule shall be adjusted annually in accordance with Section 100425. On or

before January 1, 1993, the department may adjust by regulation the fees specified in Section 117995 to reflect the actual costs of implementing this chapter. Local enforcement agencies shall set fees that shall be sufficient to cover their costs in implementing this part with regard to large quantity generators.

117995. The registration and annual permit fee for large quantity generators shall be set in following amounts:

(a) (1) A general acute care hospital, as defined in subdivision (a) of Section 1250, that has one or more beds, but not more than 99 beds, shall pay six hundred dollars ($600), a facility with 100 or more beds, but not more than 199 beds, shall pay eight hundred sixty dollars ($860), a facility with 200 or more beds, but not more than 250 beds shall pay one thousand one hundred dollars ($1,100), and a facility with 251 or more beds shall pay one thousand four hundred dollars ($1,400).

(2) In addition to the fees specified in paragraph (1), a general acute care hospital which is providing onsite treatment of medical waste shall pay an annual medical waste treatment facility inspection and permit fee of three hundred dollars ($300), if the facility has one or more beds but not more than 99 beds, five hundred dollars ($500), if the facility has 100 or more beds but not more than 250 beds, and one thousand dollars ($1,000), if the facility has 251 or more beds.

(b) A specialty clinic, providing surgical, dialysis, or rehabilitation services, as defined in subdivision (b) of Section 1204, shall pay three hundred fifty dollars ($350).

(c) A skilled nursing facility, as defined in subdivision (c) of Section 1250, that has one or more beds, but not more than 99 beds shall pay two hundred seventy-five dollars ($275), a facility with 100 or more beds, but not more than 199 beds shall pay three hundred fifty dollars ($350), and a facility with 200 or more beds shall pay four hundred dollars ($400).

(d) An acute psychiatric hospital, as defined in subdivision (b) of Section 1250, shall pay two hundred dollars ($200).

(e) An intermediate care facility, as defined in subdivision (d) of Section 1250, shall pay three hundred dollars ($300).

(f) A primary care clinic, as defined in Section 1200.1, shall pay three hundred fifty dollars ($350).

(g) A licensed clinical laboratory, as defined in paragraph (3) of subdivision (a) of Section 1206 of the Business and Professions Code, shall pay two hundred dollars ($200).

(h) A health care service plan facility, as defined in subdivision (f) of Section 1345, shall pay three hundred fifty dollars ($350).

(i) A veterinary clinic or veterinary hospital shall pay two hundred dollars ($200).

(j) A large quantity generator medical office shall pay two hundred dollars ($200).

(k) In addition to the fees specified in subdivisions (b) to (j), inclusive, a large quantity generator of medical waste which is providing onsite treatment of medical waste shall pay an annual medical waste treatment facility inspection and permit fee of three hundred dollars ($300).

CHAPTER 6. MEDICAL WASTE HAULERS

118000. (a) Except as otherwise exempted pursuant to Section 118030, all medical waste transported to an offsite medical waste treatment facility shall be transported in accordance with this chapter by a registered hazardous waste transporter issued a registration certificate pursuant to Chapter 6 (commencing with Section 118025) and Article 6.5 (commencing with Section 25167.1) of Chapter 6.5 of Division 20. A hazardous waste transporter transporting medical waste shall have a copy of the transporter's valid hazardous waste transporter registration certificate in the transporter's possession while transporting medical waste. The transporter shall show the certificate, upon demand, to any enforcement agency personnel or authorized employee of the Department of the California Highway Patrol.

(b) Except for small quantity generators transporting medical waste pursuant to Section 118030, medical waste shall be transported to a permitted offsite medical waste treatment facility or a permitted transfer station in leak-resistant and fully enclosed rigid secondary containers that are then loaded into an enclosed cargo body.

(c) A person shall not transport medical waste in the same vehicle with other waste unless the medical waste is separately contained in rigid containers or kept separate by barriers from other waste, or unless all of the waste is to be handled as medical waste in accordance with this part.

(d) Medical waste shall only be transported to a permitted medical waste treatment facility, or to a transfer station or another registered generator for the purpose of consolidation before treatment and disposal, pursuant to this part.

(e) Facilities for the transfer of medical waste shall be annually inspected and issued permits in accordance with the regulations adopted pursuant to this part.

(f) Any persons manually loading or unloading containers of medical waste shall be provided by their employer at the beginning of each shift with, and shall be required to wear, clean and protective gloves and coveralls, changeable lab coats, or other protective clothing. The department may require, by regulation, other protective devices appropriate to the type of medical waste being handled.

118025. All medical waste shall be hauled by either a registered hazardous waste hauler or by a person with an approved limited-quantity exemption granted pursuant to Section 118030.

118030. Medical waste generators may apply to the enforcement agency for a limited-quantity hauling exemption, if the generator meets all of the following requirements:

(1) The generator generates less than 20 pounds of medical waste per week, transports less than 20 pounds of medical waste at any one time, and has an information document on file in the generator's office pursuant to Section 117945.

(2) The generator transports the waste himself or herself, or directs a member of his or her staff to transport the waste, to a permitted medical waste treatment facility, a transfer station, or to another facility for the purpose of consolidation before treatment and disposal.

(3) The generator maintains a tracking document, as specified in Section 118040.

(b) The limited-quantity hauling exemption authorized by this section is valid for a period of one year.

(c) An application for an initial or a renewal of a limited-quantity hauling exemption shall be accompanied by a fee of twenty-five dollars ($25). The application shall identify each person who will transport waste for the transporter. If the generator identifies more than four persons who will be transporting medical waste, the generator shall pay an additional fee of five dollars ($5) for each person, up to a maximum additional fee of twenty-five dollars ($25).

118035. For the purpose of transferring medical waste prior to reaching a permitted medical waste treatment facility, the medical waste shall not be unloaded, reloaded, or transferred to another vehicle at any location, except at a permitted medical waste transfer station or in the case of a vehicle breakdown or other emergency.

118040. (a) A hazardous waste transporter or generator transporting medical waste shall maintain a completed tracking document of all medical waste removed for treatment or disposal. A hazardous waste transporter or generator who transports medical waste to a facility, other than the final medical waste treatment facility, shall also maintain tracking documents that show the name, address, and telephone number of the medical waste generator, for purposes of tracking the generator of medical waste when the waste is transported to the final medical waste treatment facility. At the time the medical waste is received by a hazardous waste transporter, the transporter shall provide the medical waste generator with a copy of the tracking document for the generator's medical waste records. The transporter or generator transporting medical waste shall maintain its copy of the tracking document for three years.

(b) The tracking document shall include, but not be limited to, all of the following information:

(1) The name, address, telephone number, and registration number of the transporter, unless transported pursuant to Section 118030.

(2) The type and quantity of medical waste transported.

(3) The name, address, and telephone number of the generator.

(4) The name, address, telephone number, permit number, and the signature of an authorized representative of the permitted facility receiving the waste.

(5) The date the medical waste is collected or removed from the generator's facility, the date the waste is received by the transfer station, or the registered large quantity generator for the purpose of consolidation, if applicable, and the date the waste is received by the treatment facility.

(c) Any hazardous waste transporter or generator transporting medical waste in a vehicle shall have a tracking document in his or her possession while transporting the waste. The tracking document shall be shown upon demand to any enforcement agency personnel or an officer of the Department of the California Highway Patrol. If the waste is transported by rail, vessel, or air, the railroad corporation, vessel operator, or airline shall enter on the shipping papers any information concerning the waste that the enforcement agency may require.

(d) A hazardous waste transporter or a generator transporting medical waste shall provide the facility receiving the medical waste with the original tracking document.

(e) Each hazardous waste transporter and each medical waste treatment facility shall provide tracking data periodically and in a format as determined by the department.

(f) Medical waste transported out of state shall be consigned to a permitted medical waste treatment facility in the receiving state. If there is no permitted treatment facility in the receiving state or if the medical waste is crossing an international border, the waste shall be treated in accordance with Chapter 9 (commencing with Section 118215) prior to being transported out of the state.

118045. (a) The department shall charge an application fee for a permit for a transfer station equal to one hundred dollars ($100) for each hour which the department spends on processing the application, but not more than ten thousand dollars ($10,000), or as provided in the regulations adopted by the department.

(b) In addition to the fee specified in subdivision (a), the annual permit fee for a transfer station issued a permit pursuant to subdivision (e) of Section 118000 is two thousand dollars ($2,000), or as provided in the regulations adopted pursuant to this part.

CHAPTER 7. MEDICAL WASTE TREATMENT FACILITY PERMITS

118130. All offsite medical waste treatment facilities and transfer stations shall be permitted and inspected by the department. All onsite medical waste treatment facilities shall be permitted and inspected by the enforcement agency.

118135. On or before April 1, 1991, each person operating a medical waste treatment facility shall obtain a permit pursuant to this chapter from the department. If the medical waste treatment facility begins operation after April 1, 1991, the permit shall be obtained pursuant to this article prior to commencement of the treatment facility's operation.

118140. A health care facility accepting medical waste for treatment from the physicians and surgeons who are on the staff of the facility and who are small quantity generators shall be classified as an onsite treatment facility and shall be permitted and inspected by the enforcement agency.

118145. A health care facility accepting medical waste for treatment from small quantity generators that are adjacent to the facility shall be classified as an onsite treatment facility and shall be permitted and inspected by the enforcement agency.

118150. (a) Each enforcement agency shall follow procedures that are consistent with this chapter, and the regulations adopted pursuant to this chapter, when issuing medical waste permits.

(b) Each person operating a medical waste treatment facility pursuant to a hazardous waste facilities permit or grant of interim status pursuant to Article 9 (commencing with Section 25200) of Chapter 6.5 of Division 20, as of January 1, 1991, shall be considered to have the medical waste permit required by this article until January 1, 1992, unless the enforcement agency with jurisdiction over its activities has taken final action prior to January 1, 1992, on an application for a permit pursuant to this article.

(c) Each medical waste facility subject to subdivision (b) shall operate in accordance with the standards and procedures contained in this chapter, and on and after January 1, 1991, is not subject to the standards and procedures contained in Chapter 6.5 (commencing with Section 25100) of Division 20.

118155. Any person required to obtain a permit pursuant to this part shall file with the enforcement agency an application, on forms prescribed by the department, containing, but not limited to, all of the following:

(a) The name of the applicant.

(b) The business address of the applicant.

(c) The type of treatment provided, the treatment capacity of the facility, a characterization of the waste treated at this facility, and the estimated average monthly quantity of waste treated at the facility.

(d) A disclosure statement, as provided in Section 25112.5, except for onsite medical waste treatment facilities.

(e) Evidence satisfactory to the enforcement agency that the operator of the medical waste treatment facility has the ability to comply with this part and the regulations adopted pursuant to this part.

(f) Any other information required by the enforcement agency for the administration or enforcement of this part or the regulations adopted pursuant to this part.

118160. (a) Prior to issuing or renewing a permit for an offsite medical waste treatment facility pursuant to Section 118130, the department shall review the compliance history of the applicant, under any local, state, or federal law or regulation governing the control of medical waste or pollution, including, but not limited to, the Clean Air Act (42 U.S.C. Sec. 7401 et seq.).

(b) The department shall, pursuant to this section, deny a permit, or specify additional permit conditions, to ensure compliance with applicable regulations, if the department determines that in the three-year period preceding the date of application the applicant has violated laws or regulations identified in subdivision (a) at a facility owned or operated by the applicant, and the violations demonstrate a recurring pattern of noncompliance or pose, or have posed, a significant risk to public health and safety or to the environment.

(c) In addition to any other information required to be submitted for the permitting of a facility pursuant to Section 118130, an applicant who has owned or operated a facility regulated by the department shall provide a description of all violations described in subdivision (a), that occurred at any facility permitted and owned or operated by the applicant in the state in the three years prior to the date of application.

(d) In making the determination of whether to deny a permit or to specify additional permit conditions pursuant to subdivision (b), the department shall take both of the following into consideration:

(1) Whether a permit denial or permit condition is appropriate or necessary given the severity of the violation.

(2) Whether the violation has been corrected in a timely fashion.

118165. On and after April 1, 1991, all persons operating a medical waste treatment facility shall maintain individual records for a period of three years and shall report or submit to the enforcement agency upon request, all of the following information:

(a) The type of treatment facility and its capacity.

(b) All treatment facility operating records.

(c) Copies of the tracking documents for all medical waste it receives for treatment from offsite generators or from hazardous waste haulers.

118170. (a) A medical waste permit issued by the enforcement agency to a medical waste treatment facility shall be valid for five years.

(b) An application for renewal of the permit shall be filed with the enforcement agency not less than 90 days prior to the expiration date. If a permittee fails to make a timely application for renewal, the medical waste permit shall expire on the expiration date.

118175. (a) A medical waste permit may be renewed if the enforcement agency finds the permittee has been in substantial compliance with this part and the regulations adopted pursuant to this part during the preceding permitted period or that the permittee corrected previous violations in a timely manner.

(b) Upon approval of the enforcement agency, a permit may be transferred from one subsidiary to another subsidiary of the same corporation, from a parent corporation to one of its subsidiaries, or from a subsidiary to a parent corporation.

118180. A person required to obtain a medical waste permit shall, at all times, possess a valid permit for each facility in operation. A medical waste permit shall terminate prior to its expiration date if suspended or revoked pursuant to Section 118350 or, notwithstanding Section 118355, if either of the following occurs:

(a) The permittee sells or otherwise transfers the facility, except as specified in subdivision (b) of Section 118175.

(b) The permittee surrenders the permit to the enforcement agency because the permittee ceases operation.

118185. The enforcement agency shall issue a medical waste permit upon evaluation, inspection, or records review of the applicant if the applicant is in substantial compliance with this part and the regulations adopted pursuant to this part and the applicant has corrected any previous violations. A decision to issue or not to issue the permit shall be made by the enforcement agency within 180 days of the time that the application is deemed complete, unless waived by the applicant.

118190. When issuing, renewing, or revising any treatment facility permit, the enforcement agency may prohibit or condition the handling or treatment of medical waste to protect the public health and safety.

118195. An enforcement agency shall inform an applicant for a medical waste permit, in writing, upon the denial of any application for the permit. Within 20 days after the enforcement agency mails the notice, the applicant may present a written petition for a hearing to the enforcement agency. Upon receipt by the enforcement agency of the petition in proper form, the petition shall be set for hearing.

If the department is the enforcement agency, the proceedings shall commence with the filing of a statement of issues and shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and

the department has all the powers granted to a department in that chapter.

If the department is not the enforcement agency, the hearings shall be held in accordance with the ordinance adopting the medical waste management program.

118200. The enforcement agency shall evaluate, inspect, and review the records of medical waste treatment facilities for compliance with this part.

118205. The fee schedule specified in Section 118210 shall cover the issuance of medical waste treatment facility permits and an inspection program, when the department serves as the enforcement agency. This fee schedule shall be adjusted annually in accordance with Section 100425. On or before January 1, 1993, the department may adjust by regulation the fees specified in Section 118210 to reflect the actual costs of implementing this chapter. Local enforcement agencies shall set fees that shall be sufficient to cover their costs in implementing this part with regard to large quantity generators.

118210. (a) The department shall charge an annual permit fee for an offsite medical waste treatment facility equal to either two-tenths of a cent($0.002) for each pound of medical waste treated or ten thousand dollars ($10,000), whichever is greater.

(b) The department shall charge an initial application fee for each type of treatment technology at an offsite medical waste treatment facility equal to one hundred dollars ($100) for each hour the department spends processing the application, but not more than fifty thousand dollars ($50,000), or as provided in the regulations adopted by the department.

CHAPTER 8. TREATMENT

118215. A person generating or treating medical waste shall ensure that the medical waste is treated by one of the following methods, thereby rendering it solid waste, that is not otherwise hazardous, prior to disposal:

(a) Incineration at a permitted medical waste treatment facility in a controlled-air, multichamber incinerator, or other method of incineration approved by the department that provides complete combustion of the waste into carbonized or mineralized ash. Monitoring for release of airborne pathogens from medical waste incinerators shall be conducted as prescribed by the department.

(b) (1) Discharge to a public sewage system if the medical waste is liquid or semiliquid, and not either of the following:

(A) Liquid or semiliquid laboratory waste, as defined in subdivision (a) of Section 117635.

(B) Microbiological specimens, including those specified in subdivision (b) of Section 117635.

(2) Medical waste discharge shall be consistent with the waste discharge requirements placed on the public sewer system by the California regional water quality control board with jurisdiction.

(c) Steam sterilization at a permitted medical waste treatment facility or by other sterilization, in accordance with all of the following operating procedures for steam sterilizers or other sterilization:

(1) Standard written operating procedures shall be established for biological indicators, or for other indicators of adequate sterilization approved by the department, for each steam sterilizer, including time, temperature, pressure, type of waste, type of container, closure on container, pattern of loading, water content, and maximum load quantity.

(2) Recording or indicating thermometers shall be checked during each complete cycle to ensure the attainment of 121° Centigrade (250° Fahrenheit) for at least one-half hour, depending on the quantity and density of the load, in order to achieve sterilization of the entire load. Thermometers shall be checked for calibration annually. Records of the calibration checks shall be maintained as part of the facility's files and records for a period of three years or for the period specified in the regulations.

(3) Heat-sensitive tape, or another method acceptable to the enforcement agency, shall be used on each biohazard bag or sharps container that is processed onsite to indicate the attainment of adequate sterilization conditions.

(4) The biological indicator Bacillus stearothermophilus, or other indicator of adequate sterilization as approved by the department, shall be placed at the center of a load processed under standard operating conditions at least monthly to confirm the attainment of adequate sterilization conditions.

(5) Records of the procedures specified in paragraphs (1), (2), and (4) shall be maintained for a period of not less than three years.

(d) (1) Other alternative medical waste treatment methods that are both of the following:

(A) Approved by the department.

(B) Result in the destruction of pathogenic microorganisms.

(2) Any alternative medical waste treatment method proposed to the department shall be evaluated by the department and either approved or rejected pursuant to the criteria specified in this subdivision.

118220. Recognizable human anatomical remains, with the exception of teeth not deemed infectious by the attending physician and surgeon, or dentist shall be disposed of by incineration or interment unless otherwise hazardous.

118225. (a) Sharps waste shall be rendered noninfectious prior to disposal by one of the following methods:

(1) Incineration.

(2) Steam sterilization.

(3) Disinfection using an alternative treatment method approved by the department.

(b) Sharps waste rendered noninfectious pursuant to this section may be disposed of as solid waste if the waste is not otherwise hazardous.

(c) Onsite medical waste treatment facilities treating sharps waste pursuant to paragraph (2) or (3) of subdivision (a) shall ensure that, prior to disposal, the treated sharps waste is destroyed or that public access to the treated sharps waste is prevented.

118230. An operator of a hazardous waste incinerator permitted pursuant to Section 25200 may also accept medical waste for incineration.

118235. Each medical waste treatment facility issued a medical waste permit shall provide the enforcement agency with an emergency action plan that the facility shall follow to ensure the proper disposal of medical waste in the event of equipment breakdowns, natural disasters, or other occurrences.

118240. Notwithstanding Section 9141 of the Food and Agricultural Code, animals that die from infectious diseases shall be treated in accordance with Section 118215 if, in the opinion of the attending veterinarian or local health officer, the carcass presents a danger of infection to humans.

118245. (a) The department shall charge an application fee for evaluation of an alternative treatment technology pursuant to subdivision (d) of Section 118215 of two thousand five hundred dollars ($2,500) and shall charge an additional fee equal to one hundred dollars ($100) per hour for each hour which the department spends on processing the application, but not more than a total of five thousand dollars ($5,000), or as provided in the regulations adopted by the department.

(b) The department shall charge an application fee of one thousand dollars, ($1,000) for evaluation and approval of the use of a medical waste mail back system, which sends medical waste generated in this state to an out-of-state facility for treatment and disposal pursuant to subdivision (f) of Section 118040.

CHAPTER 9. CONTAINMENT AND STORAGE

118275. To containerize or store medical waste, a person shall do all of the following:

(a) Medical waste shall be contained separately from other waste at the point of origin in the producing facility. Sharps containers may be placed in biohazard bags or in containers with biohazard bags.

(b) Biohazardous waste shall be placed in a red biohazard bag conspicuously labeled with the words ‘‘Biohazardous Waste’’ or with the international biohazard symbol and the word ‘‘BIOHAZARD’’.

(c) Sharps waste shall be contained in a sharps container pursuant to Section 118285.

(d) Biohazardous waste which meets the conditions of subdivision (g) of Section 117635 shall be segregated to ensure treatment of the waste pursuant to subdivision (a) of Section 118215.

118280. To containerize biohazard bags, a person shall do all of the following:

(a) The bags shall be tied to prevent leakage or expulsion of contents during all future storage, handling, or transport.

(b) Biohazardous waste shall be bagged in accordance with subdivision (b) of Section 118275 and placed for storage, handling, or transport in a rigid container that may be disposable, reusable, or recyclable. Containers shall be leak resistant, have tight-fitting covers, and be kept clean and in good repair. Containers may be recycled with the approval of the enforcement agency. Containers may be of any color and shall be labeled with the words ''Biohazardous Waste,'' or with the international biohazard symbol and the word ''BIOHAZARD,'' on the lid and on the sides so as to be visible from any lateral direction. Containers meeting the requirements specified in Section 66840 of Title 22 of the California Code of Regulations, as it read on December 31, 1990, may also be used until the replacement of the containers is necessary or existing stock has been depleted.

(c) Biohazardous waste shall not be removed from the biohazard bag until treatment as prescribed in Chapter 8 (commencing with Section 118215) is completed, except to eliminate a safety hazard. Biohazardous waste shall not be disposed of before being treated as prescribed in Chapter 8.

(d) (1) Except as provided in paragraph (5), a person generating 20 or more pounds of medical waste per month shall not contain or store biohazardous or sharps waste above 0° Centigrade (32° Fahrenheit) at any onsite location for more than seven days unless the enforcement agency approves the containment or storage in writing. Except as provided in paragraph (5), a person generating less than 20 pounds of biohazardous waste per month shall not contain or store biohazardous waste above 0 degrees Centigrade (32 degrees Fahrenheit) at any onsite location for more than 30 days.

(2) A person may store biohazardous or sharps waste at or below 0° Centigrade (32° Fahrenheit) at an onsite location for not more than 90 days without obtaining the written approval of the enforcement agency.

(3) A person may store biohazardous or sharps waste at a permitted transfer station at or below 0° Centigrade (32° Fahrenheit) for not more than 30 days without obtaining the approval of the enforcement agency.

(4) A person shall not store biohazardous or sharps waste above 0° Centigrade (32° Fahrenheit) for more than seven days before treatment at any location or facility that is offsite from the generator.

(5) Notwithstanding paragraphs (1) to (4), inclusive, if the facility is unable to control the odor from its stored waste and the odor poses a public nuisance, the enforcement agency may require more frequent removal.

118285. To containerize sharps waste, a person shall do all of the following:

(a) Place all sharps waste into a sharps container.

(b) Tape closed or tightly lid full sharps containers ready for disposal to preclude loss of contents.

(c) Store sharps containers ready for disposal for not more than seven days without the written approval of the enforcement agency.

(d) Label sharps containers with the words ‘‘sharps waste’’ or with the international biohazard symbol and the word ‘‘BIOHAZARD’’.

118290. Any small quantity generator who has properly containerized the medical waste according to the requirements of this article may store the waste in a permitted common storage facility.

118295. A person shall thoroughly wash and decontaminate reusable rigid containers for medical waste by a method approved by the enforcement agency each time they are emptied, unless the surfaces of the containers have been completely protected from contamination by disposable liners, bags, or other devices removed with the waste. These containers shall be maintained in a clean and sanitary manner. Approved methods of decontamination include, but are not limited to, agitation to remove visible soil combined with one of the following procedures:

(a) Exposure to hot water of at least 82° Centigrade (180° Fahrenheit) for a minimum of 15 seconds.

(b) Exposure to chemical sanitizer by rinsing with, or immersion in, one of the following for a minimum of three minutes:

(1) Hypochlorite solution (500 ppm available chlorine).

(2) Phenolic solution (500 ppm active agent).

(3) Iodoform solution (100 ppm available iodine).

(4) Quaternary ammonium solution (400 ppm active agent).

118300. Any leak or spill of a medical waste by a medical waste generator, hazardous waste hauler, or treatment facility shall be decontaminated by procedures adopted by the department.

118305. A person shall not use reusable pails, drums, dumpsters, or bins used for medical waste for the containment of solid waste, or for other purposes, except after being decontaminated by the procedures specified in Section 118295 and removal of all medical waste labels.

118310. Any enclosure or designated accumulation area used for the storage of medical waste containers shall be secured so as to deny

access to unauthorized persons and shall be marked with warning signs on, or adjacent to, the exterior of entry doors, gates, or lids. The storage area may be secured by use of locks on entry doors, gates, or receptacle lids.

The wording of warning signs shall be in English, ''CAUTION—BIOHAZARDOUS WASTE STORAGE AREA—UNAUTHORIZED PERSONS KEEP OUT,'' and in Spanish, ''CUIDADO—ZONA DE RESIDUOS—BIOLOGICOS PELIGROSOS—PROHIBIDA LA ENTRADA A PERSONAS NO AUTORIZADAS,'' or in another language, in addition to English, determined to be appropriate by the infection control staff or enforcement agency. A warning sign concerning infectious waste, as that term was defined by Section 25117.5 as it read on December 31, 1990, that sign having been installed before April 1, 1991, meets the requirements of this section, until the sign is changed and as long as the sign is not moved. Warning signs shall be readily legible during daylight from a distance of at least 25 feet.

Any enclosure or designated accumulation area shall provide medical waste protection from animals and natural elements and shall not provide a breeding place or a food source for insects or rodents.

118315. A person shall not use a trash chute to transfer medical waste.

118320. (a) Compactors or grinders shall not be used to process medical waste until after the waste has been treated pursuant to Chapter 8 (commencing with Section 118215) and rendered solid waste. However, grinding or compacting may be used when it is an integral part of an alternative treatment method, approved by the department.

(b) Medical waste in bags or other containers shall not be subject to compaction by any compacting device and shall not be placed for storage or transport in a portable or mobile trash compactor, except as allowed pursuant to subdivision (a).

CHAPTER 10. ENFORCEMENT

118325. An enforcement agency, district attorney, city attorney, or city prosecutor may bring an action to enjoin the violation, or threatened violation, of this part or the regulations adopted pursuant to this part, in the superior court in the county where the violation occurred or is about to occur. Any proceeding under this section shall be in accordance with Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the enforcement agency, district attorney, city attorney, or city prosecutor is not required to allege facts necessary to show or tending to show the lack of an adequate remedy at law or irreparable damage or loss.

With respect to any action brought pursuant to this section alleging actual violation of this part or the regulations adopted pursuant to this part, the court shall, if it finds the allegations to be true, issue its order enjoining the continuance of the violation.

118330. Whenever the enforcement agency determines that a violation or threatened violation of this part or the regulations adopted pursuant to this part has resulted, or is likely to result, in a release of medical waste into the environment, the agency may issue an order to the responsible person specifying a schedule for compliance or imposing an administrative penalty of not more than one thousand dollars ($1,000) per violation. Any person who, after notice and an opportunity for hearing, violates an order issued pursuant to this section is guilty of a misdemeanor. The department shall adopt regulations that specify the requirements for providing notice to persons to whom orders are issued and for administrative hearings and fines concerning these orders.

118335. (a) In order to carry out the purpose of this part, any authorized representative of the enforcement agency may do any of the following:

(1) Enter and inspect a facility for which a medical waste permit or registration has been issued, for which a medical waste permit or registration application has been filed, or that is subject to registration or permitting requirements pursuant to this part. Enter and inspect a vehicle for which a hazardous waste hauler registration has been issued or a limited-quantity exemption granted, for which an application has been filed for a hazardous waste hauler registration or a limited-quantity exemption, or that is subject to registration requirements pursuant to this part.

(2) Inspect and copy any records, reports, test results, or other information related to the requirements of this part or the regulations adopted pursuant to this part.

(b) The inspection shall be made with the consent of the owner or possessor of the facilities or, if consent is refused, with a warrant duly issued pursuant to Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure. However, in the event of an emergency affecting the public health or safety, an inspection may be made without consent or the issuance of a warrant.

(c) Any traffic officer, as defined in Section 625 of the Vehicle Code, and any peace officer, as defined in Section 830.1 or 830.2 of the Penal Code, may enforce Chapter 6 (commencing with Section 118000) and this chapter, and for purposes of enforcing these chapters, traffic officers and these peace officers are authorized representatives of the department.

118340. (a) No person shall, transport, store, treat, dispose, or cause the treatment or disposal of medical waste in a manner not authorized by his or her permit or registration, this part, or the regulations adopted pursuant to this part.

(b) Any person who stores, treats, disposes, or causes the treatment or disposal of medical waste in violation of this part or the regulations adopted pursuant to this part is guilty of a public offense as follows:

(1) For a small quantity generator, a first offense is an infraction and is punishable by a fine of not more than one thousand dollars ($1,000).

(2) For a person other than a small quantity generator, a first offense is a misdemeanor punishable by a fine of not less than two thousand dollars ($2,000), or by up to one year in county jail, or by both the fine and imprisonment.

(c) A person who is convicted of a second or subsequent violation of subdivision (a) within three years of the prior conviction shall be punished by imprisonment in the county jail for not more than one year or by imprisonment in state prison for one, two, or three years or by a fine of not less than five thousand dollars ($5,000), or more than twenty-five thousand dollars ($25,000), or by both the fine and imprisonment. This section shall not apply unless any prior conviction is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact. If the defendant is a corporation that operates medical facilities in more than one geographic location, this subdivision shall apply only if the offense involves an adjacent facility involved in the prior conviction.

(d) Any person who knowingly treats or disposes, or causes the treatment or disposal of, medical waste in violation of this part shall be punished by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for one, two, or three years, or by a fine of not less than five thousand dollars ($5,000), or more than twenty-five thousand dollars ($25,000), or by both the fine and imprisonment.

(e) This section does not apply to a person transporting medical waste who is required to be a registered hazardous waste transporter. Those persons are subject to penalties for violations pursuant to Article 8 (commencing with Section 25180) of Chapter 6.5 of Division 20.

118345. (a) Any person who intentionally makes any false statement or representation in any application, label, tracking document, record, report, permit, registration, or other document filed, maintained, or used for purposes of compliance with this part that materially affects the health and safety of the public is liable for a civil penalty of not more than ten thousand dollars ($10,000) for each separate violation or, for continuing violations, for each day that the violation continues.

(b) Any person who fails to register or fails to obtain a medical waste permit in violation of this part, or otherwise violates any provision of this part, any order issued pursuant to Section 118330, or any regulation adopted pursuant to this part, is liable for a civil

penalty of not more than ten thousand dollars ($10,000) for each violation of a separate provision of this part or, for continuing violations, for each day that the violation continues.

Chapter 11. Suspension or Revocation

118350. The enforcement agency may suspend, amend, or revoke any medical waste permit issued by the enforcement agency for any of the following reasons:

(a) Violation by the permittee of any of the provisions of this part or any regulation adopted pursuant to this part.

(b) Violation of any term or condition of the permit.

(c) Aiding, abetting, or permitting the violation specified in subdivision (a) or (b) or interference in the performance of the duty of the enforcement officer.

(d) Proof that the permittee has intentionally made false statements, or failed to disclose fully all relevant facts, in any material regard, on the application for a medical waste permit.

(e) The conviction of a permittee, or the person in charge of the activity subject to the medical waste permit, of any crime that is substantially related to the qualifications or duties of the permittee or the person in charge of the activity, or that is substantially related to the functions that are subject to the medical waste permit.

For purposes of this section, a conviction means a plea or verdict of guilty or a conviction following a plea of nolo contendere. An action to revoke or suspend the medical waste permit may be taken when the time for appeal has elapsed or the judgment of conviction has been affirmed on appeal. That action may also be taken when an order granting probation is made suspending the imposition of sentence, notwithstanding any subsequent order pursuant to Section 1203.4 of the Penal Code. The enforcement agency shall take into account all competent evidence of rehabilitation furnished by the permittee or person in charge of the permitted activity.

(f) A change in any condition that requires either a temporary or permanent modification, reduction, or termination of the permitted operation to bring it into compliance with the requirements of this part and the regulations adopted pursuant to this part.

118355. Proceedings conducted by the department for the suspension or revocation of a medical waste permit shall commence with the filing of any accusation and shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the department shall have all the powers granted to a department in that chapter.

118360. The enforcement agency may temporarily suspend a medical waste permit prior to any hearing, when it has determined that this action is necessary to protect the public welfare. The enforcement agency shall notify the permittee of the temporary

suspension and the effective date thereof and, at the same time, shall serve the permittee with an accusation.

Upon receipt of a notice of defense by the permittee, the matter shall, within 15 days, be set for hearing. The hearing shall be held as soon as possible, but not later than 30 days after receipt of the notice.

The temporary suspension shall remain in effect until the hearing is completed and the enforcement agency has made a final determination on the merits. However, the temporary suspension is vacated if the enforcement agency fails to make a final determination on the merits within 60 days after the original hearing has been completed.

PART 15. MISCELLANEOUS REQUIREMENTS

CHAPTER 1. ARTICLES OF COMMON USE

Article 1. Common Drinking Cups

118375. No person conducting, having charge of, or control of, any hotel, restaurant, saloon, soda fountain, store, theater, public hall, public or private school, church, hospital, club, office building, park, playground, lavatory or washroom, barber shop, railroad train, boat, or any other public place, building, room, or conveyance, shall provide or expose for common use, or permit to be so provided or exposed, or allow to be used in common, any cup, glass, or other receptacle used for drinking purposes.

118380. For the purposes of this article the term ''common use'' when applied to a drinking receptacle is defined as its use for drinking purposes by, or for, more than one person without its being thoroughly cleansed and sterilized between consecutive uses thereof by methods prescribed by or acceptable to the department.

118385. No cask, water cooler, or other receptacle shall be used for storing or supplying drinking water to the public or to employees unless it is covered and protected so as to prevent persons from dipping the water therefrom or contaminating the water. All the containers shall be provided with a faucet or other suitable device for drawing the water.

118390. (a) The state department and all health officers of counties, cities, and health districts shall enforce this article.

(b) Pursuant to their enforcement of this article, those officers shall also enforce Section 2441 of the Labor Code. This section shall not be construed to abridge or limit in any manner the jurisdiction of the Division of Occupational Safety and Health of the Department of Industrial Relations pursuant to Division 5 (commencing with Section 6300) of the Labor Code.

118395. Violation of any provision of this article is a misdemeanor punishable by a fine not exceeding fifty dollars ($50) for each offense.

Article 2. Infected Packing Material

118400. For the purpose of this article the term ‘‘filthy, contaminated, or unsanitary packing material’’ includes any or all of the following:

(a) Packing material that has been exposed to contagious or infectious disease.

(b) Material that is contaminated with vermin.

(c) Material that is generally filthy.

(d) Filthy or used wood excelsior.

(e) Excelsior made from filthy or used paper.

118405. Unsanitary packing material shall not be used until it has been cleaned and disinfected to the satisfaction of the Department of Food and Agriculture, the department, or the agents of either or both, or by a county health officer.

118410. The person having the material cleaned and disinfected shall pay the costs of the inspection.

118415. Every person who knowingly packs any goods intended for delivery to other parties or for transportation by common carriers with unsanitary packing material is guilty of a misdemeanor.

Article 3. Common Towels

118425. No person conducting, operating, or having charge or control of, any hotel, restaurant, factory, store, barber shop, office building, school, public hall, railroad train, railway station, boat, or any other public place, room, or conveyance, shall maintain or keep in or about any such place any towel for common use.

118430. For the purpose of this article the term ‘‘common use’’ when applied to a towel means its use by, or for, more than one person without its being laundered between consecutive uses of the towel by methods prescribed by or acceptable to the department.

118435. The department and all health officers of counties, cities, and health districts shall enforce this article.

118440. Violation of any provision of this article is a misdemeanor punishable by a fine not exceeding fifty dollars ($50) for each offense.

Article 4. Wiping Rags

118450. ‘‘Wiping rags,’’ as used in this article means cloths and rags, other than reusable rental cloths or towels, used for any or all of the following purposes:

(a) Wiping and cleaning the surfaces of machinery, machines, tools, locomotives, engines, motor cars, automobiles, cars, carriages, windows, furniture, and surfaces of articles, appliances, and engines in factories, shops, steamships, and steamboats.

(b) Generally for cleaning in industrial employment.

(c) Used by mechanics and workmen for wiping from their hands and bodies soil incident to their employment.

118455. No person shall supply or furnish to his or her employees for wiping rags, or sell or offer for sale for wiping rags, any soiled wearing apparel, underclothing, bedding, or parts of soiled or used underclothing, wearing apparel, bedclothes, bedding, or soiled rags or cloths unless they have been sanitized by methods prescribed by or acceptable to the department.

118460. Every local health officer or registered sanitarian, upon proper demand and notice of his or her authority, may, during business hours, enter any place where wiping rags are used, are kept for sale, or offered for sale, and inspect the wiping rags. No person shall refuse to permit the inspection, or impede or obstruct the officer during the inspection.

118465. On and after July 1, 1975, it shall be unlawful for any person to operate any business of laundering, sanitizing, or selling wiping rags unless, in addition to any other permit that may be required, he or she has a valid permit issued by the local health officer pursuant to an ordinance of the local governing body.

118470. A permit to operate any business of laundering, sanitizing, or selling wiping rags shall be issued by the local health officer if the applicant complies with the provisions of this article and any regulations adopted thereunder. The governing body of each city and county shall determine the amount of any fee for the issuance of a permit pursuant to provisions of this article for any business within the territory under its jurisdiction. The amount of the fee shall not exceed the amount necessary to defray the costs of administering this article. The permit for operation shall be posted in a conspicuous place in the business establishment for which the permit is issued. Any permit issued pursuant to this article may be suspended or revoked for any violation of any of the provisions of this article, the regulations adopted thereunder, or any condition of the permit required by the ordinance of the local governing body. Nothing in this article shall preempt local regulation of the business of laundering, sanitizing, or selling wiping rags, and any local governing body may adopt an ordinance containing requirements more restrictive than those contained in regulations adopted pursuant to this article.

The local health officer shall issue and serve upon the permit holder a notice setting forth in clear and concise language the act or omission upon which the violation is based, when the permit holder is charged with any violation and shall inform the permit holder of his or her rights to a hearing prior to suspension or revocation. At any time within the 15 days after service of the notice, the permit holder may request a hearing before the local health officer to show cause why his or her permit should not be suspended or revoked. A failure

to request a hearing within 15 days shall be deemed a waiver of a right to a hearing.

The local health officer may call a hearing for the purpose of investigating any violations of this article.

118475. The local health officer authorized to issue permits to launder, sanitize, or sell wiping rags shall keep a record of suspension or revocation of permits and a register of:

(a) The names and places of business of persons to whom permits are issued.

(b) The date of issue and number of each permit.

118480. Before being sold or offered for sale, each package or parcel of wiping rags shall be plainly marked ''sanitized wiping rags,'' and in addition it shall be plainly marked with the name and location of the laundry where the rags were laundered and sanitized.

118485. No machinery or appliances used for laundering clothing and articles for personal wear or household use shall be used for laundering soiled rags or soiled cloth material for wiping rags.

118490. Every person who violates any provision of this article is guilty of a misdemeanor.

CHAPTER 2. RESTROOMS

Article 1. Public Restrooms

118500. Every public agency that conducts an establishment serving the public or open to the public and that maintains therein restroom facilities for the public, shall make every water closet for each sex maintained within the facilities available without cost or charge to the patrons, guests, or invitees of the establishment. ''Public agency'' as used in this section means only the state and any agency of the state and a city, a county, and a city and county.

118505. (a) Publicly and privately owned facilities where the public congregates shall be equipped with sufficient temporary or permanent restrooms to meet the needs of the public at peak hours.

(b) In conformity with the State Plumbing Code, and except as otherwise provided in this section, standards shall be adopted in order to enforce this section, as follows:

(1) The State Building Standards Commission shall adopt standards with respect to all state-owned or state-occupied facilities where the public congregates and over which it has jurisdiction pursuant to Section 18934.5.

(2) The Office of the State Architect shall adopt standards with respect to all facilities where the public congregates and that are not covered by paragraph (1), unless exempt from coverage pursuant to this section.

(c) The standards adopted pursuant to subdivision (b) shall be published in the State Building Standards Code contained in Title 24 of the California Code of Regulations.

(d) This section shall apply to facilities where the public congregates that commence construction, or that undertake structural alterations, repairs, or improvements exceeding 50 percent of the entire facility, on or after January 1, 1989.

(e) For the purposes of this section, ''facilities where the public congregates'' means sports and entertainment arenas, stadiums, community and convention halls, specialty event centers, amusement facilities, and ski resorts.

For purposes of this section, ''facilities where the public congregates'' also means specialty event centers in public parks.

(f) This section shall not apply to the following:

(1) Any hotel. For purposes of this section, ''hotel'' means an establishment in which there exists the relationship of guests and innkeeper between the occupants and the owner or operator of the establishment. The existence of some other legal relationship between the occupants and owner or operator shall be immaterial.

(2) Any restaurant or food facility, as defined in Section 113785.

(3) Any public or private elementary or secondary school facility.

(4) Any qualified historic building, defined as qualifying under provisions in the State Historical Building Code contained in Part 8 (commencing with Section 8-100) of Title 24 of the California Code of Regulations.

(g) It is the intent of the Legislature that, in order to ensure that standards are both viable and efficacious, the Office of the State Architect and the State Building Standards Commission hold a series of public meetings with representatives of affected industries and state and local agencies prior to adopting standards under this section.

Article 2. Food Facility Restroom Requirements (Reserved)

Article 3. Food Processor Restroom Requirements (Reserved)

Article 4. Other Restroom Requirements (Reserved)

CHAPTER 3. MISCELLANEOUS NOISE CONTROL

118825. The Legislature, recognizing the growing problem of noise pollution throughout the state and that we are daily assaulted with increased noise from advancing technology, machines, vehicles, and human clamor, declares that excessive noise must be considered a degradation of our environment and a health hazard to our citizens.

The Legislature further declares that it is particularly concerned that the proposed supersonic transport aircraft may significantly

increase the noise level in the areas surrounding our state's airports unless preventive legal sanctions are invoked.

The Legislature is compelled to enact a noise limit for aircraft landing in the state, as a necessary and proper function of its police powers, in order to protect the health and welfare of the citizens of this state.

118830. (a) Except in an emergency situation, no private or commercial aircraft entering commercial service after the effective date of this section may land or take off within the state if it produces noise in excess of the federal certification limits for subsonic jet transport aircraft as set forth in Title 14, Code of Federal Regulations, Part 36.

(b) The prohibition contained in this section shall not apply in the case of an aircraft of a type or class manufactured or in production on or before the effective date of this section where the manufacture of the aircraft is ordered and the aircraft is delivered for commercial service no later than three years after the effective date of this section.

CHAPTER 4. INDOOR AIR QUALITY

Article 1. California Indoor Clean Air Act of 1976

118875. This article and Article 2 (commencing with Section 118920) shall be known and may be cited as the California Indoor Clean Air Act of 1976.

118880. The Legislature finds and declares that tobacco smoke is a hazard to the health of the general public.

118885. Within indoor rooms, indoor chambers, or indoor places of public assembly in publicly owned buildings in which public business is conducted requiring or providing direct participation or observation by the general public there shall be a contiguous area of not less than 50 percent of the total area of the room, chamber, or place designated and posted by signs of sufficient number and posted in locations as to be readily seen by persons within the area, where the smoking of tobacco is prohibited while a public meeting is in progress. A public body, commission, agency, or other entity conducting a public meeting may waive the requirements of this section with respect to its own members, provided that the rights of nonsmoking members are not adversely affected.

118890. Every health facility, as defined in Section 1250, and clinic, as defined in Section 1200, shall comply with the following:

(a) Shall make every reasonable effort to assign patients to rooms according to the patient's individual nonsmoking or smoking preference.

(b) Shall designate and post by signs of sufficient number and posted in locations as to be readily seen by persons within the area,

a contiguous area of not less than 20 percent of every cafeteria or other dining area whose occupied capacity is 50 or more persons as a nonsmoking section.

(c) This section shall not prevent any health facility or clinic from banning smoking in any area that it may designate and post by sign or in all areas of the facility or clinic.

118895. Within every publicly owned building open to the general public for the primary purpose of exhibiting any motion picture, stage drama, music recital, or any other performance, with the exception of any indoor sporting event, signs shall be posted in sufficient number and in locations as to be readily seen by persons within the area, that shall designate that the smoking of tobacco is prohibited in any area other than that commonly known as the lobby. This prohibition shall not apply except during those times when the building is actually open to the public.

118900. Within every restaurant in a publicly owned building serving food or alcoholic beverages in rooms whose occupied capacity is 50 or more persons there shall be designated and posted by signs of sufficient number and posted in locations as to be readily seen by persons within the area, a contiguous area of not less than 20 percent of the serving area where the smoking of tobacco is prohibited.

(a) This section shall not apply to banquet rooms in use for private functions.

(b) This section shall not apply to premises under lease as a restaurant for the time as the lessee of record on January 1, 1977, has a lease as the operator of the restaurant.

(c) As used in this section, ‘‘restaurant’’ means any place designated as a restaurant by Section 28522.

118905. Any person may apply for a writ of mandate to compel compliance by any public entity that has not complied with the requirements of this article and Article 3 (commencing with Section 118920) for the designating or posting of nonsmoking areas or areas where the smoking of tobacco is prohibited. If judgment is given for the applicant, he or she may recover all reasonable costs of the suit, including reasonable attorney fees, reasonableness to be determined by the court.

118910. The Legislature declares its intent not to preempt the field of regulation of the smoking of tobacco. A local governing body may ban completely the smoking of tobacco, or may regulate smoking in any manner not inconsistent with this article and Article 3 (commencing with Section 118920) or any other provision of state law.

118915. (a) Except as provided in subdivision (b), no person shall smoke any tobacco product in any retail food production and marketing establishment, as defined in Section 28802, during the hours the establishment is open to the public.

(b) The provisions of subdivision (a) shall not apply to that portion of an establishment subject to Section 118900 nor to an area of an establishment set aside for employee smoking and not open to the public.

Article 2. Smoking in Private and Public Transportation

118920. (a) The Legislature hereby finds and declares that the United States Surgeon General's 1986 Report on the Health Consequences of Involuntary Smoking conclude all of the following:

(1) Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.

(2) The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lungs mature.

(3) The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.

(b) The Legislature further finds and declares the following:

(1) Nonsmokers have no adequate means to protect themselves from the damage inflicted upon them when they involuntarily inhale tobacco smoke.

(2) Regulation of smoking in public places is necessary to protect the health, safety, welfare, comfort, and environment of nonsmokers.

(c) It is, therefore, the intent of the Legislature, in enacting this article, to eliminate smoking on public transportation vehicles.

118925. It is unlawful for any person to smoke tobacco or any other plant product in any vehicle of a passenger stage corporation, the National Railroad Passenger Corporation (Amtrak) except to the extent permitted by federal law, in any aircraft except to the extent permitted by federal law, on a public transportation system, as defined by Section 99211 of the Public Utilities Code, or in any vehicle of an entity receiving any transit assistance from the state.

118930. A notice prohibiting smoking, displayed as a symbol and in English, shall be posted in each vehicle or aircraft subject to this article.

118935. (a) Every person and public agency providing transportation services for compensation, including, but not limited to, the National Railroad Passenger Corporation (Amtrak) to the extent permitted by federal law, passenger stage corporations, and local agencies that own or operate airports, shall designate and post, by signs of sufficient number and posted in locations that may be readily seen by persons within the area, a contiguous area of not less than 75 percent of any area made available by the person or public agency as a waiting room for these passengers where the smoking of

tobacco is prohibited. Not more than 25 percent of any given area may be set aside for smokers.

(b) Every person or public agency subject to subdivision (a) shall also post, by sign of sufficient number and posted in locations as to be readily seen by persons within the area of any building where tickets, tokens, or other evidences that a fare has been paid for transportation services that are provided by the person or public agency, a notice that the smoking of tobacco by persons waiting in line to purchase the tickets, tokens, or other evidences that a fare has been paid is prohibited.

(c) It is unlawful for any person to smoke in an area posted pursuant to this section.

118940. This article does not preempt any local ordinance on the same subject where a local ordinance is more restrictive to the benefit of the nonsmoker.

118945. Any violation of this article is an infraction punishable by a fine not exceeding one hundred dollars ($100) for a first violation, by a fine not exceeding two hundred dollars ($200) for a second violation within one year, or by a fine not exceeding five hundred dollars ($500) for a third and for each subsequent violation within one year.

Article 3. Tobacco Distribution

118950. (a) The Legislature hereby finds and declares the following:

(1) Smoking is the single most important source of preventable disease and premature death in California.

(2) Smoking is responsible for one-quarter of all death caused by fire.

(3) Tobacco-related disease places a tremendous financial burden upon the persons with the disease, their families, the health care delivery system, and society as a whole.

(4) Despite laws in at least 44 states prohibiting the sale of tobacco products to minors, each day 3,000 children start using tobacco products in this nation. Children under the age of 18 consume 947 million packages of cigarettes in this country yearly.

(5) The earlier a child begins to use tobacco products, the more likely it is that the child will be unable to quit.

(6) More than 60 percent of all smokers begin smoking by the age of 14, and 90 percent begin by age 19.

(7) Use of smokeless tobacco products among minors in this state is increasing.

(8) Smokeless tobacco or chewing tobacco is harmful to the health of individuals and may cause gum disease, mouth or oral cancers, increased tooth decay and leukoplakia.

(9) Tobacco product advertising and promotion are an important cause of tobacco use among children. More money is spent advertising and promoting tobacco products than any other consumer product.

(10) Distribution of tobacco product samples and coupons is a recognized source by which minors obtain tobacco products, beginning the addiction process.

(11) It is the intent of the Legislature that keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the highest priorities in disease prevention for the State of California.

(b) It is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes from engaging in the nonsale distribution of any smokeless tobacco or cigarettes to any person in any public building, park or playground, or on any public sidewalk, street, or other public grounds.

(c) For purposes of this section:

(1) ''Nonsale distribution'' means to give smokeless tobacco or cigarettes to the general public at no cost, or at nominal cost, or to give coupons or rebate offers for smokeless tobacco or cigarettes to the general public at no cost or at nominal cost. Distribution of tobacco products or coupons or rebate offers in connection with the sale of another item, including tobacco products, cigarette lighters, magazines, or newspapers shall not constitute nonsale distribution.

(2) ''Smokeless tobacco'' means (A) a loose or flat, compressed cake form of tobacco that may be chewed or held in the mouth or (B) a shredded, powdered, or pulverized form of tobacco that may be inhaled through the nostrils, chewed, or held in the mouth.

(3) ''Public building, park, playground, sidewalk, street, or other public grounds'' means any structure or outdoor area that is owned, operated, or maintained by any public entity, including, but not limited to: city and county streets and sidewalks, parade grounds, fair grounds, public transportation facilities and terminals, public reception areas, public health facilities, public recreational facilities, and public office buildings.

(d) Any person who violates this section shall be liable for a civil penalty of not less than two hundred dollars ($200) for one act, five hundred dollars ($500) for two acts, and one thousand dollars ($1,000) for each succeeding violation. Each distribution of a single package, coupon, or rebate offer to an individual member of the general public in violation of this section shall be considered a separate violation.

(e) Nothing contained in this section or any other provision of law shall invalidate an ordinance of, or be construed to prohibit the adoption of an ordinance by, a city or county regulating distribution of smokeless tobacco or cigarette samples within its boundaries that

is more restrictive than this section. If this occurs, the more restrictive local ordinance shall control to the extent of any inconsistency between it and this section.

(f) This section shall not apply to any public building, park, playground, sidewalk, street, or other public grounds where minors are prohibited by law. This section also shall not apply to any public building, park, playground, sidewalk, street, or other public grounds leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises.

CHAPTER 5. ELECTRICAL HAZARDS

119075. (a) The Legislature intends to prevent electricity generated by permanent or portable electric generators from backfeeding into a utility electrical distribution system by the enactment of this chapter.

(b) Any portable electrical generator that is capable of being connected temporarily to a customer's electrical system, that is normally supplied by an electrical corporation or state or local public agency, shall be connected only after opening the customer's main switch so as to isolate the customer's electrical system from that of the electrical corporation or state or local agency.

(c) Any electrical generator, other than a generator designed to run in parallel with the system of the serving utility and approved by that utility, that is capable of being permanently connected to a customer's electrical system shall be connected only by means of a double throw switch so as to isolate the customer's electrical system from that of the electrical corporation or state or local agency.

119080. (a) Every manufacturer of a portable or permanent electrical generator that is capable of being connected either permanently or temporarily to a commercial, industrial, or residential structure's electrical system, shall include a warning statement in the generator's instruction manual and a legible warning label on the generator that states the requirement of Section 119075 and explains the electrical hazards of backfeed into a utility's distribution system. The same warning information shall be included in all advertisements offering portable electric generators.

(b) No person or public agency shall sell, rent to another person or public agency, or offer for sale or rent to another person or public agency a portable electrical generator unless the legible warning label is on a visible surface of the generator.

119085. (a) Every public utility or utility district shall notify all electrical service customers of the electrical backfeed hazards of portable and permanent electric generators.

(b) Any owner, renter, or lessee who possesses and operates an electric generator, when the generator is connected to a commercial, industrial, or residential structure's electrical system that is

connected to the service of a public utility or utility district, shall notify the utility of the location of the generator.

119090. (a) Any person who violates Sections 119075 to 119085, inclusive, is guilty of a misdemeanor, and subject to a fine of not more than five hundred dollars ($500) or not more than six months' imprisonment.

(b) For purposes of this section, ''person'' shall not include public agencies, officers or employees of public agencies, or public utilities.

CHAPTER 6. CHLOROFLUOROCARBONS

119150. (a) On and after October 15, 1978, no person shall manufacture in this state a saturated chlorofluorocarbon not containing hydrogen for use as an aerosol propellant in a can, canister, or other container.

(b) On and after December 15, 1978, no person shall manufacture in this state any can, canister, or other container that is intended to utilize an aerosol propellant chemically composed, in whole or in part, of a saturated chlorofluorocarbon not containing hydrogen.

(c) On and after April 15, 1979, no person shall sell in this state any can, canister, or other container that utilizes an aerosol propellant chemically composed, in whole or in part, of a saturated chlorofluorocarbon not containing hydrogen.

119155. Notwithstanding the foregoing provisions of this chapter, nothing in this chapter shall preclude the manufacture or sale of saturated chlorofluorocarbons not containing hydrogen for any of the uses exempted in currently proposed federal regulations, to be modified as the federal regulations are modified.

119160. Subdivisions (a) and (b) of Section 119150 shall be superseded by the enactment or adoption of any federal law or regulation prohibiting the manufacture of any aerosol product utilizing saturated chlorofluorocarbons not containing hydrogen and prohibiting the manufacture of saturated chlorofluorocarbons not containing hydrogen for use as an aerosol propellant in a can, canister, or other container.

SEC. 7. Division 105 (commencing with Section 120100) is added to the Health and Safety Code, to read:

DIVISION 105. COMMUNICABLE DISEASE PREVENTION AND CONTROL

PART 1. ADMINISTRATION OF COMMUNICABLE DISEASE PREVENTION AND CONTROL

CHAPTER 1. GENERAL PROVISIONS AND DEFINITIONS

120100. ''Health officer,'' as used in the Communicable Disease Prevention and Control Act (Section 27) includes county, city, and district health officers, and city and district health boards, but does not include advisory health boards.

120105. Whenever in the Communicable Disease Prevention and Control Act (Section 27), service or notice of any order or demand is provided for, it shall be sufficient to do so by registered or certified mail if a receipt therefor signed by the person to be served or notified is obtained. The receipt shall be prima facie evidence of the service or notice in any civil or criminal action.

120110. As used in the Communicable Disease Prevention and Control Act (Section 27) a person has ''active tuberculosis disease'' when either one of the following occur:

(a) A smear or culture taken from any source in the person's body has tested positive for tuberculosis and the person has not completed the appropriate prescribed course of medication for active tuberculosis disease.

(b) There is radiographic, current clinical, or laboratory evidence sufficient to support a medical diagnosis of tuberculosis for which treatment is indicated.

120115. As used in the Communicable Disease Prevention and Control Act (Section 27) the following terms have the following meanings, unless the context indicates otherwise:

(a) ''Infectious tuberculosis disease'' means active or suspected active tuberculosis disease in an infectious state.

(b) ''Tuberculosis infection'' means the latent phase of tuberculosis, during which the infected person cannot spread tuberculosis to others.

(c) ''Heightened risk of tuberculosis exposure'' means likely exposure to persons with infectious tuberculosis disease.

(d) ''The appropriate prescribed course of medication for tuberculosis disease'' means that course recommended by the health officer, the most recent guidelines of the department, the most recent guidelines of the Centers for Disease Control and Prevention, or the most recent guidelines of the American Thoracic Society.

(e) ''Directly observed therapy'' means the appropriately prescribed course of treatment for tuberculosis disease in which the prescribed antituberculosis medications are administered to the person or taken by the person under direct observation of a health

care provider or a designee of the health care provider approved by the local health officer.

(f) An ''examination'' for tuberculosis infection or disease means conducting tests, including, but not limited to, Mantoux tuberculin skin tests, laboratory examination, and X-rays, as recommended by any of the following:

(1) The local health officer.

(2) The most recent guidelines of the state department.

(3) The most recent guidelines of the Centers for Disease Control and Prevention.

(4) The most recent guidelines of the American Thoracic Society.

(g) ''State correctional institution'' means a prison, institution, or other facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority.

(h) ''Local detention facility'' is defined in Section 6031.4 of the Penal Code.

(i) ''Penal institution'' means either a state correctional institution or a local detention facility.

(j) ''Health facility'' means a licensed health facility as defined in Sections 1250, 1250.2, and 1250.3.

(k) ''Health officer'' or ''local health officer'' includes his or her designee.

CHAPTER 2. FUNCTIONS AND DUTIES OF THE STATE DEPARTMENT OF HEALTH SERVICES

120125. The department shall examine into the causes of communicable disease in man and domestic animals occurring or likely to occur in this state.

120130. The department shall establish a list of reportable diseases. The list of reportable diseases may include both communicable and noncommunicable diseases. The list may include those diseases that are either known to be, or suspected of being, transmitted by milk or milk-based products. The list shall also include, but not be limited to, diphtheria, listeria, salmonella, shigella, streptococcal infection in food handlers or dairy workers, and typhoid. This list may be changed at any time by the department. Those diseases listed as reportable shall be properly reported as required to the department by the health officer.

The department may from time to time adopt and enforce regulations requiring isolation (strict or modified) or quarantine for any of the contagious, infectious, or communicable diseases if in the opinion of the department the action is necessary for the protection of the public health.

The health officer may require isolation (strict or modified) or quarantine for any case of contagious, infectious, or communicable disease when this action is necessary for the protection of the public

health. This list shall be published in Title 17 of the California Code of Regulations.

120135. The department may establish and maintain places of quarantine or isolation.

120140. Upon being informed by a health officer of any contagious, infectious, or communicable disease the department may take measures as are necessary to ascertain the nature of the disease and prevent its spread. To that end, the department may, if it considers it proper, take possession or control of the body of any living person, or the corpse of any deceased person.

120142. (a) The state director may order examinations for tuberculosis infection in the following persons for the purpose of directing preventive measures:

(1) Persons in close contact with persons with infectious tuberculosis disease.

(2) Other persons for whom the state director has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination for tuberculosis infection shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

120145. The department may quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, other property, places, cities, or localities, whenever in its judgment the action is necessary to protect or preserve the public health.

120150. The department may destroy such objects as bedding, carpets, household goods, furnishings, materials, clothing, or animals, when ordinary means of disinfection are considered unsafe, and when the property is in its judgment, an imminent menace to the public health.

CHAPTER 3. FUNCTIONS AND DUTIES OF LOCAL HEALTH OFFICERS

120175. Each health officer knowing or having reason to believe that any case of the diseases made reportable by regulation of the department, or any other contagious, infectious or communicable disease exists, or has recently existed, within the territory under his or her jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases.

120180. If the health officer of any county having a population of 5,000,000 or more employs personnel as inspectors or investigators in the enforcement of the Communicable Disease Prevention and Control Act (Section 27), who are not otherwise licensed, registered, nor certified by this state, the personnel shall meet any one of the following minimum standards and qualifications:

(a) Possess a bachelor’s degree in public health from an institution on the list of accredited colleges of the United States Office of Education.

(b) Possess a bachelor's degree with a minimum of 30 semester units of basic sciences from an institution on the list of accredited colleges of the United States Office of Education; or a statement from an accredited institution that the applicant has successfully completed a minimum of 16 semester units distributed among at least the following fields: public health and administration, epidemiology, public health statistics, public health microbiology, and communicable disease control.

(c) Possess a bachelor's degree from an institution on the list of accredited colleges of the United States Office of Education; and have had at least one year of full-time experience or the equivalent in investigation or inspection work in public health or law enforcement.

(d) Be employed as an inspector or investigator in communicable disease prevention and control by a county health department in the State of California, and have passed an official civil service examination therefor prior to the effective date of this section.

120185. In the case of a local epidemic of disease, the health officer shall report at those times as are requested by the department all facts concerning the disease, and the measures taken to abate and prevent its spread.

120190. Each health officer shall immediately report by telegraph or telephone to the department every discovered or known case or suspect case of those diseases designated for immediate reporting by the department. Within 24 hours after investigation each health officer shall make reports as the department may require.

120195. Each health officer shall enforce all orders, rules, and regulations concerning quarantine or isolation prescribed or directed by the department.

120200. Each health officer, whenever required by the department, shall establish and maintain places of quarantine or isolation that shall be subject to the special directions of the department.

120205. No quarantine shall be established by a county or city against another county or city without the written consent of the department.

120210. Whenever in the judgment of the department it is necessary for the protection or preservation of the public health, each health officer shall, when directed by the department, do the following:

(a) Quarantine or isolate and disinfect persons, animals, houses or rooms, in accordance with general and specific instructions of the department.

(b) Destroy bedding, carpets, household goods, furnishings, materials, clothing, or animals, when ordinary means of disinfection are considered unsafe, and when the property is, in the judgment of the department, an imminent menace to the public health.

When the property is destroyed pursuant to this section, the governing body of the locality where the destruction occurs may make adequate provision for compensation in proper cases for those injured thereby.

120215. Upon receiving information of the existence of contagious, infectious, or communicable disease for which the department may from time to time declare the need for strict isolation or quarantine, each health officer shall:

(a) Ensure the adequate isolation of each case, and appropriate quarantine of the contacts and premises.

(b) Follow local rules and regulations, and all general and special rules, regulations, and orders of the department, in carrying out the quarantine or isolation.

120220. When quarantine or isolation, either strict or modified, is established by a health officer, all persons shall obey his or her rules, orders, and regulations.

120225. A person subject to quarantine or strict isolation, residing or in a quarantined building, house, structure, or other shelter, shall not go beyond the lot where the building, house, structure, or other shelter is situated, nor put himself or herself in immediate communication with any person not subject to quarantine, other than the physician, the health officer or persons authorized by the health officer.

120230. No instructor, teacher, pupil, or child who resides where any contagious, infectious, or communicable disease exists or has recently existed, that is subject to strict isolation or quarantine of contacts, shall be permitted by any superintendent, principal, or teacher of any college, seminary, or public or private school to attend the college, seminary, or school, except by the written permission of the health officer.

120235. No quarantine shall be raised until every exposed room, together with all personal property in the room, has been adequately treated, or, if necessary, destroyed, under the direction of the health officer; and until all persons having been under strict isolation are considered noninfectious.

120240. If, pursuant to Section 120130, a modified isolation order is issued, and the order is not complied with, the local health officer may, in that instance, issue a strict isolation order.

120245. Each health officer, other than a county health officer, in the county shall transmit to the county health officer at least weekly in writing a report showing the number and character of infectious, contagious, or communicable diseases reported, and their location.

120250. All physicians, nurses, clergymen, attendants, owners, proprietors, managers, employees, and persons living, or visiting any sick person, in any hotel, lodginghouse, house, building, office, structure, or other place where any person is ill of any infectious, contagious, or communicable disease, shall promptly report that fact

to the health officer, together with the name of the person, if known, the place where he or she is confined, and the nature of the disease, if known.

CHAPTER 4. VIOLATIONS

120275. Any person who, after notice, violates, or who, upon the demand of any health officer, refuses or neglects to conform to, any rule, order, or regulation prescribed by the department respecting a quarantine or disinfection of persons, animals, things, or places, is guilty of a misdemeanor.

120280. Inasmuch as the orders provided for by Section 121365 are for the protection of the public health, any person who, after service upon him or her of an order of a local health officer as provided in Section 121365 violates or fails to comply with the order, is guilty of a misdemeanor. Upon conviction thereof, in addition to any and all other penalties that may be imposed by law upon the conviction, the person may be ordered by the court confined until the order of the local health officer shall have been fully complied with or terminated by the local health officer, but not exceeding one year from the date of passing judgment upon the conviction, further, the court, upon suitable assurances that the order of the local health officer will be complied with, may place any person convicted of a violation of the order of the local health officer upon probation for a period not to exceed two years, upon condition that the order of the local health officer be fully complied with, further, upon any subsequent violation of the order of the local health officer, the probation shall be terminated and confinement as provided for in this section shall be ordered by the court. Confinement may be accomplished by placement in any appropriate facility, penal institution, or dwelling approved for the specific case by the local health officer.

120285. Upon any subsequent conviction under the provisions of Section 120280, the court may order the person confined for a period not exceeding one year for the subsequent conviction, or other penalty as provided by that section.

120290. Except in the case of the removal of an afflicted person in a manner the least dangerous to the public health, any person afflicted with any contagious, infectious, or communicable disease who wilfully exposes himself, and any person who wilfully exposes another person afflicted with the disease, is guilty of a misdemeanor.

120295. Any person who violates any section in Chapter 3 (commencing with Section 120175, but excluding Sections 120130 and 120195), is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars ($50) nor more than one thousand dollars ($1,000), or by imprisonment for a term of not more than 90 days, or

by both. He or she is guilty of a separate offense for each day that the violation continued.

120300. The district attorney of the county where a violation of Sections 121365 and 120280 may be committed, shall prosecute all those violations and, upon the request of a health officer, shall prosecute, as provided in Section 120280, violations of any order of a health officer made and served as provided in Section 121365 or Section 120105.

120305. Every person who possesses any intoxicating liquor in or on any public hospital or sanatorium providing for the treatment of tuberculosis or within the boundaries of the grounds belonging thereto is guilty of a misdemeanor. This section shall not prohibit (a) the possession of any intoxicating liquor used for medicinal purposes when issued pursuant to a written order of a physician licensed to practice medicine under the laws of the State of California, (b) the possession of any intoxicating liquor by personnel for his or her own use who resides at the hospital or sanatorium or on the grounds thereof, (c) the possession of any intoxicating liquor used by a minister of the gospel or priest or rabbi in a religious sacrament or ceremony or (d) the service of wine to a patient as part of the hospital's regular menu or bill of fare if the patient is located in a portion of the premises wholly separate and isolated from patients receiving treatment for tuberculosis.

PART 2. IMMUNIZATIONS

CHAPTER 1. EDUCATIONAL AND CHILD CARE FACILITY IMMUNIZATION REQUIREMENTS

120325. In enacting Chapter 1 (commencing with Section 120325, but excluding Section 120380) and in enacting Sections 120400, 120405, 120410, and 120415, it is the intent of the Legislature to provide:

(a) A means for the eventual achievement of total immunization of appropriate age groups against the following childhood diseases:

(1) Diphtheria.
(2) Hepatitis B.
(3) Haemophilus influenzae type b.
(4) Measles.
(5) Mumps.
(6) Pertussis (whooping cough).
(7) Poliomyelitis.
(8) Rubella.
(9) Tetanus.
(10) Any other disease that is consistent with the most current recommendations of the United States Public Health Services' Centers for Disease Control Immunization Practices Advisory

Committee and the American Academy of Pediatrics Committee of Infectious Diseases, and deemed appropriate by the department.

(b) That the persons required to be immunized be allowed to obtain immunizations from whatever medical source they so desire, subject only to the condition that the immunization be performed in accordance with the regulations of the department and that a record of the immunization is made in accordance with the regulations.

(c) Exemptions from immunization for medical reasons or because of personal beliefs.

(d) For the keeping of adequate records of immunization so that health departments, schools, and other institutions, parents or guardians, and the persons immunized will be able to ascertain that a child is fully or only partially immunized, and so that appropriate public agencies will be able to ascertain the immunization needs of groups of children in schools or other institutions.

(e) Incentives to public health authorities to design innovative and creative programs that will promote and achieve full and timely immunization of children.

120330. The department, in consultation with the Department of Education, shall adopt and enforce all regulations necessary to carry out Chapter 1 (commencing with Section 120325, but excluding Section 120380) and to carry out Sections 120400, 120405, 120410, and 120415.

120335. (a) As used in Chapter 1 (commencing with Section 120325, but excluding Section 120380) and as used in Sections 120400, 120405, 120410, and 120415, the term ''governing authority'' means the governing board of each school district or the authority of each other private or public institution responsible for the operation and control of the institution or the principal or administrator of each school or institution.

(b) The governing authority shall not unconditionally admit any person as a pupil of any private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center, unless prior to his or her first admission to that institution he or she has been fully immunized. The following are the diseases for which immunizations shall be documented:

(1) Diphtheria.

(2) Haemophilus influenzae type b, except for children who have reached the age of four years, six months.

(3) Measles.

(4) Mumps, except for children who have reached the age of seven years.

(5) Pertussis (whooping cough), except for children who have reached the age of seven years.

(6) Poliomyelitis.

(7) Rubella.

(8) Tetanus.

(9) Any other disease deemed appropriate by the department, taking into consideration the recommendations of the United States Public Health Services' Centers for Disease Control Immunization Practices Advisory Committee and the American Academy of Pediatrics Committee of Infectious Diseases.

(c) The department may specify the immunizing agents that may be utilized and the manner in which immunizations are administered.

120340. A person who has not been fully immunized against one or more of the diseases listed in Section 120335 may be admitted by the governing authority on condition that within time periods designated by regulation of the department he or she presents evidence that he or she has been fully immunized against all of these diseases.

120345. The immunizations required by Chapter 1 (commencing with Section 120325, but excluding Section 120380) and required by Sections 120400, 120405, 120410, and 120415 may be obtained from any private or public source desired if the immunization is administered and records are made in accordance with regulations of the department.

120350. The county health officer of each county shall organize and maintain a program to make immunizations available to all persons required by Chapter 1 (commencing with Section 120325, but excluding Section 120380) and required by Sections 120400, 120405, 120410, and 120415 to be immunized. The county health officer shall also determine how the cost of the program is to be recovered. To the extent that the cost to the county is in excess of that sum recovered from persons immunized, the cost shall be paid by the county in the same manner as other expenses of the county are paid.

120355. Any person or organization administering immunizations shall furnish each person immunized, or his or her parent or guardian, with a written record of immunization given in a form prescribed by the department.

120360. The requirements of Chapter 1 (commencing with Section 120325, but excluding Section 120380) and of Sections 120400, 120405, 120410, and 120415 shall not apply to any person 18 years of age or older, or to any person seeking admission to a community college.

120365. Immunization of a person shall not be required for admission to a school or other institution listed in Section 120335 if the parent or guardian or adult who has assumed responsibility for his or her care and custody in the case of a minor, or the person seeking admission if an emancipated minor, files with the governing authority a letter or affidavit stating that the immunization is contrary to his or her beliefs. However, whenever there is good cause to believe that the person has been exposed to one of the

communicable diseases listed in subdivision (a) of Section 120325, that person may be temporarily excluded from the school or institution until the local health officer is satisfied that the person is no longer at risk of developing the disease.

120370. If the parent or guardian files with the governing authority a written statement by a licensed physician to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances that contraindicate immunization, that person shall be exempt from the requirements of Chapter 1 (commencing with Section 120325, but excluding Section 120380) and Sections 120400, 120405, 120410, and 120415 to the extent indicated by the physician's statement.

120375. (a) The governing authority of each school or institution included in Section 120335 shall require documentary proof of each entrant's immunization status. The governing authority shall record the immunizations of each new entrant in the entrant's permanent enrollment and scholarship record on a form provided by the department. The immunization record of each new entrant admitted conditionally shall be reviewed periodically by the governing authority to ensure that within the time periods designated by regulation of the department he or she has been fully immunized against all of the diseases listed in Section 120335, and immunizations received subsequent to entry shall be added to the pupil's immunization record.

(b) The governing authority of each school or institution included in Section 120335 shall prohibit from further attendance any pupil admitted conditionally who failed to obtain the required immunizations within the time limits allowed in the regulations of the department, unless the pupil is exempted under Section 120365 or 120370, until that pupil has been fully immunized against all of the diseases listed in Section 120335.

(c) The governing authority shall file a written report on the immunization status of new entrants to the school or institution under their jurisdiction with the department and the local health department at times and on forms prescribed by the department. As provided in paragraph (4) of subdivision (a) of Section 49076 of the Education Code, the local health department shall have access to the complete health information as it relates to immunization of each student in the schools or other institutions listed in Section 120335 in order to determine immunization deficiencies.

(d) The governing authority shall cooperate with the county health officer in carrying out programs for the immunization of persons applying for admission to any school or institution under its jurisdiction. The governing board of any school district may use funds, property, and personnel of the district for that purpose. The

governing authority of any school or other institution may permit any licensed physician or any qualified registered nurse as provided in Section 2727.3 of the Business and Professions Code to administer immunizing agents to any person seeking admission to any school or institution under its jurisdiction.

120380. It is the intent of the Legislature that the administration of immunizing agents by registered nurses in school immunization programs under the direction of a supervising physician and surgeon as provided in Section 11704 of the Education Code shall be in accordance with accepted medical procedure. To implement this intent, the department may adopt written regulations specifying the procedures and circumstances under which a registered nurse, acting under the direction of a supervising physician and surgeon, may administer an immunizing agent pursuant to Section 11704 of the Education Code.

However, nothing in this section shall be construed to prevent any registered nurse from administering an immunizing agent in accordance with Section 11704 of the Education Code in the absence of written regulations as the department is authorized to adopt under this section.

CHAPTER 2. DEPARTMENT OF HEALTH SERVICES PROVISION OF FUNDS, IMMUNIBIOLOGICS, AND ACCESS TO IMMUNIBIOLOGICS

120400. The department may establish an immunization outreach program.

120405. (a) A local health officer, or consortium of local health officers, may establish permanent, temporary, or mobile sites and programs, for the purpose of immunizing children, or performing outreach to refer parents to other programs that provide immunizations and comprehensive health services. These sites for referral or immunization may include, but are not limited to, the following:

(1) Public places where parents of children at high risk of remaining unimmunized reside, shop, worship, or recreate.

(2) School grounds, either during regular hours, or evening hours or on weekends.

(3) On or adjacent to sites of public- or community-based agencies or programs that either provide or refer persons to public assistance programs or services.

(b) Outreach programs shall, to the extent feasible, include referral components intended to link immunized children with available public or private primary care providers, in order to increase access to continuing pediatric care, including subsequent immunization services as necessary.

120410. The population to be targeted by the program shall include children who do not receive immunizations through private

third-party sources or other public sources with priority given to infants and children from birth up to age three. Outreach programs shall include information to the families of children being immunized about possible reactions to the vaccine and about followup referral sources.

120415. The Health and Welfare Agency may waive state administrative, eligibility, and billing requirements that apply to other public assistance programs through which immunization and comprehensive health services outreach and vaccination are offered, for counties that establish streamlined administrative, eligibility, billing, and referral procedures between those public assistance programs, and the immunization and comprehensive health services programs established pursuant to Sections 120400 through 120415, inclusive.

120420. The department shall provide financial assistance to county and areawide immunization campaigns under the direction of local health officers for the prevention of rubella.

120425. All moneys appropriated to the department for the purposes of this section and Section 120420 shall be made available to local health departments, as defined in Section 101185, or to areawide associations of local health departments. All moneys received by the local departments or areawide associations shall be utilized only for the purchase of rubella vaccines, other necessary supplies and equipment for rubella immunization campaigns, and promotional costs of such campaigns. No moneys appropriated for the purpose of this section and Section 120420 shall be used by the department or by any local department or areawide association for administrative purposes, and no such moneys may be used to supplant or support local health department clinics and programs already regularly operated by such the departments, but may be used only for additional county or areawide rubella immunization campaigns. All moneys appropriated for the purposes of this section and Section 120420 shall be expended by March 31, 1971.

120430. (a) The Legislature finds and declares that 1990 marks one of the worst measles epidemics in recent history and that this epidemic threatens the health and safety of our schoolaged children.

The Legislature finds and declares that, according to the Center for Disease Control and the American Academy of Pediatrics, current medical technology suggests that in order to be fully immunized against measles, children should receive two doses of the immunization agent for measles before the age of seven years.

It is the intent of the Legislature to ensure that all possible steps are taken to combat the spread of any disease through California schools.

(b) The department, in consultation with the State Department of Education, shall develop and adopt regulations to ensure that every student in any private or public elementary or secondary school, child care center, day nursery, nursery school, or

development center shall have access to full immunization against measles, as determined by the Center for Disease Control, to the extent funds are available.

Priority shall be given to children who have not received any type of measles immunization.

120435. The department shall purchase or prepare, and distribute free of cost, under any regulations as may be necessary, anti-rabic virus to be used in the treatment of persons exposed to rabies when they declare that it would be a hardship for them to pay for anti-rabic treatment.

CHAPTER 3. IMMUNIZATION REACTIONS

120450. It is the intent of the Legislature to provide for care, including medical, institutional, supportive, and rehabilitative care, necessitated because of severe adverse reaction to any immunization required by state law to be administered to children under 18 years of age.

As used in this chapter, a severe adverse reaction is one that manifests itself not more than 30 days after the immunization and requires extensive medical care, as defined by regulation of the department.

Medical expenses shall be reimbursed by the department in an amount not to exceed twenty-five thousand dollars ($25,000).

Eligibility for reimbursement under this section shall be limited to persons requiring extensive medical care, as defined by the department pursuant to this section. Such reimbursement shall be made without regard to ability to pay and neither the parents nor the estates of the persons shall be liable for repayment to the state of any portion of the amounts reimbursed pursuant to this chapter.

The department shall, by regulation, establish procedures for processing claims pursuant to this section.

Whenever reimbursement is provided for medical expenses under this chapter, the state shall be subrogated to the rights of the person receiving reimbursement of medical expenses for any amounts due to or recoverable by the person from third parties. The subrogation shall be for an amount equal to any claim reimbursed under this chapter.

There is hereby created in the State Treasury the Immunization Adverse Reaction Fund, that shall be administered by the department and is appropriated without regard to fiscal years. Reimbursements made pursuant to this chapter shall be made from the Immunization Adverse Reaction Fund.

120455. No person shall be liable for any injury caused by an act or omission in the administration of a vaccine or other immunizing agent to a minor, including the residual effects of the vaccine or immunizing agent, if the immunization is either required by state

law, or given as part of an outreach program pursuant to Sections 120400 through 120415, inclusive, and the act or omission does not constitute willful misconduct or gross negligence.

CHAPTER 4. REPORTS

120475. On or before March 15, 1991, and on or before March 15 of each year thereafter, the department shall submit a report to the Legislature on all of the following issues:

(a) The immunization status of young children in the state, based on available data.

(b) The steps taken to strengthen immunization efforts, particularly efforts through the Child Health and Disability Prevention Program.

(c) The steps taken to improve immunization levels among currently underserved minority children, young children in family day care and other child care settings, and children with no health insurance coverage.

(d) The improvements made in ongoing methods of immunization outreach and education in communities where immunization levels are disproportionately low.

(e) Its recommendations for a comprehensive strategy for fully immunizing all California children and its analysis of the funding necessary to implement the strategy.

PART 3. SEXUALLY TRANSMITTED DISEASE

CHAPTER 1. PREVENTION AND CONTROL

120500. As used in the Communicable Disease Prevention and Control Act (Section 27) ''venereal diseases'' means syphilis, gonorrhea, chancroid, lymphopathia venereum, and granuloma inguinale.

120505. The department shall develop and review plans and provide leadership and consultation for, and participate in, a program for the prevention and control of venereal disease.

120510. The department shall cooperate in the prevention, control, and cure of venereal diseases with physicians and surgeons; medical schools; public and private hospitals, dispensaries, and clinics; public and private school, college and university authorities; penal and charitable institutions; reform and industrial schools; detention homes; federal, state, local and district health officers, and boards of health, and all other health authorities; institutions caring for the mentally ill; and with any other persons, institutions, or agencies.

120515. The department shall investigate conditions affecting the prevention and control of venereal diseases and approved

procedures for prevention and control, and shall disseminate educational information relative thereto.

120520. The department shall conduct educational and publicity work as it may deem necessary; and, from time to time, shall cause to be issued, free of charge, copies of regulations, pamphlets, and other literature as it deems reasonably necessary.

120525. The department may establish, maintain, and subsidize clinics, dispensaries, and prophylactic stations for the diagnosis, treatment, and prevention of venereal diseases, and may provide medical, advisory, financial, or other assistance to the clinics, dispensaries, and stations as may be approved by it. No clinic, dispensary, or prophylactic station shall be approved unless it meets the requirements of the board and complies with its regulations.

120530. The department may furnish treatment for a case or for a group of cases in rural counties or cities upon the recommendation of the local health officer if adequate facilities for the treatment are not available in the county or city.

120535. Any state agency conducting a public hospital shall admit acute venereal disease cases, when, in the opinion of the department or the local health officer having jurisdiction, persons infected with venereal disease may be a menace to public health.

120540. The department may require any physician in attendance on a person infected or suspected of being infected with a venereal disease infection to submit specimens as may be designated for examination, when in its opinion the procedure is reasonably necessary to carry out the provisions and purposes of this chapter.

120545. The examination may be made in the state laboratory or in a local public health laboratory designated by the department or in a clinical laboratory that is under the immediate supervision and direction of a clinical laboratory technologist or a licensed physician and surgeon.

120550. Nothing in this chapter limits any person’s freedom to have additional examinations made elsewhere than specified in this chapter.

120555. Every diseased person shall give all information required by this chapter, including the name and address of any person from whom the disease may have been contracted and to whom the disease may have been transmitted.

120560. Every diseased person shall from time to time submit to approved examinations to determine the condition of the disease.

120565. If any person subject to proper venereal disease control measures discontinues any control procedure required by this chapter, the agency administering the procedure prior to the discontinuance shall make reasonable efforts to determine whether the person is continuing to comply with the procedure elsewhere.

120570, If it appears reasonably likely that the person is not complying with the procedure elsewhere, the agency that was administering the procedure prior to the discontinuance shall make all reasonable efforts to induce the person to comply; and if it thereafter appears reasonably likely that he or she has failed to comply, shall report his or her name and address to the local health officer or board of health, or to the department where there is no local health officer or board.

120575. It is the duty of the local health officers to use every available means to ascertain the existence of cases of infectious venereal diseases within their respective jurisdictions, to investigate all cases that are not, or probably are not, subject to proper control measures approved by the board, to ascertain so far as possible all sources of infection, and to take all measures reasonably necessary to prevent the transmission of infection.

120580. Notwithstanding any other provision of law, a person employed by a public health department as a venereal disease case investigator may perform venipuncture or skin puncture for the purpose of withdrawing blood for test purposes, upon specific authorization from a licensed physician and surgeon, even though he or she is not otherwise licensed to withdraw blood; provided that the person meets all of the following requirements:

(a) He or she works under the direction of a licensed physician and surgeon.

(b) He or she has been trained by a licensed physician and surgeon in the proper procedures to be employed when withdrawing blood, in accordance with training requirements established by the board, and has a statement signed by the instructing physician and surgeon that the training has been successfully completed.

120585. Local health officers may inspect and quarantine any place or person when the procedure is necessary to enforce the regulations of the board or the department.

120590. It is the duty of the district attorney of the county where a violation of this chapter may occur to prosecute the person accused of the violation.

120595. In any prosecution for a violation of any provision of this chapter, or any rule or regulation of the board made pursuant to this chapter, or in any quarantine proceeding authorized by this chapter, or in any habeas corpus or other proceeding in which the legality of the quarantine is questioned, any physician, health officer, spouse, or other person shall be competent and may be required to testify against any person against whom the prosecution or other proceeding was instituted, and the privileges provided by Sections 970, 971, 980, 994, and 1014 of the Evidence Code are not applicable to or in any such prosecution or proceeding.

120600. Any person who refuses to give any information to make any report, to comply with any proper control measure or

examination, or to perform any other duty or act required by this chapter, or who violates any provision of this chapter or any rule or regulation of the state board issued pursuant to this chapter, or who exposes any person to or infects any person with any venereal disease; or any person infected with a venereal disease in an infectious state who knows of the condition and who marries or has sexual intercourse, is guilty of a misdemeanor.

120605. Nothing in this chapter shall be construed to interfere with the freedom of any adherent of teachings of any well-recognized religious sect, denomination, or organization to depend exclusively upon prayer for healing in accordance with the teachings of the religious sect, denomination, or organization. Any such person, along with any person treating him or her, shall be exempt from all provisions of this chapter regarding venereal diseases, except that the provisions of this code and the regulations of the board regarding compulsory reporting of communicable diseases and the quarantine of those diseases, and regarding callings that a person with venereal disease may not engage, shall apply.

CHAPTER 2. PRENATAL SYPHILIS TESTS

120675. ''Approved laboratory'' as used in this chapter means a laboratory approved by the department, or any other laboratory whose director is licensed by the department according to law.

120680. ''Standard laboratory blood test'' as used in this chapter means a test for syphilis approved by the department.

120685. Every licensed physician and surgeon or other person engaged in prenatal care of a pregnant woman, or attending the woman at the time of delivery, shall obtain or cause to be obtained a blood specimen of the woman at the time of the first professional visit or within 10 days thereafter.

120690. The blood specimen thus obtained shall be submitted to an approved laboratory for a standard laboratory test for syphilis.

120695. In submitting a specimen to a laboratory the physician shall designate it as a prenatal test or a test following recent delivery.

120700. The laboratory shall submit the laboratory reports of records to the department as are required by regulation of the department. The health officer may destroy any copies of reports that have been retained by him or her pursuant to this section for a period of two years.

120705. All laboratory reports are confidential, and are not open to public inspection.

120710. In case of question concerning the accuracy of a test required by this chapter, it is mandatory upon the department to accept specimens for checking purposes from any district in the state.

120715. Any licensed physician and surgeon, or other person engaged in attendance upon a pregnant woman or a recently

delivered woman, or any representative of a laboratory who violates any provision of this chapter, is guilty of a misdemeanor. However, a licensed physician and surgeon, or other person engaged in attendance upon a pregnant or recently delivered woman, whose request for a specimen is refused, is not guilty of a misdemeanor for failure to obtain it.

CHAPTER 3. INFORMATION ON VENERAL DISEASE MATERIALS

120750. The department shall develop and prepare posters and leaflets that inform the public of venereal disease and make the posters and leaflets available to the California State Board of Pharmacy for distribution.

The department may determine the size, shape, and materials of the posters and leaflets so as to adequately fulfill the purposes of this chapter.

PART 4. HUMAN IMMUNODEFICIENCY VIRUS (HIV)

CHAPTER 1. DEFINITIONS

120775. As used in this code:

(a) ''AIDS'' means acquired immune deficiency syndrome.

(b) ''Human immunodeficiency virus'' or ''HIV'' means the etiologic virus of AIDS.

(c) ''HIV test'' means any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV.

CHAPTER 2. CALIFORNIA ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) PROGRAM (CAP)

120800. The intent of the Legislature in enacting this chapter is as follows:

(a) To fund specified pilot AIDS education programs.

(b) To fund pilot projects to demonstrate the value of noninstitutional health care services such as hospice, home health, and attendant care in controlling costs and providing humane care to people with AIDS and AIDS-related conditions.

(c) To fund clinical research.

(d) To fund the development of an AIDS Mental Health Project.

(e) To fund specified needs assessments, studies, and program evaluations.

(f) To authorize the use of funds appropriated by Section 6 of Chapter 23 of the Statutes of 1985 for preventive education for individuals who are seropositive as a result of antibody testing.

(g) To promote broad-based support for AIDS programs by encouraging community level networking and coordination of

efforts among private sector, nonprofit, and public service agencies as well as health care professionals and providers of essential services.

(h) To promote an aggressive community-based HIV infection prevention program in all communities and areas where behaviors and prevalence indicate high risk of HIV infection, and to encourage local programs to involve racial and ethnic minorities in a leading role to plan the development, implementation, and evaluation of preventive education, HIV testing, delivery of care, and research activities that are necessary to the formation of a comprehensive, community-based, culturally sensitive HIV infection prevention strategy.

(i) To promote education of health care practitioners concerning new clinical manifestations of HIV, particularly among women and children.

120805. (a) The department shall:

(1) Additionally, use funds appropriated by Section 6 of Chapter 23 of the Statutes of 1985 for purposes of making reimbursements to counties pursuant to Section 120895, for preventive education for individuals who are seropositive as a result of antibody testing.

(2) Issue contracts to evaluate the effectiveness of the AIDS information and education program conducted by the department.

(3) Issue contracts for development and implementation of pilot programs of professional education and training for hospital, home health agency, and attendant care workers.

(4) Issue contracts for the development and implementation of pilot programs to reduce the spread of AIDS through residential detoxification and outpatient detoxification and treatment services for intravenous drug users with AIDS or AIDS-related conditions.

(5) Monitor state and federal AIDS-related budget and policy development, and coordinate budget items to ensure that funding for matters related to AIDS is adequate and complete within the department each fiscal year.

(6) Develop and maintain an information clearinghouse within the department including periodic updates or releases to inform health professionals or community organizations providing services to people with AIDS or AIDS-related conditions of the status of current or new clinical drug trials. These updates shall be compiled through review of scientific journals and in conjunction with the UC AIDS Task Force and researchers conducting clinical drug trials in California.

(7) Review, edit, and input summaries from scientific journals into the Computerized AIDS Information Network (CAIN), and do outreach about CAIN availability to health professionals.

(8) Develop and conduct a needs assessment of the availability of supportive services for people with AIDS or AIDS-related conditions. The needs assessment shall be conducted in conjunction with the state's AIDS education contractors and with any public or private

agencies providing services to people with AIDS or AIDS-related conditions.

(9) Promote information and education programs for the general public to correct misinformation about AIDS. This shall include, but need not be limited to, periodic press releases to the printed and broadcast media and public service announcements.

(10) Prepare a report to the Legislature on the feasibility of coordinating various levels of health care, including health facility licensure categories within one program in a city and county that would serve persons with HIV infections, AIDS-related complex, and AIDS. The levels of health care to be covered in the report include, but are not limited to, general acute care hospital, acute psychiatric hospital, skilled nursing facility, hospice, intermediate care facility, residential care facility, adult day health care facility, and congregate living health facility. The report shall be developed in cooperation with the office, and shall be submitted to the Legislature before July 1, 1990. The director may contract for services necessary for completion of the report that cannot be provided through existing resources of the department.

(11) Establish, with the assistance of other state agencies as the department deems appropriate, centralized translation services to facilitate development of multilanguage, culturally relevant educational materials on HIV infection.

(12) Include, to the extent feasible, in its HIV surveillance and reporting practices, a breakdown of the major Asian-Pacific Islander subgroup populations. This breakdown shall be reflected in the surveillance and morbidity statistics issued by the director pursuant to Section 120825.

(13) Include, to the extent feasible with existing resources, in its HIV surveillance and reporting practices, information concerning newly identified clinical manifestations of HIV infection and available resources for health care practitioners to seek diagnostic and treatment information.

(b) The director shall contract for a prospective two-year study to accomplish the following objectives:

(1) Determine the medical costs of AIDS, comparing inpatient care, outpatient care, physician services, and community support services.

(2) The study shall include cost factors in the review of inpatient costs that may not be apparent in the analysis of charges, such as private rooms and social work.

The study shall include an interim report to the Legislature six months after receipt of funding and a final report to the Legislature within two years of receipt of funding so that the state can be in a knowledgeable position to plan for and provide the services and funding needed to meet this public health crisis.

(c) Notwithstanding Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code, if the director determines that it is in the best interest of the state to enter into a contract for the purposes specified below without competitive bids, then the state director may, during the 1985–86 fiscal year, enter into a sole source contract for all of the following:

(1) Educational program evaluation.

(2) Education of hospital, home health agency, and attendant care workers.

(3) Drug education and treatment programs.

(4) The cost-of-care study.

(d) Notwithstanding Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code, if the director determines that it is in the best interest of the state to enter into a contract for the purposes of the preparation of the feasibility report required by paragraph (10) of subdivision (a) without competitive bids, then the state director may enter into a sole source contract for the preparation of the feasibility report. The contract for the feasibility report shall be exempt from the requirement of approval by the Department of General Services and the Department of Finance.

120815. (a) The department may provide supplemental funding to residential AIDS shelters in accordance with Section 120810, as long as that section is operative, and to residential care facilities for persons with a chronic, life-threatening illness, that are licensed in accordance with Chapter 3.01 (commencing with Section 1568.01) of Division 2.

(b) A residential AIDS shelter that receives a supplemental grant and subsequently is licensed as a residential care facility for persons with a chronic, life-threatening illness prior to the end of the grant period shall be entitled to the full amount of the supplemental grant.

120817. (a) The State Department of Health Services shall develop and implement, with the assistance of other state agencies, a pilot project to provide a model women's HIV early intervention center. The Office of AIDS, within the department, shall designate areas of the state in which to implement this pilot project. The selection shall be based on observed HIV and AIDS trends among women. At a minimum, two pilot sites shall be established. Los Angeles County and the Alameda/Contra Costa County area shall be considered as possible sites for the pilot project. The women's HIV early intervention centers shall be linked to, or located with, AIDS outpatient treatment clinics and clinics providing a full range of women's health services.

(b) Women's HIV early intervention services shall include, but not be limited to, medical monitoring, laboratory tests, colposcopy, mammography, HIV-related obstetrical and gynecological services, psychosocial support, HIV transmission risk assessment, risk

reduction counseling and support, health education, nutritional counseling, assistance with clinical drug trials, alcohol and substance abuse treatment, and child care.

(c) It is the intent of the Legislature that funding for implementation of this pilot project be provided from funds allocated to the Office of AIDS within the State Department of Health Services for early intervention for the prevention of HIV and AIDS among women, subject to appropriation in the Budget Act of 1994.

(d) The department shall develop and implement this pilot project on or before July 1, 1995.

(e) This section shall become inoperative on June 30, 1998, and, as of January 1, 1999, is repealed, unless a later enacted statute, which becomes effective on or before January 1, 1999, deletes or extends the dates on which it becomes inoperative and is repealed.

120820. (a) Personal data in any investigations, reports, and information relating thereto shall be kept confidential and be afforded protections provided by Section 100330, except as provided by Section 1603.1 or 1603.3.

(b) If patient-identifying information is subpoenaed from the department, the department shall seek and the court shall issue a protective order keeping this information confidential. The court order may require production, but limit the use and disclosure of, records, require production with names and identifying information deleted, provide sanctions for misuse of records or set forth other methods for assuring confidentiality.

120825. The director shall:

(a) Be prepared to report to the Legislature on the amounts and recipients of contracts or block grant awards, and needs assessments conducted by the department.

(b) Issue once each month a public information release to the state contractors, local health departments, medical societies or organizations, nursing associations, hospital and hospital administrator associations, blood banks or centers, hemophilia associations and treatment centers, lesbian and gay health organizations, media outlets or community organizations, and other interested organizations or individuals, and the news media identifying research breakthroughs, new treatment protocols, infection control updates, surveillance and morbidity statistics, and other current and up-to-date information regarding AIDS education, treatment, or patient service programs.

120830. Pilot projects to demonstrate the cost effectiveness of home health, attendant, or hospice care shall be initiated through a block grant program, as described in this section.

(a) The state director shall designate the contractors and the amounts that contractors will receive for the block grant direct service demonstration projects.

(b) An amount of not more than 10 percent of the grant may be retained by contractors for administrative overhead. Contractors accepting block grant funds shall compile comparative cost data reports for transmission to the department and the Legislature. Reports shall be made semiannually until the conclusion of the project.

(c) Contractors receiving direct service block grants shall:

(1) Encourage broad-based community involvement and support for AIDS programs and involve charitable, other nonprofit, and other agencies as well as health care professionals as providers of essential services.

(2) Ensure the proposed services are not duplicated in the community and are based on the needs of people with AIDS, AIDS-related conditions, at-risk communities, their families or others affected by AIDS.

(3) Make maximum use of other federal, state, and local funds and programs.

(4) Provide services that are culturally and linguistically appropriate to the population served.

(c) Counties with existing programs of demonstrated effectiveness in AIDS education or services shall receive equal consideration with other applicants and shall not be penalized when awarding funds pursuant to this chapter with respect to the proposed expansion of their programs.

(d) Contractors shall develop a comprehensive service system including, but not limited to, the following essential services, that can be provided either directly by the contractors or indirectly through a referral network arranged by the contractor:

(1) Provision for hospice, skilled nursing facility, home health care, and homemaker chore services.

(2) Individual consultation and health planning and assessment.

(3) Information for people with AIDS or AIDS-related conditions regarding death and dying.

(4) Evaluation and referral services for medical care.

(5) Referral services for mental health services, as appropriate.

(6) Assistance in applying for financial aid or social services that are available and for which clients qualify.

The system of essential services developed by a contractor shall offer maximum opportunity for involvement of family, friends, domestic partners and of nonprofit and charitable organizations in preventing the severe, adverse health and social consequences that result from being diagnosed with AIDS or AIDS-related conditions.

(e) The direct service program for provision of essential services shall ensure:

(1) An ongoing quality assurance program.

(2) Confidentiality assurances and methods for developing interagency confidentiality agreements.

120835. (a) The department shall amend the home health, hospice, and attendant care pilot projects funded pursuant to this chapter, to include, to the extent that it is cost-effective to the Medi-Cal program or the General Fund, the payment of private health insurance premiums for participants in the pilot projects prior to the participants becoming eligible for Medi-Cal.

(b) The director shall make a determination of cost-effectiveness, that shall be reviewed by the Department of Finance. The director may use existing budgeted resources for services provided for pursuant to subdivision (a).

120840. The Department of Mental Health shall establish an AIDS mental health project, as described in this section.

(a) The program should include, but need not be limited to, the following:

(1) The conduct of a statewide needs assessment of AIDS-related mental health issues.

(2) The conduct of education and training for mental health professionals throughout the state.

(3) The conduct, through the Office of Promotion, of a media campaign on such issues as the use of support groups, the relationship between stress and the immune system, and dealing with grief.

(b) The Department of Mental Health shall coordinate projects and resources directly with the department.

(c) The Director of the Department of Mental Health may appoint advisory groups for this project as needed.

(d) Notwithstanding any provision of Chapter 2 (commencing with Section 10290) of Part 2 of Division 2 of the Public Contract Code, if the Director of Mental Health determines that it is in the best interest of the state to enter into a contract for the purposes specified in this section without competitive bids, then the director may, during the 1985–86 fiscal year, enter into a sole source contract for these purposes.

120845. Pilot programs to reduce the spread of AIDS through residential detoxification and outpatient detoxification and treatment services for intravenous drug users, as described in paragraph (4) of subdivision (a) of Section 120805, shall be initiated through local agency operated AIDS-related substance abuser programs.

(a) The director shall designate the local agency contractors and the amounts that these contractors will receive for the AIDS-related substance abuser demonstration programs.

(b) The contractors shall develop a comprehensive service system including, but not limited to, the following essential services, that can be provided either directly by the contractors or through a referral network arranged by the contractors:

(1) Residential detoxification programs for intravenous drug users.

(2) Outpatient detoxification programs including health promotion and health assessment for intravenous drug users.

(3) AIDS and substance abuse information, consultation and resource referral to providers of services to AIDS patients and to drug treatment providers.

(4) Outreach, health promotion, health assessment, consultation and referrals for homeless youth substance abusers.

120850. The amount of two million three hundred thousand dollars ($2,300,000), appropriated pursuant to Section 2 of Chapter 767 of the Statutes of 1985, shall be allocated to the University of California for research into AIDS. When expending these funds, the university shall solicit and consider proposals from within the University of California system and from universities and colleges outside the University of California system as well. In the expenditure of these funds, it is the preference of the Legislature that priority be given to viral cultures, clinical trials, and the administrative and laboratory support services necessary to conduct the trials.

120855. (a) The department may use funds appropriated to it to pay the costs, including reimbursements to contractors for administrative costs, of providing home and community-based services to eligible persons with a diagnosis of acquired immune deficiency syndrome (AIDS) or AIDS related conditions (ARC) when the funds are appropriated for that purpose.

(b) To the extent that federal financial participation is available, each department within the Health and Welfare Agency, including departments designated as single state agencies for public social services programs, shall waive regulations and general policies and make resources available when necessary for the provision of home and community-based care services to eligible persons with a diagnosis of AIDS or ARC.

120860. (a) The department shall, in coordination with the State Department of Alcohol and Drug Programs, develop a plan that assesses the need for, a program of acquired immune deficiency syndrome (AIDS) primary prevention, health education, testing, and counseling, specifically designed for women and children, that shall be integrated, as the department deems appropriate, into the following programs:

(1) The California Childrens Services Program provided for pursuant to Article 5 (commencing with Section 123800) of Chapter 3 of Part 2 of Division 106.

(2) Programs under the Maternal and Child Health Branch of the department.

(3) The Child Health Disability Prevention Program provided for pursuant to Article 6 (commencing with Section 124025) of Chapter 3 of Part 2 of Division 106.

(4) The Genetic Disease Program, provided for pursuant to Sections 125000 and 125005.

(5) The Family Planning Programs, provided for pursuant to Chapter 8.5 (commencing with Section 14500) of Part 3 of Division 9 of the Welfare and Institutions Code.

(6) The Rural and Community Health Clinics Program.

(7) The County Health Services Program, provided for pursuant to Part 4.5 (commencing with Section 16700) of Division 9 of the Welfare and Institutions Code.

(8) The Sexually Transmitted Disease Program.

(9) Programs administered by the State Department of Alcohol and Drug Programs.

(b) The AIDS-related services that shall be addressed in the plan specified in this section shall include, but not be limited to, all of the following:

(1) A variety of educational materials that are appropriate to the cultural background and educational level of the program clientele.

(2) The availability of confidential HIV antibody testing and counseling either onsite or by referral.

(c) Pursuant to subdivision (a), the plan shall include a method to provide the educational materials specified in subdivision (b) and appropriate AIDS-related training programs for those persons who provide direct services to women and children receiving services under the programs specified in this section.

(d) In order that the AIDS-related services plan provided through the programs specified in this section be as effective as possible, the department shall ensure that the educational materials and training programs provided for each program specified in subdivision (a) are developed in coordination with, and with input from, each of the respective programs.

(e) Nothing in this section shall preclude the department from incorporating the plan requirements into the department's annual state AIDS plan, or any other reporting document relating to AIDS deemed appropriate by the department.

120865. (a) The department, in consultation with the State Department of Alcohol and Drug Programs, shall review existing programs administered by the department, the State Department of Alcohol and Drug Programs, or both that provide services to persons with AIDS or ARC or persons at risk of becoming infected with HIV to identify whether there are unmet needs in targeting these programs to substance abusers, racial and ethnic minority populations, and women. In reviewing the existing programs, the department shall consider the provision of care by the existing programs outside of a general acute care hospital setting to substance abusers, racial and ethnic minority populations, and women by taking into account the current availability of beds outside of a hospital setting, the availability of those beds to substance abusers, racial and ethnic minority populations, and women, and the projected need for additional beds outside of a hospital setting for

substance abusers, racial and ethnic minority populations, and women.

(b) The department shall take into account the unmet needs of substance abusers, racial and ethnic minority populations, and women as identified pursuant to subdivision (a) in its planning and development of programs that provide services to persons with AIDS and ARC.

(c) The department shall report its findings pursuant to this section on or before April 1, 1991. The report shall include, but not be limited to, recommendations suggesting programmatic changes deemed appropriate by the department that would better meet the needs of substance abusers, racial and ethnic minority populations, and women with, or at risk of becoming infected with, HIV, and the fiscal considerations for implementing the recommendations.

120870. (a) Every person who sells alkyl nitrites shall at the point of sale of the alkyl nitrites, post a sign measuring no less than five by seven inches to read as follows:

''Warning: These products contain alkyl nitrites ('poppers'). Inhaling or swallowing alkyl nitrites may be harmful to your health. The use of alkyl nitrites may affect the immune system. Several studies have suggested that their use is associated with the development of Kaposi's sarcoma (an AIDS condition).''

(b) The signs required by subdivision (a) shall be furnished by the manufacturers or distributors of alkyl nitrites in California in sufficient quantity with the shipments of alkyl nitrites to allow posting at all points of sale.

(c) ''Point of sale'' for purposes of this section is that place within close proximity of the shelves or other area where the alkyl nitrites are displayed for consumer purchase.

CHAPTER 3. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) INFORMATION

120875. The State Department of Education shall provide information to school districts on acquired immune deficiency syndrome (AIDS), on AIDS-related conditions, and on Hepatitis B. This information shall include, but not be limited to, any appropriate methods school employees may employ to prevent exposure to AIDS and Hepatitis B, including information concerning the availability of a vaccine to prevent contraction of Hepatitis B, and that the cost of vaccination may be covered by the health plan benefits of the employees. This information shall be compiled and updated annually, or if there is new information, more frequently, by the State Department of Education in conjunction with the department department and in consultation with the California Conference of

Local Health Officers. In order to reduce costs, this information may be included as an insert with other regular mailings to the extent practicable, and the information required to be provided on Hepatitis B shall be provided in conjunction with the information required to be provided on AIDS.

120880. School districts shall inform their employees annually, or if there is new information, more frequently, of the information compiled by the State Department of Education pursuant to Section 120875.

120885. The Legislature finds and declares it is of great benefit to the public health and essential to the protection of safe blood and blood components available for transfusion to provide testing for the presence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) as a function separate from the donation of blood or blood components.

120890. The director shall, in order to protect the public health and in order to make blood and blood components safe for transfusion, designate counties that shall establish alternative testing sites, within the funds available, pursuant to this section and Sections 120885 and 120895. When designating a county pursuant to this section, the director may consider whether the county contains a permanent operational blood bank. All alternative test sites, established pursuant to this section and Sections 120885 and 120895, shall be under the supervision of a physician and surgeon or be a clinic or health facility licensed by the department.

120895. (a) Each county, designated by the director, shall make the test available within its jurisdiction without charge, in an accessible manner and the tests shall be made available by the county on a confidential basis through use of a coded system with no linking of individual identity with the test request or results. The number and location of sites in each county designated by the director shall be approved by the director. The test shall be made available by the county either directly or by contract with a physician and surgeon or with any clinic or health facility licensed by the department. Neither the county nor anyone else administering the test described in this section and Sections 120885 and 120890, shall ask for the name, social security number, or any other information that could reveal the identity of the individual who takes the test. Each alternative test site shall make available confidential information and referral services, within the funds available, to individuals who seek testing. A county may subcontract with individuals or entities to provide information and referral services.

All alternative test sites shall provide a referral list of physicians and surgeons or clinics knowledgeable about AIDS, to all persons who have any known risk factor for AIDS, especially those who have a reactive antibody test, for further information and explanation of the test results and for medical evaluation.

At a minimum, individuals seeking testing shall be informed about the validity and accuracy of the antibody test before the test is performed. All testing site personnel shall be required to attest to having provided the above information. Furthermore, all individuals who are tested at the sites established by this section and Sections 120885 and 120890 shall be given the results of this test in person. All sites providing antibody testing pursuant to this section and Sections 120885 and 120890 shall have a protocol for referral for 24-hour inpatient and mental health services. All individuals awaiting test results and all persons to whom results are reported shall be informed of available crisis services and shall be directly referred, if necessary.

Each county, designated by the director, shall be required to submit a plan to the department within 45 days after the effective date of this section that details where testing and pretest and posttest information and referral will be provided and the qualifications of the staff who will be performing the services required by this section and Sections 120885 and 120890. The department shall make training available, especially to smaller counties.

(b) The department shall establish a reimbursement process for counties within 30 days after the effective date of this section for the following services:

(1) Informing test applicants on the test's reliability and validity.

(2) Administration of tests, analysis of test samples, and costs associated with the laboratory work required by this antibody test.

(3) Short-term information and referral sessions, of no more than one visit per person tested for the purpose of transmitting the person's test results and, as requested, for referral to available followup services.

The department shall establish the amounts to be reimbursed for each of these services, but the amounts shall be established at a level to ensure that the purposes of this section and Sections 120885 and 120890 are carried out. Reimbursements shall be made for each service provided.

(c) The department may replace the test for the antibody to the probable causative agent for AIDS with another type of HIV test, as the department deems appropriate.

(d) The director may grant a waiver to a county from the requirements of this section and Sections 120885 and 120890 if the county petitions the director for the waiver and the director determines that the waiver is consistent with the purposes of this section and Sections 120885 and 120890.

(e) A participating county or the department may accept grants, donations, and in-kind services for purposes of carrying out this section and Sections 120885 and 120890.

CHAPTER 4. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) EARLY INTERVENTION PROJECTS

120900. (a) The director shall award contracts to early intervention projects to provide long-term services to persons infected with HIV. The purposes of the early intervention projects shall be to provide appropriate medical treatment to prevent or delay the progression of disease that results from HIV infection, to coordinate services available to HIV infected persons, and to provide information and education, including behavior change support, to HIV infected persons to prevent the spread of HIV infection to others. The director shall award contracts to early intervention projects from a variety of geographical areas. In selecting projects, the director shall ensure that each early intervention project will respond to the needs of its projected service area, will be sensitive to linguistic, ethnic, and cultural differences, and will accommodate the special needs of clients by taking into account the circumstances that placed them at risk for becoming infected with HIV. The director shall award contracts for early intervention services at a pace that reflects the availability of private, state, and federal reimbursement pursuant to Section 120920. Prior to awarding contracts to new programs, the director shall consider utilizing existing services and programs with which it currently contracts, or that are currently in operation, and that provide HIV-related services.

(b) Early intervention projects that are awarded contracts pursuant to this section shall provide all of the following services:

(1) Health assessment of HIV infected persons, including, but not limited to, a physical examination and immunologic and clinical monitoring.

(2) Health education and behavior change support related to reducing the risk of spreading HIV infection to others and to maximize the healthy and productive lives of HIV infected persons.

(3) Psychosocial counseling services.

(4) Information and referrals for social services.

(5) Information and referrals on available research for the treatment of HIV infection.

(6) Covered outpatient preventative or therapeutic health care services related to HIV infection, as determined by the director.

(7) Case management.

(c) An early intervention project shall establish a core case management team for each client to assess the needs of the client and to develop, implement, and evaluate the client's written individual service plan. As needed by the client, the individual service plan shall include services specified in subdivision (b), other support services, legal services, public assistance, insurance, and inpatient and outpatient health care services needs of the client. A core case management team shall include, but not be limited to, a physician

and surgeon, a physician assistant or nurse practitioner, a health educator, a case manager, and the client. Case management in an early intervention project shall incorporate an interdisciplinary approach. Other professionals, paraprofessionals, and other interested persons deemed appropriate by the members of the core case management team also may be included. The case manager shall coordinate the objectives specified in the client's individual service plan. The case manager also shall monitor and assist the client through all services provided by the project and shall provide information, guidance, and assistance to the client regarding support services, legal services, public assistance, insurance, and inpatient and outpatient health care services. The project shall designate a sufficient number of case managers to reflect case manager-to-client ratios established by the department.

120905. (a) The director shall commence awarding contracts to projects on or before July 1, 1990. In awarding contracts to early intervention projects, the director may select projects from each of the following models:

(1) A privately operated profit or nonprofit clinic that is not licensed as part of a health facility and that provides all of the services specified in subdivision (b) of Section 120900.

(2) A publicly operated clinic that is not licensed as part of a health facility and that provides all of the services specified in subdivision (b) of Section 120900.

(3) A combination of independent privately operated clinics, publicly operated clinics, and other health care providers that in total provide all of the services specified in subdivision (b) of Section 120900.

(4) Any other model that the director considers worthy of receiving funds.

(b) An applicant for a contract to operate an early intervention project that is not a part of a county health department shall submit its application to the county health department for review and comment. The county health department shall provide comment on the application to the department within a time period to be specified by the department. The failure by a county health department to comment on an application submitted to it within the time period specified by the department shall not jeopardize the application, and the department in a case of this nature may process and award a contract in the absence of comment by the county health department.

(c) An applicant for a contract to operate an early intervention project shall indicate in its application how it intends to coordinate with county health department programs, community-based organizations that provide HIV-related services, and other public and private entities that may provide services to a person who is infected with HIV.

120910. (a) The department shall collect data from the early intervention projects, assess the effectiveness of the different models of early intervention projects, and report its findings to the Legislature on or before January 1, 1992, and on or before January 1 of each subsequent year.

(b) The department shall continuously collect data from each early intervention project. The data collected may include, but not be limited to, the following:

(1) The total number of clients served.

(2) The number of clients utilizing each service provided by the project.

(3) Demographics on clients in the aggregate.

(4) The source of funding for each type of service provided.

(5) The cost of each type of service provided.

(6) Medical treatment modalities utilized in the aggregate.

(7) Changes in the clinical status of clients in the aggregate.

(8) Changes in behaviors that present risks of transmitting HIV infection of the clients in the aggregate.

(9) The psychosocial changes of clients in the aggregate.

(10) Referrals made by the project.

(11) Perceived unmet needs of the clients served by the project.

(c) The department shall develop and distribute to each early intervention project forms for data collection that are designed to elicit information necessary for the department to comply with the requirements of subdivision (b). The data may be used by the department to comply with the requirements of subdivision (a).

120915. (a) The department shall establish a reimbursement schedule for all of the services detailed in subdivision (b) of Section 120900. The amounts to be reimbursed for these services shall be commensurate with the costs of providing these services.

(b) The department shall develop and disseminate guidelines to assist early intervention projects in identifying appropriate public and private payers of early intervention services. The guidelines shall take into account each client's access to, and eligibility for, private health insurance and public medical assistance. The guidelines shall include, but not be limited to, the reimbursement schedule established pursuant to subdivision (a) and the elements identified in subdivisions (c) to (h), inclusive.

(c) Reimbursement under Sections 120900 to 120920, inclusive, shall not be made for any services that are available to the client under a private health insurance program. Early intervention projects shall inquire of each client as to the client's coverage by a private health insurance policy. Where a client has a private health insurance policy, the early intervention project shall bill the insurer for those services in subdivision (b) of Section 120900 that are covered by the client's policy.

(d) The department shall develop and implement, or cause to be implemented by an early intervention project, a uniform sliding fee schedule for services provided to individuals under Sections 120900 to 120920, inclusive. The schedule shall be based on the client's ability to pay.

(e) The department may apply for any funds available from the federal government for the reimbursement of those services to be provided by early intervention projects, including, but not limited to, funds available pursuant to Section 2318 of the Public Health Service Act, as added by Public Law 100-607, that provides for the development of model protocols for the clinical care of individuals who are infected with HIV.

(f) To the extent permitted under existing law, the Medi-Cal program shall provide reimbursement to early intervention projects for services provided under Sections 120900 to 120920, inclusive, that are covered under the Medi-Cal program. This subdivision shall not be construed to confer Medi-Cal eligibility on any person who does not meet existing Medi-Cal eligibility requirements.

(g) The department shall use federal and state general funds that are appropriated for the purpose of purchasing HIV-related drug treatments and related services, to reimburse for covered outpatient preventative or therapeutic health care services, as defined by the director, provided that the client is eligible for a federal or state program that subsidizes the cost of HIV-related drugs and related services. If Assembly Bill 2251 of the 1989–90 Regular Session is enacted, the department shall use the provisions in Chapter 6 (commencing with Section 120950) to implement this subdivision.

(h) The department shall use moneys from the General Fund to cover expenses for early intervention services that are not otherwise reimbursed, to the extent that moneys from the General Fund are expressly appropriated to the department for early intervention services.

120920. The Legislature hereby finds and declares that people with HIV infection may not avail themselves of early intervention services unless they are aware of the availability of the services and the efficacy of early intervention in prolonging life. This awareness by HIV-infected persons is critical to maximizing the benefits of early intervention. Therefore, it is the intent of the Legislature that the department includes early intervention education as a component of information and education grants in the first grant cycle following enactment of Sections 120900 to 120920, inclusive.

CHAPTER 5. PROVISION OF AZIDOTHYMIDINE

120925. The Legislature hereby finds and declares all of the following:

(a) The drug azidothymidine (AZT) improves and prolongs the quality of life for those suffering from acquired immune deficiency syndrome (AIDS) or AIDS-related conditions, is believed to reduce the infectiousness of a person infected with human immunodeficiency virus (HIV), and is the only drug approved by the federal Food and Drug Administration for treatment of AIDS and AIDS-related conditions.

(b) Hundreds of Californians infected with HIV are receiving AZT due to a subsidy for AZT made available by the federal government for low-income people.

(c) The department estimates that it will have sufficient federal funds to maintain those enrolling in the program prior to October 1, 1988, through April 1989, if it terminates new enrollees beginning October 1, 1988.

(d) The department intends to direct counties to cease accepting new enrollees for the subsidy program beginning October 1, 1988, because of the exhaustion of these federal funds.

(e) The federal government has an obligation to continue to support the subsidy program that it has initiated because of the horrendous moral consequences of terminating the access of low-income infected people to the drug.

(f) The funding cycle for federal programs precludes appropriating additional funds to maintain this program until June of 1989.

120930. It is the intent of the Legislature that the State of California continue to provide temporary funding for the program to ensure that those whose health depends on obtaining access to AZT and who are unable to afford it can receive the drug during this interim period.

120935. The department shall continue through June 1989, the AZT subsidy program established in 1987 with federal funds. The department shall maintain the eligibility standards used for the program as of August 1988. The department shall allocate to local health jurisdictions the funds appropriated to support the subsidy program. The department may reallocate funds among these local health jurisdictions as needed to ensure that persons requiring the subsidy receive it through June 1989.

CHAPTER 6. HUMAN IMMUNODEFICIENCY VIRUS (HIV) TREATMENT

120950. The Legislature hereby finds and declares all of the following:

(a) State-of-art knowledge regarding treatment of people infected with the human immunodeficiency virus (HIV) indicates that active HIV infection (AIDS) can be a manageable, though chronic, condition with the use of drugs such as zidovudine (AZT), aerosolized pentamidine, and ganciclovir. AIDS experts across the

nation agree that early intervention with these drugs can prolong life, minimize the related occurrences of more serious illnesses, reduce more costly treatments, and maximize the HIV-infected person's vitality and productivity.

(b) For reasons of compassion and cost effectiveness, the State of California has a compelling interest in ensuring that its citizens infected with the HIV virus have access to these drugs.

(c) The department subsidizes the cost of these drugs for persons who do not have private health coverage, are not eligible for Medi-Cal, or cannot afford to purchase the drug privately. The subsidy program is funded through state and federal sources.

(d) Congress is expected to place limitations on the federal subsidy program that will jeopardize access to these life-prolonging drugs for people whose income is higher than federal income eligibility cap but lower than the state's income eligibility cap.

(e) It is critical that suffering persons with limited income have access to life-prolonging drugs. It is also critical that persons currently eligible for the subsidy program remain eligible regardless of changes that may result from the congressional action and the enactment of this chapter. However, it is appropriate that people who can afford to pay a portion of the cost of treatment be obligated to share the cost of these drugs.

120955. (a) To the extent that state and federal funds are appropriated in the Budget Act for these purposes, the director shall establish and may administer a program to provide drug treatments to persons infected with human immunodeficiency virus (HIV), the etiologic agent of acquired immune deficiency syndrome (AIDS). The director shall develop, maintain, and update as necessary a list of drugs to be provided under this program. Drugs on the list shall include, but not be limited to, the drugs zidovudine (AZT) and aerosolized pentamidine.

(b) The director may grant funds to a county public health department through standard agreements to administer this program in that county. To maximize the recipients' access to drugs covered by this program, the director shall urge the county health department in counties granted these funds to decentralize distribution of the drugs to the recipients.

(c) The director shall establish a rate structure for reimbursement for the cost of each drug included in the program. Rates shall not be less than the actual cost of the drug. However, the director may purchase a listed drug directly from the manufacturer and negotiate the most favorable bulk price for that drug.

(d) Reimbursement under this chapter shall not be made for any drugs that are available to the recipient under any other private, state, or federal programs, or under any other contractual or legal entitlements, except that the director may authorize an exemption

from this subdivision where exemption would represent a cost savings to the state.

120960. (a) The department shall establish uniform standards of financial eligibility for the drugs under the program established under this chapter.

(b) Nothing in the financial eligibility standards shall prohibit drugs to an otherwise eligible person whose adjusted gross income does not exceed fifty thousand dollars ($50,000) per year. However, the director may authorize drugs for persons with incomes higher than fifty thousand dollars ($50,000) per year if the estimated cost of those drugs in one year is expected to exceed 20 percent of the person's adjusted gross income.

(c) The department shall establish and may administer a payment schedule to determine the payment obligation of a person receiving drugs. No person shall be obligated for payment whose adjusted gross income is less than four times the federal poverty level. The payment obligation shall be the lesser of the following:

(1) Two times the person's annual state income tax liability, less funds expended by the person for health insurance premiums.

(2) The cost of drugs.

(d) Persons who have been determined to have a payment obligation pursuant to subdivision (c) shall be advised by the department of their right to request a reconsideration of that determination to the department. Written notice of the right to request a reconsideration shall be provided to the person at the time that notification is given that he or she is subject to a payment obligation. The payment determination shall be reconsidered if one or more of the following apply:

(1) The determination was based on an incorrect calculation made pursuant to subdivision (b).

(2) There has been a substantial change in income since the previous eligibility determination that has resulted in a current income that is inadequate to meet the calculated payment obligation.

(3) Unavoidable family or medical expenses that reduce the disposable income and that result in current income that is inadequate to meet the payment obligation.

(4) Any other situation that imposes undue financial hardship on the person and would restrict his or her ability to meet the payment obligation.

(e) The department may exempt a person, who has been determined to have a payment obligation pursuant to subdivision (c), from the obligation if both of the following criteria are satisfied:

(1) One or more of the circumstances specified in subdivision (d) exist.

(2) The department has determined that the payment obligation will impose an undue financial hardship on the person.

(f) If a person requests reconsideration of the payment obligation determination, the person shall not be obligated to make any payment until the department has completed the reconsideration request pursuant to subdivision (d). If the department denies the exemption, the person shall be obligated to make payments for drugs received while the reconsideration request is pending.

(g) A county public health department administering this program pursuant to an agreement with the director pursuant to subdivision (b) of Section 120955 shall use no more than 5 percent of total payments it collects pursuant to this section to cover any administrative costs related to eligibility determinations, reporting requirements, and the collection of payments.

(h) A county public health department administering this program pursuant to subdivision (b) of Section 120955 shall provide all drugs added to the program pursuant to subdivision (a) of Section 120955 within 60 days of the action of the director, subject to the repayment obligations specified in subdivision (d) of Section 120965.

120965. (a) Effective March 15, 1991, a person determined eligible for benefits under this chapter shall be subject to the payment obligation specified in subdivision (c) of Section 120960.

(b) Persons who are receiving benefits under a HIV drug treatment subsidy program administered by the department prior to March 15, 1991, shall not be subject to the payment obligation specified in subdivision (c) of Section 120960.

(c) Notwithstanding subdivision (b), if any person is disenrolled from eligibility in a HIV drug treatment subsidy program administered by the department for any reason after March 15, 1991, the subsequent enrollment of that person for benefits under this chapter shall be in accordance with the payment obligation specified in subdivision (c) of Section 120960.

(d) Notwithstanding subdivision (b), if a drug is added pursuant to subdivision (a) of Section 120955, any person determined eligible for benefits under this chapter, regardless of the date of enrollment, shall be subject to the payment obligation specified in subdivision (c) of Section 120960 for the added drug. The payment obligation for any other drug shall be determined in accordance with subdivision (b).

CHAPTER 7. MANDATED BLOOD TESTING AND CONFIDENTIALITY TO PROTECT PUBLIC HEALTH

120975. To protect the privacy of individuals who are the subject of blood testing for antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) the following shall apply:

Except as provided in Section 1603.1 or 1603.3, as amended by Chapter 23 of the Statutes of 1985, no person shall be compelled in any state, county, city, or other local civil, criminal, administrative,

legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS.

120980. (a) Any person who negligently discloses results of an HIV test, as defined in Section 120775, to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, except pursuant to a written authorization, as described in subdivision (g), or except as provided in Section 1603.1 or 1603.3 or any other statute that expressly provides an exemption to this section, shall be assessed a civil penalty in an amount not to exceed one thousand dollars ($1,000) plus court costs, as determined by the court, which penalty and costs shall be paid to the subject of the test.

(b) Any person who willfully discloses the results of an HIV test, as defined in Section 120775, to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, except pursuant to a written authorization, as described in subdivision (g), or except as provided in Section 1603.1 or 1603.3 or any other statute that expressly provides an exemption to this section, shall be assessed a civil penalty in an amount not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) plus court costs, as determined by the court, which penalty and costs shall be paid to the subject of the test.

(c) Any person who willfully or negligently discloses the results of an HIV test, as defined in Section 120775, to a third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, except pursuant to a written authorization, as described in subdivision (g), or except as provided in Section 1603.1 or 1603.3 or any other statute that expressly provides an exemption to this section, that results in economic, bodily, or psychological harm to the subject of the test, is guilty of a misdemeanor, punishable by imprisonment in the county jail for a period not to exceed one year or a fine of not to exceed ten thousand dollars ($10,000) or both.

(d) Any person who commits any act described in subdivision (a) or (b) shall be liable to the subject for all actual damages, including damages for economic, bodily, or psychological harm that is a proximate result of the act.

(e) Each disclosure made in violation of this chapter is a separate and actionable offense.

(f) Except as provided in Article 6.9 (commencing with Section 799) of Chapter 1 of Part 2 of Division 1 of the Insurance Code, the results of an HIV test, as defined in Section 120775, that identifies or provides identifying characteristics of the person to whom the test results apply, shall not be used in any instance for the determination of insurability or suitability for employment.

(g) ‘‘Written authorization,’’ as used in this section, applies only to the disclosure of test results by a person responsible for the care and treatment of the person subject to the test. Written authorization is required for each separate disclosure of the test results, and shall include to whom the disclosure would be made.

(h) Nothing in this section limits or expands the right of an injured subject to recover damages under any other applicable law. Nothing in this section shall impose civil liability or criminal sanction for disclosure of the results of tests performed on cadavers to public health authorities or tissue banks.

(i) Nothing in this section imposes liability or criminal sanction for disclosure of an HIV test, as defined in Section 120775, in accordance with any reporting requirement for a diagnosed case of AIDS by the department or the Centers for Disease Control under the United States Public Health Service.

(j) The department may require blood banks and plasma centers to submit monthly reports summarizing statistical data concerning the results of tests to detect the presence of viral hepatitis and HIV. This statistical summary shall not include the identity of individual donors or identifying characteristics that would identify individual donors.

(k) ‘‘Disclosed,’’ as used in this section, means to disclose, release, transfer, disseminate, or otherwise communicate all or any part of any record orally, in writing, or by electronic means to any person or entity.

(*l*) When the results of an HIV test, as defined in Section 120775, are included in the medical record of the patient who is the subject of the test, the inclusion is not a disclosure for purposes of this section.

120985. (a) Notwithstanding Section 120980, the results of an HIV test that identifies or provides identifying characteristics of the person to whom the test results apply may be recorded by the physician who ordered the test in the test subject’s medical record or otherwise disclosed without written authorization of the subject of the test, or the subject’s representative as set forth in Section 121020, to the test subject’s providers of health care, as defined in subdivision (d) of Section 56.05 of the Civil Code, for purposes of diagnosis, care, or treatment of the patient, except that for purposes of this section ‘‘providers of health care’’ does not include a health care service plan regulated pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2.

(b) Recording or disclosure of HIV test results pursuant to subdivision (a) does not authorize further disclosure unless otherwise permitted by law.

120990. (a) Except in the case of a person treating a patient, no person shall test a person’s blood for evidence of antibodies to the probable causative agent of AIDS without the written consent of the subject of the test or the written consent of the subject, as provided

in Section 121020, and the person giving the test shall have a written statement signed by the subject or conservator or other person, as provided in Section 121020 confirming that he or she obtained the consent from the subject. In the case of a physician and surgeon treating a patient, the consent required under this subdivision shall be informed consent, by the patient, conservator, or other person provided for in Section 121020.

This requirement does not apply to a test performed at an alternative site, as established pursuant to Sections 120885 to 120895, inclusive. This requirement also does not apply to any blood and blood products specified in paragraph (2) of subdivision (a) of Section 1603.1. This requirement does not apply when testing is performed as part of the medical examination performed pursuant to Section 7152.5.

(b) Nothing in this section shall preclude a medical examiner or other physician from ordering or performing a blood test to detect antibodies to the probable causative agent of AIDS on a cadaver when an autopsy is performed or body parts are donated pursuant to the Uniform Anatomical Gift Act, provided for pursuant to Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7.

(c) The requirements of subdivision (a) do not apply when blood is tested as part of a scientific investigation conducted either by medical researchers operating under institutional review board approval or by the department in accordance with a protocol for unlinked testing. For purposes of this section, unlinked testing means that blood samples are obtained anonymously or that the individual's name and other identifying information is removed in a manner that precludes the test results from ever being linked to a particular individual in the study.

120995. Actions taken pursuant to Section 1768.9 of the Welfare and Institutions Code shall not be subject to subdivisions (a) to (c), inclusive, of Section 120980. In addition, the requirements of subdivision (a) of Section 120990 shall not apply to testing performed pursuant to Section 1768.9 of the Welfare and Institutions Code.

121000. Actions taken pursuant to Title 8 (commencing with Section 7500) of Part 3 of the Penal Code shall not be subject to subdivisions (a) to (c), inclusive, of Section 120980. In addition, the requirements of subdivision (a) of Section 120990 shall not apply to testing performed pursuant to that title.

121005. Neither the department nor any blood bank or plasma center, including a blood bank or plasma center owned or operated by a public entity, shall be held liable for any damages resulting from the notification of test results, as set forth in paragraph (3) of subdivision (a) of, and in subdivision (c) of, Section 1603.3, as amended by Chapter 23 of the Statutes of 1985.

121010. Notwithstanding Section 120975 or 120980, the results of a blood test to detect antibodies to the probable causative agent of

AIDS may be disclosed to any of the following persons without written authorization of the subject of the test:

(a) To the subject of the test or the subject's legal representative, conservator, or to any person authorized to consent to the test pursuant to subdivision (b) of Section 120990.

(b) To a test subject's provider of health care, as defined in subdivision (d) of Section 56.05 of the Civil Code, except that for purposes of this section, ''provider of health care'' does not include a health care service plan regulated pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2.

(c) To an agent or employee of the test subject's provider of health care who provides direct patient care and treatment.

(d) To a provider of health care who procures, processes, distributes, or uses a human body part donated pursuant to the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7).

121015. (a) Notwithstanding Section 120980 or any other provision of law, no physician and surgeon who has the results of a confirmed positive test to detect infection by the probable causative agent of acquired immune deficiency syndrome of a patient under his or her care shall be held criminally or civilly liable for disclosing to a person reasonably believed to be the spouse, or to a person reasonably believed to be a sexual partner or a person with whom the patient has shared the use of hypodermic needles, or to the county health officer, that the patient has tested positive on a test to detect infection by the probable causative agent of acquired immune deficiency syndrome, except that no physician and surgeon shall disclose any identifying information about the individual believed to be infected.

(b) No physician and surgeon shall disclose the information described in subdivision (a) unless he or she has first discussed the test results with the patient and has offered the patient appropriate educational and psychological counseling, that shall include information on the risks of transmitting the human immunodeficiency virus to other people and methods of avoiding those risks, and has attempted to obtain the patient's voluntary consent for notification of his or her contacts. The physician and surgeon shall notify the patient of his or her intent to notify the patient's contacts prior to any notification. When the information is disclosed to a person reasonably believed to be a spouse, or to a person reasonably believed to be a sexual partner, or a person with whom the patient has shared the use of hypodermic needles, the physician and surgeon shall refer that person for appropriate care, counseling, and followup. This section shall not apply to disclosures made other than for the purpose of diagnosis, care, and treatment of persons notified pursuant to this section, or for the purpose of interrupting the chain of transmission.

(c) This section is permissive on the part of the attending physician, and all requirements and other authorization for the disclosure of test results to detect infection by the probable causative agent of acquired immune deficiency syndrome are limited to the provisions contained in this chapter, Chapter 10 (commencing with Section 121075) and Sections 1603.1 and 1603.3. No physician has a duty to notify any person of the fact that a patient is reasonably believed to be infected by the probable causative agent of acquired immune deficiency syndrome.

(d) The county health officer may alert any persons reasonably believed to be a spouse, sexual partner, or partner of shared needles of an individual who has tested positive on a test to detect infection by the probable causative agent of acquired immune deficiency syndrome about their exposure, without disclosing any identifying information about the individual believed to be infected or the physician making the report, and shall refer any person to whom a disclosure is made pursuant to this subdivision for appropriate care and followup. Upon completion of the county health officer's efforts to contact any person pursuant to this subdivision, all records regarding that person maintained by the county health officer pursuant to this subdivision, including but not limited to any individual identifying information, shall be expunged by the county health officer.

(e) The county health officer shall keep confidential the identity and the seropositivity status of the individual tested and the identities of the persons contacted, as long as records of contacts are maintained.

(f) Except as provided in Section 1603.1 or 1603.3, no person shall be compelled in any state, county, city, or local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual reported or person contacted pursuant to this section.

121020. (a) (1) When the subject of an HIV test is not competent to give consent for the test to be performed, written consent for the test may be obtained from the subject's parents, guardians, conservators, or other person lawfully authorized to make health care decisions for the subject. For purposes of this paragraph, a minor shall be deemed not competent to give consent if he or she is under 12 years of age.

(2) Notwithstanding paragraph (1), when the subject of the test is a minor adjudged to be a dependent child of the court pursuant to Section 360 of the Welfare and Institutions Code, written consent for the test to be performed may be obtained from the court pursuant to its authority under Section 362 or 369 of the Welfare and Institutions Code.

(b) Written consent shall only be obtained for the subject pursuant to subdivision (a) when necessary to render appropriate care or to practice preventative measures.

(c) The person authorized to consent to the test pursuant to subdivision (a) shall be permitted to do any of the following:

(1) Notwithstanding Sections 120975 and 120980, receive the results of the test on behalf of the subject without written authorization.

(2) Disclose the test results on behalf of the subject in accordance with Sections 120975 and 120980.

(3) Provide written authorization for the disclosure of the test results on behalf of the subject in accordance with Sections 120975 and 120980.

CHAPTER 8. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) PUBLIC HEALTH RECORDS CONFIDENTIALITY ACT

121025. (a) Public health records relating to acquired immune deficiency syndrome (AIDS), containing personally identifying information, that were developed or acquired by state or local public health agencies shall be confidential and shall not be disclosed, except as otherwise provided by law for public health purposes or pursuant to a written authorization by the person who is the subject of the record or by his or her guardian or conservator.

(b) State or local public health agencies may disclose personally identifying information in public health records, as described in subdivision (a), to other local, state, or federal public health agencies or to corroborating medical researchers, when the confidential information is necessary to carry out the duties of the agency or researcher in the investigation, control, or surveillance of disease, as determined by the state or local public health agency.

(c) Any disclosure authorized by subdivision (a) or (b) shall include only the information necessary for the purpose of that disclosure and shall be made only upon agreement that the information will be kept confidential and will not be further disclosed without written authorization, as described in subdivision (a).

(d) No confidential public health record, as described in subdivision (a), shall be disclosed, discoverable, or compelled to be produced in any civil, criminal, administrative, or other proceeding.

(e) Any person who willfully or maliciously discloses the content of any confidential public health record, as described in subdivision (a), to any third party, except pursuant to a written authorization, as described in subdivision (a), or as otherwise authorized by law, shall be subject to a civil penalty in an amount not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) plus court costs, as determined by the court, which penalty and costs shall be paid to the person whose record was disclosed.

(f) In the event that a public health record, as described in subdivision (a), is disclosed, the information shall not be used to determine employability, or insurability of any person.

121030. (a) To the extent Chapter 7 (commencing with Section 120975) and Chapter 10 (commencing with Section 121075) apply to records or information that would be covered by this chapter, Chapters 7 and 10 shall supersede this chapter.

(b) This chapter supersedes Section 100330 to the extent it applies to records or information covered by Section 100325 or 100330.

121035. For purposes of this chapter:

(a) ''Disclosed'' or ''disclosure'' or ''discloses'' has the same meaning as set forth in subdivision (b) of Section 121125.

(b) ''State or local public health agencies'' are the department, and any local entity that a health officer, as defined in Section 120100, serves.

CHAPTER 9. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) PUBLIC SAFETY AND TESTING DISCLOSURE

121050. The people of the State of California find and declare that AIDS, AIDS-related conditions, and other communicable diseases pose a major threat to the public health and safety.

The health and safety of the public, victims of sexual crimes, and peace officers, firefighters, and custodial personnel who may come into contact with infected persons, have not been adequately protected by law. The purpose of this chapter is to require that information that may be vital to the health and safety of the public, victims of certain crimes, certain defendants and minors, and custodial personnel, custodial medical personnel, peace officers, firefighters and emergency medical personnel put at risk in the course of their official duties, be obtained and disclosed in an appropriate manner in order that precautions can be taken to preserve their health and the health of others or that those persons can be relieved from groundless fear of infection.

It is the intent of this chapter to supersede in case of conflict existing statutes or case law on the subjects covered including but not limited to the confidentiality and consent provisions contained in Chapter 7 (commencing with Section 120975), Chapter 8 (commencing with Section 121025), and Chapter 10 (commencing with Section 121075).

121055. Any defendant charged in any criminal complaint filed with a magistrate or court with any violation of Penal Code Sections 261, 261.5, 262, 266b, 266c, 286, 288, or 288a and any minor with respect to whom a petition has been filed in a juvenile court alleging violation of any of the foregoing laws, shall be subject to an order of a court having jurisdiction of the complaint or petition requiring testing as provided in this chapter.

If an alleged victim listed in the complaint or petition makes a written request for testing under this section, the prosecuting attorney, or the alleged victim may petition the court for an order authorized under this section.

The court shall promptly conduct a hearing upon any such petition. If the court finds that probable cause exists to believe that a possible transfer of blood, saliva, semen, or other bodily fluid took place between the defendant or minor and the alleged victim in an act specified in this section, the court shall order that the defendant or minor provide two specimens of blood for testing as provided in this chapter.

Copies of the test results shall be sent to the defendant or minor, each requesting victim and, if the defendant or minor is incarcerated or detained, to the officer in charge and the chief medical officer of the facility where the person is incarcerated or detained.

121060. Any person charged in any criminal complaint filed with a magistrate or court and any minor with respect to whom a petition has been filed in juvenile court, in which it is alleged in whole or in part that the defendant or minor interfered with the official duties of a peace officer, firefighter, or emergency medical personnel by biting, scratching, spitting, or transferring blood or other bodily fluids on, upon, or through the skin or membranes of a peace officer, firefighter, or emergency medical personnel shall in addition to any penalties provided by law be subject to an order of a court having jurisdiction of the complaint or petition requiring testing as provided in this chapter.

The peace officer, firefighter, emergency medical personnel or the employing agency, officer, or entity may petition the court for an order authorized under this section.

The court shall promptly conduct a hearing upon any such petition. If the court finds that probable cause exists to believe that a possible transfer of blood, saliva, semen, or other bodily fluid took place between the defendant or minor and the peace officer, firefighter, or emergency medical personnel, as specified in this section, the court shall order that the defendant or minor provide two specimens of blood for testing as provided in this chapter.

Copies of the test results shall be sent to the defendant or minor, each peace officer, firefighter, and emergency medical personnel named in the petition and his or her employing agency, officer, or entity, and if the defendant or minor is incarcerated or detained, to the officer in charge and the chief medical officer of the facility where the person is incarcerated or detained.

121065. (a) The withdrawal of blood shall be performed in a medically approved manner. Only a physician, registered nurse, licensed vocational nurse, licensed medical technician, or licensed phlebotomist may withdraw blood specimens for the purposes of this chapter.

(b) The court shall order that the blood specimens be transmitted to a licensed medical laboratory and that tests be conducted thereon for medically accepted indications of exposure to or infection by acquired immunity deficiency syndrome (AIDS) virus, AIDS-related conditions, and those communicable diseases for which medically approved testing is readily and economically available as determined by the court.

(c) Copies of test results that indicate exposure to or infection by AIDS, AIDS-related conditions, or other communicable diseases shall also be transmitted to the department.

(d) The test results shall be sent to the designated recipients with the following disclaimer:

''The tests were conducted in a medically approved manner but tests cannot determine exposure to or infections by AIDS or other communicable diseases with absolute accuracy. Persons receiving this test result should continue to monitor their own health and should consult a physician as appropriate.''

If the person subject to the test is a minor, copies of the test result shall also be sent to the minor's parents or guardian.

(e) The court shall order all persons, other than the test subject, who receive test results pursuant to Sections 121055 or 121060, to maintain the confidentiality of personal identifying data relating to the test results except for disclosure that may be necessary to obtain medical or psychological care or advice.

(f) The specimens and the results of tests ordered pursuant to Sections 121055 and 121060 shall not be admissible evidence in any criminal or juvenile proceeding.

(g) Any person performing testing, transmitting test results, or disclosing information pursuant to the provisions of this chapter shall be immune from civil liability for any action undertaken in accordance with the provisions of this chapter.

121070. (a) Any medical personnel employed by, under contract to, or receiving payment from the State of California, any agency thereof, or any county, city, or city and county to provide service at any state prison, the Medical Facility, any Youth Authority institution, any county jail, city jail, hospital jail ward, juvenile hall, juvenile detention facility, or any other facility where adults are held in custody or minors are detained, or any medical personnel employed, under contract, or receiving payment to provide services to persons in custody or detained at any of the foregoing facilities, who receives information as specified herein that an inmate or minor at the facility has been exposed to or infected by the AIDS virus or has an AIDS-related condition or any communicable disease, shall communicate the information to the officer in charge of the facility where the inmate or minor is in custody or detained.

(b) Information subject to disclosure under subsection (a) shall include the following: any laboratory test that indicates exposure to

or infection by the AIDS virus, AIDS-related condition, or other communicable diseases; any statement by the inmate or minor to medical personnel that he or she has AIDS or an AIDS-related condition, has been exposed to the AIDS virus, or has any communicable disease; the results of any medical examination or test that indicates that the inmate or minor has tested positive for antibodies to the AIDS virus, has been exposed to the AIDS virus, has an AIDS-related condition, or is infected with AIDS or any communicable disease; provided, that information subject to disclosure shall not include information communicated to or obtained by a scientific research study pursuant to prior written approval expressly waiving disclosure under this section by the officer in charge of the facility.

(c) The officer in charge of the facility shall notify all employees, medical personnel, contract personnel, and volunteers providing services at the facility who have or may have direct contact with the inmate or minor in question, or with bodily fluids from the inmate or minor, of the substance of the information received under subsections (a) and (b) so that those persons can take appropriate action to provide for the care of the inmate or minor, the safety of other inmates or minors, and their own safety.

(d) The officer in charge and all persons to whom information is disclosed pursuant to this section shall maintain the confidentiality of personal identifying data regarding the information, except for disclosure authorized hereunder or as may be necessary to obtain medical or psychological care or advise.

(e) Any person who wilfully discloses personal identifying data regarding information obtained under this section to any person who is not a peace officer or an employee of a federal, state, or local public health agency, except as authorized hereunder, by court order, with the written consent of the patient or as otherwise authorized by law, is guilty of a misdemeanor.

CHAPTER 10. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) RESEARCH CONFIDENTIALITY ACT

121075. Research records, in a personally identifying form, developed or acquired by any person in the course of conducting research or a research study relating to Acquired Immune Deficiency Syndrome (AIDS) shall be confidential, and these confidential research records shall not be disclosed by any person in possession of the research record, nor shall these confidential research records be discoverable, nor shall any person be compelled to produce any confidential research record, except as provided by this chapter.

121080. Confidential research records may be disclosed in accordance with the prior written consent of the research subject

with respect to whom the research record is maintained, but only to the extent, under the circumstances, to the persons, and for the purposes the written consent authorizes. Any disclosure authorized by a research subject shall be accompanied by a written statement containing substantially the same language as follows:

''This information has been disclosed to you from a confidential research record the confidentiality of which is protected by state law and any further disclosure of it without specific prior written consent of the person to whom it pertains is prohibited. Violation of these confidentiality guarantees may subject you to civil or criminal liabilities.''

121085. (a) Confidential research records shall be protected in the course of conducting financial audits or program evaluations, and audit personnel shall not directly or indirectly identify any individual research subject in any report of a financial audit or program evaluation. To the extent it is necessary for audit personnel to know the identity of individual research subjects, authorized disclosure of confidential research records shall be made on a case-by-case basis, and every prudent effort shall be exercised to safeguard the confidentiality of these research records in accordance with this chapter. Information disclosed for audit or evaluation purposes should be used only for audit and evaluation purposes and may not be redisclosed or used in any other way.

(b) Nothing in this section imposes liability or criminal sanction for disclosure of confidential research records in accordance with any reporting requirement for a diagnosed case of AIDS by the department or the Centers for Disease Control under the United States Public Health Services.

121090. Notwithstanding Section 121080, whether or not the research subject, with respect to whom any confidential research record is maintained, gives prior written consent, the content of the confidential research record may be disclosed in any of the following situations:

(a) To medical personnel to the extent it is necessary to meet a bona fide medical emergency of a research subject.

(b) To the department to the extent necessary for the conduct of a special investigation pursuant to Section 100325, in which case the confidentiality provisions of Chapter 8 (commencing with Section 121025) shall apply.

121095. The content of any confidential research record shall be disclosed to the research subject, the legal representative of the research subject if the research subject is a minor, or the personal representative of a deceased research subject to whom the record pertains, thirty (30) days after written request therefor by the research subject, the legal representative or the personal representative.

121100. (a) No confidential research record may be compelled to be produced in any state, county, city or other proceeding in order to initiate or substantiate any criminal charge or charges against a research subject, or to conduct an investigation of a research subject, unless a court finds there is reasonable likelihood that the records in question will disclose material information or evidence of substantial value in connection with the criminal charge or charges or investigation, and there is no other practicable way of obtaining the information or evidence.

In addition, no confidential research record shall be disclosed, discoverable, or compelled to be produced in order to initiate or substantiate any criminal charge or charges against a research subject until after a showing of good cause. In assessing good cause, the court shall weigh the public interest and need for disclosure against the injury to the research subject and the harm to the research being undertaken. Upon the granting of an order to produce, the court, in determining the extent to which disclosure of all or any part of a confidential research record is necessary, shall impose appropriate safeguards against unauthorized disclosure, that shall include, but not necessarily be limited to, the individuals or bodies that may have access to the data, the purposes for which the data shall be used, prohibitions on further disclosure and protection of the identities of other research subjects.

(b) No confidential research record may be compelled to be produced in any state, county, city or other civil proceeding, except as expressly provided in this chapter.

121105. Prior to participation of an individual in a research study relating to AIDS, both of the following requirements shall be met:

(a) The informed consent of each research subject shall be obtained in the method and manner required by Section 46.116, (a) and (b), of Part 46 of Title 45 of the Code of Federal Regulations and be documented in accordance with Section 46.117 of that part.

(b) Each research subject shall be provided with an explanation in writing, in language understandable to the research subject, of the rights and responsibilities of researchers and research subjects under this chapter.

121110. (a) Any person who willfully or maliciously discloses the content of any confidential research record, to any third party, except pursuant to this chapter, shall be assessed a civil penalty in an amount not less than one thousand dollars ($1,000) and not more than five thousand dollars ($5,000) plus court costs, as determined by the court, which penalty and costs shall be paid to the subject of the test.

(b) Any person who maliciously discloses the content of any confidential research record, to a third party, except pursuant to this chapter, that results in economic, bodily, or psychological harm to the research subject, is guilty of a misdemeanor, punishable by

imprisonment in the county jail for a period not to exceed one year or a fine of not to exceed ten thousand dollars ($10,000) or both.

(c) Any person who commits any act described in subdivision (a) or (b) shall be liable to the subject for all actual damages for economic, bodily, or psychological harm that is a proximate result of the act.

(d) Any person who negligently or willfully violates Section 121105 is guilty of an infraction punishable by a fine of twenty-five dollars ($25).

(e) Each violation f this chapter is a separate and actionable offense.

(f) Nothing in this section limits or expands the right of an injured research subject to recover damages under any other applicable law.

121115. In the event that the participation of an individual in a research study is disclosed, the information shall not be used to determine the employability or insurability of the research subject.

121120. Nothing in this chapter shall preclude disclosure of information in order to further research efforts, including, but not limited to, the publication, dissemination, or sharing of raw data, statistics, or case studies, so long as no confidential research records concerning any research subject are disclosed.

121125. For purposes of this chapter:

(a) ''AIDS'' means Acquired Immune Deficiency Syndrome.

(b) ''Disclosed'' means to disclose, release, transfer, disseminate, or otherwise communicate all or any part of any confidential research record orally, in writing, or by electronic means to any person or entity, or to provide the means for obtaining the records.

(c) ''Confidential research record or records'' means any data in a personally identifying form, including name, social security number, address, employer, or other information that could, directly or indirectly, in part or in sum, lead to the identification of the individual research subject, developed or acquired by any person in the course of conducting research or a research study relating to AIDS.

CHAPTER 11. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) RESEARCH AND WORKSHOP GRANTS

121150. The Legislature hereby finds and declares that the department, working with the California AIDS Leadership Committee, has developed a draft state AIDS plan for comprehensive, coordinated government action against AIDS and HIV infection. It is the intention of the Legislature to implement those recommendations pertaining to infectious-disease screening of blood and other body parts and fluids, and to notifying donors of the results of those screening tests.

121155. (a) There is hereby created in the state department an AIDS Advisory Committee. The membership of the committee shall be composed of eight members who have knowledge or expertise in the area of public health or AIDS research, or have been educated in the areas for which the grants are to be directed by the committee. These members shall be appointed by the following:

(1) Two by the Speaker of the Assembly.

(2) Two by the Senate Rules Committee.

(3) Four by the Governor.

(b) In addition to the membership prescribed by subdivision (a), the following persons shall be ex officio members:

(1) The Director of Health Services or a designee shall be a voting member.

(2) The Director of Mental Health, or a designee, a designee, requested to be appointed by the President of the University of California, with knowledge, experience, and responsibility for the university-wide allocation of AIDS research grants, shall be nonvoting members.

(c) The committee shall be abolished effective July 1, 1990, unless extended by subsequent legislative action.

121160. The members of the AIDS Advisory Committee shall serve at the pleasure of the appointing powers. The members shall serve without compensation, but shall be reimbursed for necessary and travel expenses incurred in the performance of the duties of the committee.

The committee shall advise and assist the state in addressing the public health issues associated with Acquired Immune Deficiency Syndrome, and shall work with the department in statewide efforts to promote primary prevention, public education, and the advancement of knowledge regarding Acquired Immune Deficiency Syndrome.

121165. The committee may establish rules or criteria for grants under this chapter as it deems necessary. Pursuant to the rules or criteria, the committee may review and recommend approval by the director of grant applications and monitor programs receiving grants under this chapter.

121170. The director may award grants from any funds that may be made available for the purposes of this chapter to individuals, organizations, or facilities for activities that may include, but need not be limited to, any of the following:

(a) Education regarding primary prevention for high risk groups.

(b) Public education to reduce panic and lessen unnecessary anxiety about AIDS among California residents.

(c) Interdisciplinary or educational workshops to facilitate the interchange of knowledge among investigators regarding AIDS and related disorders.

(d) Research grants that would assist the state with the educational efforts outlined in subdivisions (a) and (b).

(e) Grants to provide seed money for larger grants funded by the federal government or other sources.

121175. The department may do all of the following:

(a) Accept any federal funds provided for any of the purposes of this chapter.

(b) Accept any gift, donation, bequest, or grant of funds from a private or public agency for any of the purposes of this chapter.

121180. Not more than 10 percent of any money appropriated for purposes of this chapter shall be utilized for the administration of this chapter.

CHAPTER 12. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) VACCINE RESEARCH AND DEVELOPMENT GRANT PROGRAM

121200. The Legislature finds and declares all of the following:

(a) Over the past five years AIDS has reached an epidemic stage and is estimated to affect 30,000 Californians by 1990.

(b) The estimated cost of medical care alone for the 4,000 AIDS cases that have occurred to date in California totals approximately two hundred fifty million dollars ($250,000,000). By the end of 1990, medical care is projected to approach three billion five hundred million dollars ($3,500,000,000) and the total public health and medical care expenditures are expected to exceed five billion dollars ($5,000,000,000).

(c) There is no cure for the AIDS virus. The long-term solution to the elimination of AIDS lies in conducting vaccine research.

(d) Much research has already been completed by the private sector and should be utilized to the maximum extent possible, including supplementing with public funds.

(e) Profitmaking corporations are (1) not eligible for most of the existing public funding sources as are institutions of higher learning and nonprofit corporations; (2) when eligible, the public funding amounts are not adequate to conduct research; and (3) private grants are only available to nonprofit corporations.

(f) Moreover, private research companies, already having established vaccine development and manufacturing capabilities, are uniquely situated to maximize available resources and to utilize both management and research staff, equipment, and technical innovations to their greatest efficiency towards the specific goal of developing and manufacturing an AIDS vaccine at the earliest possible time.

(g) Exclusion of private corporations from public funding to develop an approved vaccine will likely result in (1) a delay in the development of a vaccine to prevent AIDS; (2) continued spread of

AIDS to the general population; and (3) continued increases in private and public funds to provide care to AIDS victims.

(h) An AIDS Vaccine Research and Development Grant Program should be established to encourage AIDS vaccine research by the private sector.

(i) It is appropriate to mandate that a grant made to a private entity to develop an AIDS vaccine, once the vaccine has been approved by the FDA for use by the general population, should be reimbursed to the state from the sale of the vaccine.

121205. (a) There is hereby created an AIDS Vaccine Research and Development Grant Program. There is hereby established an AIDS Vaccine Research and Development Grant Fund the moneys in which shall, upon appropriation to the department, be available for the purposes of this chapter.

(b) For the purposes of this chapter:

(1) ''AIDS'' means acquired immune deficiency syndrome.

(2) ''California manufacturer'' means a manufacturer with management or officers based in this state and operations for the conduct of research and development of an AIDS vaccine in this state.

(3) ''Committee'' means the AIDS Vaccine Research and Development Advisory Committee.

(4) ''Grant'' means AIDS vaccine research and development grants.

121215. (a) The department shall issue within 60 days of the effective date of this chapter, a request for proposal (RFP) for research and development projects, based on the criteria provided in subdivision (d). Upon issuing the RFP the department shall publish this fact along with the deadline for grant proposals in the newspapers with the greatest circulation in the major cities of the state, as determined by the department. Additionally, upon issuing the RFP the same information shall be transmitted to the Secretary of the Senate and the Chief Clerk of the Assembly for publishing in the respective journals of each house of the California Legislature.

(b) Any California manufacturer may submit a proposal to the RFP for an AIDS vaccine research and development grant to the department. The proposal shall be submitted to the department within 90 days of the issuance of the RFP.

(c) Within 30 days after the proposal deadline, the committee shall review the proposals and make recommendations to the department. The department, taking into consideration the committee's recommendations, shall award grants to no more than three California manufacturers within 30 days after receiving the committee's recommendations.

(d) The department, making use of an RFP, shall include a clear description of the criteria to be used to select the projects that will receive funding pursuant to this chapter. The committee shall make

recommendations to the department regarding the content of the RFP. The criteria shall include, but not be limited to, the following:

(1) The potential of the grant recipient to develop a vaccine for AIDS.

(2) The financial, technical, and managerial commitment of the grant recipient to the development of an AIDS vaccine.

(3) The demonstrated need of the grant recipient for state funding.

(e) The grants made pursuant to this chapter are not subject to the State Contract Act (Part 2 (commencing with Section 10100) of Division 2 of the Public Contract Code).

121220. (a) The recipients of the grants shall use the moneys of the grant to develop an AIDS vaccine until the Federal Food and Drug Administration (FDA) approves the clinical testing of an AIDS vaccine on humans. Any grant funds not encumbered or expended at the time of the FDA approval of the clinical testing of an AIDS vaccine on humans shall not be used by the recipients until the department authorizes further expenditure or requires the funds to be returned to the AIDS Vaccine Research and Development Grant Fund pursuant to subdivision (b).

(b) If an AIDS vaccine that has received FDA approval for clinical testing on humans has been developed by a grant recipient pursuant to this chapter, then any funds that have been granted to, but not expended or encumbered by, the grant recipient, after approval by the department, shall be expended for the clinical testing of the vaccine on humans in accordance with the FDA protocol, the continued research and development of the vaccine, or both, for the purpose of optimizing the efficacy of the vaccine during clinical testing.

With respect to the other grant recipients, or when none of the recipients have received the FDA approval for the vaccine they are developing, the committee shall meet to consider whether the grant recipient has a good chance of developing a vaccine that will receive FDA approval for clinical testing on humans and shall make recommendations to the department. If the department, taking into consideration the committee's recommendations, determines that the grant recipient has a good chance of developing an FDA approved vaccine, it shall inform the grant recipient in writing to continue expending its grant funds for the development of an AIDS vaccine.

If the department, taking into consideration the committee's recommendations, determines that the grant recipient does not have a good chance of developing a vaccine that will receive FDA approval for clinical testing on humans, it shall inform the recipient in writing that the funds not encumbered or expended, as described in subdivision (a), shall be returned to the department for deposit in the AIDS Vaccine Research and Development Grant Fund.

Any funds remaining in the AIDS Vaccine Research and Development Grant Fund after the department's determinations pursuant to this subdivision, shall, in the state department's discretion, either be expended for (1) further support of the clinical trials of a vaccine developed in whole or in part by a grant recipient or for (2) further research and development of a vaccine by a grant recipient who has been permitted, in accordance with this subdivision, to continue expending grant funds for development of a vaccine, or be expended for (3) both purposes. If no grant recipient is conducting clinical trials or developing a vaccine pursuant to this subdivision, then the moneys in the AIDS Vaccine Research and Development Grant Fund shall revert to the General Fund.

(c) Notwithstanding any other provision of this section, the department may make grants to applicants even after approval has been given by the federal Food and Drug Administration to conduct clinical testing of an AIDS vaccine on humans.

121225. If a California manufacturer that is a grant recipient sells, delivers, or distributes an AIDS vaccine that has received FDA approval for use by the general population and that was developed in whole or in part using a grant awarded pursuant to this chapter, the State of California shall be reimbursed for the grant as provided in this section.

Until the total amount of the grant is repaid, repayments in the amount of one dollar ($1) per dose from the sale of the AIDS vaccine shall be deposited by the grant recipient into the General Fund. Upon payment in full of the grant amount into the General Fund, a royalty on the sale of the vaccine from the grant recipient shall be deposited into the General Fund. The percentage amount of the royalty shall be negotiated at the time of the grant award.

CHAPTER 13. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) IMMUNIZATION

121250. The Legislature finds and declares all of the following:

(a) The rapidly spreading AIDS epidemic poses an unprecedented major public health crisis in California, and threatens, in one way or another, the life and health of every Californian.

(b) The best hope of stemming the spread of the AIDS virus among the general public is the development of an AIDS vaccine to develop an immunity to exposure.

(c) No vaccine has yet been fully developed, tested, or approved for AIDS. An effective vaccine, especially when directed at high-risk groups of unexposed persons, will virtually eliminate the risk of contracting AIDS, just as the risk of contracting polio and smallpox have been virtually eliminated by earlier vaccine development, production, and use among the general public.

(d) Private industry today has the capability of conducting the vaccine research, biological research, immunology, and genetic engineering of appropriate viral components needed to formulate, develop, produce, and test an AIDS vaccine. Whenever these and other appropriate expertise cannot be found within a single company, the formation of multiinstitutional research groups should be encouraged and prioritized, as it is in the public interest to encourage efforts toward vaccine production.

(e) It is of the highest importance and in the public interest to maximize public protection by developing an AIDS vaccine and by establishing high levels of immunization, initially among high-risk populations.

(f) The continuous spread of AIDS and especially the threat of infection spreading among population groups previously considered low-risk demands that the highest of priorities be given to the development of a universal immunoprophylaxis.

(g) The use of vaccines to control the spread of infectious pathogens is recognized as one of the genuinely decisive technologies of modern medicine. Recent advances in pharmaceutical technology combined with better understanding of the immune process offer the hope of an AIDS vaccine that is effective, safe, relatively inexpensive, and relatively easy to administer.

(h) Utilization of this new science may be forestalled, however, by problems that have recently deterred the development of vaccines by traditional means. These problems must be resolved before the full public health benefits of new approaches to vaccine development can be fully and expeditiously realized.

(i) The marketplace conditions facing vaccine manufacturers and developers today have changed considerably over the past 30 years. Private manufacturers and developers of vaccines cannot be forced to produce vaccines, and may choose, under the free enterprise system, not to produce them if marketplace conditions are unfavorable.

(j) Certain market conditions are slowing and threatening to halt the development of an AIDS vaccine. Any delay in the discovery, testing, approval, and production of the vaccine because of these secondary considerations may cost tens of thousands of human lives annually, unnecessary pain and suffering for hundreds of thousands of infected Americans, and billions of dollars in medical costs and in lost productivity.

(k) Resource constraints in the public and private sectors and the time required to bring vaccines to market presently limit investments in vaccines research and development. Although universities constitute a significant resource in AIDS research in particular and vaccines research in general, university funding limitations and conflicting research priorities make reliance on the

resources and expertise of the private pharmaceutical industry a necessary supplement to public funding of AIDS research.

(*l*) There has been a decrease in the willingness of pharmaceutical companies to become involved in vaccine research, development, and manufacturing because of uncertain profitability and perceived and actual marketplace risks and disincentives.

(m) It is clearly in the public interest to provide appropriate and necessary incentives toward the timely development and production of an effective and safe AIDS vaccine.

(n) The development of an AIDS vaccine provides an exceptionally important benefit, making its availability highly desirable. However, certain conditions may preclude that development, including the following:

(1) There is a high cost for capital expenditures for vaccine development (estimated to be from ten million dollars ($10,000,000) to thirty million dollars ($30,000,000)). Testing costs of clinical trials (twenty million dollars ($20,000,000) per vaccine, by some estimates) are particularly burdensome, especially for smaller firms.

(2) There is an uncertain market demand for a vaccine once development costs have been invested and FDA marketing approval has been secured.

(o) Without state intervention to assure minimal profitability of an AIDS vaccine, inadequate incentives may exist for the private sector to commit resources and expertise to the accelerated development of an AIDS vaccine.

(p) In light of the dangers inherent in the AIDS epidemic to the general public of California, it is crucial that to the extent possible any serious obstacles to the development of a vaccine be removed.

(q) Because an AIDS vaccine provides an exceptionally important public benefit, it is in the public interest to take uncommon action to facilitate the development and production of a vaccine.

(r) It is as well in the public interest to assure fair compensation, if necessary at public expense, to any innocent victim who may be injured by an AIDS vaccine, as a part of implementing the socially beneficial policy of establishing high levels of AIDS immunization.

(s) In light of the high incidence of AIDS amongst Californians, the California Legislature must lead our country into the 20th century in this effort.

(t) It is therefore fitting and proper that the State of California enact uncommon and exceptional legislation in order to prevent the further spread of the AIDS epidemic.

121255. The Legislature further finds and declares all of the following:

(a) Acquired immune deficiency syndrome (AIDS) is caused by the virus human T-cell lymphotropic virus, type III (HTLV-3) that initially cripples the body’s immune system and eventually leaves the body open to an array of lethal opportunistic infections.

(b) So far, there is no known cure for AIDS and once a person is AIDS infected, the virus remains throughout the rest of his or her life.

(c) The AIDS virus has a three-to-seven year incubation period, making it one of the most difficult diseases to combat and trace.

(d) An easily administered blood test can determine whether a person has been exposed to the AIDS virus.

(e) In 1979, when AIDS was first diagnosed in the United States, the number of newly diagnosed victims was doubling every six to nine months; today the number of people diagnosed with AIDS doubles each year.

(f) Nationally, between 500,000 and 2,000,000 Americans are estimated to have been exposed to the AIDS virus. Of those exposed, between 25,000 and 500,000 persons (5 percent–25 percent) may be expected to die of AIDS.

(1) Another 25,000 to 500,000 persons may be expected to develop AIDS Related Complex (ARC). The range of illnesses these individuals will suffer from may range from minor ailments to brain damage.

(2) The remaining majority of those exposed may never suffer its consequences, but may carry and transmit the disease unknowingly.

(3) Some experts estimate as many as 1,000 additional people are exposed daily.

(g) The department, in its report to the Legislature (March 1986) estimated conservatively that over 30,000 Californians shall have contracted AIDS by 1990, about 50 percent having succumbed. The disease is believed to be fatal within 18 months of diagnosis. To date, more than half the 16,000 people with AIDS in the United States have died.

(h) The AIDS virus is transmitted primarily through sexual contact, and also through the sharing of hypodermic needles, contaminated blood transfusions, and during pregnancy to the fetus.

(i) While the earliest spread of the AIDS virus was primarily among homosexuals, the virus is now found and spreading among heterosexuals as well.

(j) Additionally, drug abusers are highly susceptible to the AIDS virus since the drugs diminish the ability of the body’s immune system to function. Intravenous drug abusers traditionally come into contact with the virus from sharing hypodermic needles.

(k) Persons sexually active in the heterosexual community are also at risk. Until a vaccine is developed, the AIDS virus will cross over from the high-risk groups to the lower risk groups. At this time, it is not known how fast the AIDS virus will penetrate other population groups, but it is not expected to be nearly as rapid. To date, partners of high-risk groups (bisexual men and intravenous drug users) are considered the main means of transmitting the AIDS virus to the heterosexual population. Other means include pregnant women who

pass the infection on to the child and prostitutes who pass on the infection to their clients.

(*l*) Of the first 9,000 AIDS cases diagnosed in the United States, almost 1,000 were women. Fourteen percent of these women developed AIDS through sexual contact. Recent studies have demonstrated that the virus can be transmitted by women to their male sexual partners. Sexual contact with an infected partner may transmit the virus and fatally infect the partner.

121260. The Legislature further finds and declares all of the following:

(a) The average cost per patient in the treatment of AIDS until death is now one hundred fifty thousand dollars ($150,000). It is estimated that total costs including health care of the first 10,000 AIDS cases in the United States totaled more than six billion three hundred million dollars ($6,300,000,000). By 1990, according to the department, Californians will spend almost five billion dollars ($5,000,000,000) in medical costs alone in care and treatment of 30,000 AIDS patients, with no realistic hope for their remission or cure. This cost does not include money spent on education, research, and lost income.

(b) To date, the costs of caring for people with AIDS related complex (ARC) has not been officially calculated. However, it is safe to assume the costs are substantial over time. Experts fear that the illnesses of ARC patients, although they may not be fatal, are severe. For example, the virus invades the brain rendering the patients incapable of caring for themselves. It is, therefore, plausible that a percentage of ARC patients will need to be institutionalized.

(c) The Legislature intends by this chapter to take uncommon action to remove the impediments to the expeditious development of an AIDS vaccine.

(d) It is further the intent of the Legislature to provide to any person, whose injury is proximately caused by the use of the vaccine, except to the extent the injuries are attributable to the comparative negligence of the claimant in the use of the vaccine, all of the following:

(1) Compensation for related medical costs associated with the care and treatment of the injury.

(2) Compensation for the loss of any and all earnings caused by the injury.

(3) Compensation for pain and suffering caused by the injury, except that in no action shall the amount of damages for noneconomic losses exceed five hundred fifty thousand dollars ($550,000).

(e) It is further the intent of the Legislature to establish the AIDS Clinical Trials Testing Fund that will be available to not more than three California manufacturers of an AIDS vaccine approved by the federal Food and Drug Administration (FDA) or the department

pursuant to Part 5 (commencing with Section 109875) of Division 104 for clinical trials with humans.

(f) The AIDS Vaccine Research and Development Advisory Committee, established pursuant to Section 121210, shall review requests from California manufacturers for funds from the AIDS Clinical Trials Testing Fund and shall make recommendations to the department regarding the award of funds, including the appropriate amount of funding. The department, taking into consideration the committee's recommendations, may allocate the funds to the manufacturers specified in the protocol approved by the FDA or the department pursuant to Part 5 (commencing with Section 109875) of Division 104 for administering the clinical trials.

(g) A California manufacturer seeking the approval of the FDA, rather than the department, for administering clinical trials of an AIDS vaccine may apply while FDA approval is pending to the AIDS Vaccine Research and Development Advisory Committee for the committee's recommendation that the manufacturer receive funds from the AIDS Clinical Trials Testing Fund upon FDA approval.

121265. ''State,'' as used in this chapter, has the same meaning as set forth in Section 900.6 of the Government Code.

121270. (a) There is hereby created the AIDS Vaccine Victims Compensation Fund.

(b) For the purposes of this section:

(1) ''AIDS vaccine'' means a vaccine that (A) has been developed by any manufacturer and (B) is approved by the FDA or the department pursuant to Part 5 (commencing with Section 109875) of Division 104 as a safe and efficacious vaccine for the purpose of immunizing against AIDS.

(2) ''Board'' means the State Board of Control.

(3) ''Damages for personal injuries,'' means the direct medical costs for the care and treatment of injuries to any person, including a person entitled to recover damages under Section 377 of the Code of Civil Procedure, proximately caused by an AIDS vaccine, the loss of earnings caused by the injuries, and the amount necessary, but not to exceed five hundred fifty thousand dollars ($550,000), to compensate for noneconomic losses, including pain and suffering caused by the injuries.

(4) ''Fund'' means the AIDS Vaccine Victims Compensation Fund.

(c) The board shall pay from the fund, contingent entirely upon the availability of moneys as provided in subdivision (o), damages for personal injuries caused by an AIDS vaccine that is sold in or delivered in California, and administered or dispersed in California to the injured person except that no payment shall be made for any of the following:

(1) Damages for personal injuries caused by the vaccine to the extent that they are attributable to the comparative negligence of the person making the claim.

(2) Damages for personal injuries in any instance when the manufacturer has been found to be liable for the injuries in a court of law.

(3) Damages for personal injuries due to a vaccination administered during a clinical trial.

(d) An application for payment of damages for personal injuries shall be made on a form prescribed by the board, that application may be required to be verified, within one year of the date that the injury and its cause are discovered. Upon receipt, the board may require the submission of additional information necessary to evaluate the claim.

(e) (1) Within 45 days of the receipt of the application and the submission of any additional information, the board shall do either of the following:

(A) Allow the claim in whole or part.

(B) Disallow the claim.

(2) In those instances of unusual hardship to the victim, the board may grant an emergency award to the injured person to cover immediate needs upon agreement by the injured person to repay in the event of a final determination denying the claim.

(3) If the claim is denied in whole or part, the victim may apply within 60 days of denial for a hearing. The hearing shall be held within 60 days of the request for a hearing unless the injured person requests a later hearing.

(f) At the hearing the injured person may be represented by counsel and may present relevant evidence as defined in subdivision (c) of Section 11513 of the Government Code. The board may consider additional evidence presented by its staff. If the injured person declines to appear at the hearing, the board may act solely upon the application, the staff report, and other evidence that appears on the record.

(g) The board may delegate the hearing of applications to hearing examiners.

(h) The decision of the board shall be in writing and shall be delivered or mailed to the injured person within 30 days of the hearing. Upon the request by the applicant within 30 days of delivery or mailing, the board may reconsider its decision.

(i) Judicial review of a decision shall be under Section 1094.5 of the Code of Civil Procedure, and the court shall exercise its independent judgment. A petition for review shall be filed as follows:

(1) If no request for reconsideration is made, within 30 days of personal delivery or mailing of the board’s decision on the application.

(2) If a timely request for reconsideration is filed and rejected by the board, within 30 days of personal delivery or mailing of the notice of rejection.

(3) If a timely request for reconsideration is filed and granted by the board, or reconsideration is ordered by the board, within 30 days of personal delivery or mailing of the final decision on the reconsidered application.

(j) The board shall adopt regulations to implement this section, including those governing discovery.

(k) The fund is subrogated to any right or claim that any injured person may have who receives compensation pursuant to this section, or any right or claim that the person's personal representative, legal guardian, estate, or survivor may have, against any third party who is liable for the personal injuries caused by the AIDS vaccine, and the fund shall be entitled to indemnity from that third party. The fund shall also be entitled to a lien on the judgment, award, or settlement in the amount of any payments made to the injured person.

(*l*) In the event that the injured person, or his or her guardian, personal representative, estate, or survivors, or any of them, bring an action for damages against the person or persons liable for the injury or death giving rise to an award by the board under this section, notice of institution of legal proceedings and notice of any settlement shall be given to the board in Sacramento except in cases where the board specifies that notice shall be given to the Attorney General. All notices shall be given by the attorney employed to bring the action for damages or by the injured person, or his or her guardian, personal representative, estate, or survivors, if no attorney is employed.

(m) This section is not intended to affect the right of any individual to pursue claims against the fund and lawsuits against manufacturers concurrently, except that the fund shall be entitled to a lien on the judgment, award, or settlement in the amount of any payments made to the injured party by the fund.

(n) There is hereby created the AIDS Vaccine Injury Compensation Policy Review Task Force consisting of 14 members. The task force shall be composed of 10 members appointed by the Governor, of which two shall be from a list provided by the California Trial Lawyers Association, one from the department, the Director of Finance, one unspecified member, and one attorney with experience and expertise in products liability and negligence defense work, two representing recognized groups that represent victims of vaccine induced injuries or AIDS victims, or both, and two representing manufacturers actively engaged in developing an AIDS vaccine. In addition four Members of the Legislature or their designees shall be appointed to the task force, two of which shall be appointed by the Speaker of the Assembly and two of which shall be appointed by the Senate Rules Committee. The chairperson of the task force shall be

appointed by the Governor from the membership of the task force. The task force shall study and make recommendations on the legislative implementation of the fund created by subdivision (a). These recommendations shall at least address the following issues:

(1) The process by which victims are to be compensated through the fund.

(2) The procedures by which the fund will operate and the governance of the fund.

(3) The method by which manufacturers are to pay into the fund and the amount of that payment.

(4) The procedural relationship between a potential victim's claim through the fund and a court claim made against the manufacturer.

(5) Other issues deemed appropriate by the task force.

The task force shall make its recommendations to the Legislature on or before June 30, 1987.

(o) The fund shall be funded wholly by a surcharge on the sale of an AIDS vaccine, that has been approved by the FDA, or by the department pursuant to Part 5 (commencing with Section 109875) of Division 104, in California in an amount to be determined by the department. The surcharge shall be levied on the sale of each unit of the vaccine sold or delivered, administered, or dispensed in California. The appropriate amount of the surcharge shall be studied by the AIDS Vaccine Injury Compensation Policy Review Task Force which shall recommend the appropriate amount as part of its report, with the amount of the surcharge not to exceed ten dollars ($10) per unit of vaccine. Expenditures of the task force shall be made at the discretion of the Director of Finance or the director's designee.

(p) For purposes of this section, claims against the fund are contingent upon the existing resources of the fund as provided in subdivision (o), and in no case shall the state be liable for any claims in excess of the resources in the fund.

121275. (a) Because the development of a vaccine now costs somewhere between twenty million dollars ($20,000,000) and forty million dollars ($40,000,000), and because the last vaccine produced and marketed did not sell well, vaccine manufacturers are hesitant to proceed to invest their resources in a risky venture. It is, therefore, in the public health interest of California to assure that manufacturers proceed to develop this vaccine and protect Californians against this dread disease and protect the State of California against the enormous fiscal costs of treatment for persons getting AIDS. It is a sound and worthwhile investment to provide a guarantee of a market to lessen the risk of loss and assure the development of an AIDS vaccine.

It is anticipated that this AIDS vaccine will consist of a three-unit series. The State of California is willing to guarantee that at least 175,000 persons will be vaccinated, and to guarantee the purchase,

within three years after the FDA or the department pursuant to Part 5(commencing with Section 109875) of Division 104 approves marketing of an AIDS vaccine, of at least 500,000 units, at a cost of no more than twenty dollars ($20) per dosage, by all companies, anywhere in the United States.

Therefore, the State of California, by moneys to be appropriated later through the Budget Act, commits itself to purchasing, at the end of three years after the FDA or the department pursuant to Part 5 (commencing with Section 109875) of Division 104 has approved the marketing on a competitive basis, at not more than twenty dollars ($20) per dosage, the difference between 500,000 units and the actual amount sold, delivered, administered, or dispensed by all companies throughout the United States, including units sold to or reimbursed by Medi-Cal, Medicare, or other public programs, providing that less than 500,000 units are sold, delivered, administered, or dispensed.

(b) The AIDS Vaccine Guaranteed Purchase Fund is hereby established and shall be administered by the department, that may develop necessary regulations to carry out the purpose of this section.

(c) The department may carry out this section, when those funds are appropriated through the State Budget. In determining which vaccine shall be purchased by the state from among those manufacturers selling or distributing in California, an AIDS vaccine approved by the FDA or the department pursuant to Part 5 (commencing with Section 109875) of Division 104, the department shall take into consideration at least all of the following factors:

(1) The length of time each AIDS vaccine has been in the marketplace in California.

(2) Each AIDS vaccine's history of efficacy since approval by the FDA or the department.

(3) Each AIDS vaccine's history of side effects experienced by previous recipients of the vaccine.

(4) The relative cost of each competing manufacturer's AIDS vaccine.

121280. (a) In enacting this section the Legislature finds and declares:

(1) It is in the interest of the people of California to develop a vaccine that will prevent the infection of HIV, the agent that causes AIDS.

(2) In order to develop that vaccine, a prototype vaccine must be first given to HIV-negative people to determine the following:

(A) The vaccine's toxicity.

(B) The vaccine's efficacy.

(C) The human immune response to the vaccine.

(3) These studies are currently impossible because vaccine manufacturers fear that, by inoculating HIV-negative individuals with an experimental vaccine, they will elicit a positive immune response as measured by an enzyme linked immunosorbent assay

(ELISA), western blot or other federal Food and Drug Administration approved in vitro diagnostic test, thereby placing vaccine volunteers at risk for denial of health or life insurance by insurance carriers as a consequence of their participation.

(4) Insurers need a reliable mechanism by which they can verify the insurability of a vaccine trial participant.

(b) No health care service plan, disability insurer, nonprofit hospital service plan, self-insured employee welfare benefit plan, or life insurer may withhold any settlement or coverage of an individual solely because of his or her participation in an AIDS/HIV vaccine clinical trial studied under an investigational new drug application effective pursuant to Section 312 of Title 21 of the Code of Federal Regulations, or Section 111595.

(c) The sponsor of any such trial shall make a confidential certificate with all the necessary particulars, which shall be determined by the department, for each enrollee and then submit it to the department, which shall endorse it and return it to the vaccine recipient. A copy of this confidential certificate shall be kept on file indefinitely by both the study sponsor and the department.

(d) Release of a confidential certificate shall be by written authorization of the enrollee named in the certificate. If the enrollee is unable to provide the written authorization, a person designated in the certificate by the enrollee may provide the written authorization. The written authorization shall include the name of the person or entity to whom the disclosure would be made.

Disclosure as used in this section means to release, transfer, disseminate or otherwise communicate all or part of any confidential certificate orally, in writing, or by electronic means to any person or entity.

CHAPTER 14. ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) CLINICAL TRIAL GRANT AWARD FOR THE PREVENTION OF MATERNAL TRANSMISSION OF HUMAN IMMUNODEFICIENCY VIRUS (HIV) INFECTION

121300. The Legislature finds and declares all of the following:

(a) Nearly 90 percent of the cases of pediatric AIDS in the United States occur as a result of maternal infant transmission.

(b) It is estimated that from 13 to 45 percent of infants born to HIV-infected mothers will acquire HIV either in utero, during delivery, or postpartum.

(c) In 1990, the number of cases of AIDS in women in the United States increased by 34 percent compared to an increase of 18 percent in men. As a consequence of this increased dissemination of HIV in women, there has been a concomitant increase in the number of HIV infected infants.

(d) Approximately 6,000 children were born to HIV-infected women in the United States in 1990. This resulted in 1,500 to 2,000 newly infected infants. Internationally, it is estimated that one million children acquired HIV through maternal transmission in 1990.

(e) HIV infection that is transmitted maternally progresses more rapidly than HIV infection in adults, with most infants developing advanced symptoms of infection within 18 months. Costs for care of infants infected with HIV have been estimated to be comparable or higher than the cost of treating HIV-related illness in adults. Currently, limited data exists for the costs of treating HIV-infected children. A recent estimate for those costs is as follows:

(1) For the mean lifetime hospital costs per child: ninety thousand dollars ($90,000).

(2) For the mean annual cost per child hospitalized all year: two hundred nineteen thousand dollars ($219,000). A significant portion of pediatric hospital costs may be due to a prolonged hospitalization because of the lack of foster homes for children.

(3) For the estimated annual medicaid cost: eighteen thousand dollars ($18,000) to forty-two thousand dollars ($42,000).

(4) In comparison, recent estimates of the national cost of treating an adult with HIV and without AIDS is five thousand dollars ($5,000) per year and the average cost of treating an adult person with AIDS is thirty-two thousand dollars ($32,000) per year of that twenty-four thousand dollars ($24,000) is inpatient costs and eight thousand dollars ($8,000) for other services.

(f) AIDS vaccines are now available for testing in FDA-approved clinical trials in HIV-infected pregnant women for the purpose of protecting against HIV transmission from mother to child.

(g) Manufacturers are hesitant to conduct these trials because of the combined threat of liability and the limited market to reimburse the research and clinical trial investment.

(h) The California Legislature wishes to encourage FDA-approved AIDS vaccine clinical trials to protect against maternal HIV transmission from mother to child, that may also provide a therapeutic effect in the HIV-infected mother. It is appropriate to mandate that grants be made to encourage qualified manufacturers to conduct these trials for the benefit of California citizens.

121305. For the purposes of this chapter, the following definitions apply:

(a) ''AIDS'' means acquired immune deficiency syndrome.

(b) ''An HIV-positive individual'' means an individual who is infected with the AIDS virus.

(c) ''Committee'' means the AIDS Vaccine Research and Development Advisory Committee established pursuant to Section 121210.

(d) ‘‘Grant award’’ means an AIDS Vaccine Clinical Trial Grant Award for the Prevention of Maternal Transmission of HIV Infection.

(e) ‘‘AIDS vaccine,’’ for the purposes of this chapter, means a vaccine that has been developed by a manufacturer and is being tested and administered for the purposes of determining whether immunization of HIV-infected pregnant women will protect against maternal transmission of the AIDS virus. Clinical trials must be conducted under an investigational new drug (IND) application on file with the federal Food and Drug Administration (FDA).

(f) ‘‘Research subject’’ means a person who is administered an AIDS vaccine, or a fetus of a woman administered an AIDS vaccine, or a child born to a woman administered an AIDS vaccine during pregnancy.

(g) ‘‘Researcher’’ means a person employed by or affiliated with a manufacturer or a research institution, who participates in the development or testing or administration of an AIDS vaccine, or who is involved in the diagnosis and treatment of a research subject.

121310. A manufacturer, research institution, or researcher shall, prior to the administration of an AIDS vaccine to a research subject, obtain that woman’s informed consent, that shall comply with all applicable statutes and regulations.

(a) The informed consent shall contain a statement that significant new findings developed during the course of the research that may relate to the subject’s willingness to continue participation will be provided to the subject.

(b) A copy of the informed consent shall be maintained with the woman’s medical records.

121315. (a) A manufacturer, research institution, or researcher shall not be strictly liable for personal injury or wrongful death resulting from the administration of any AIDS vaccine to a research subject participating in the clinical trials described in this chapter.

(b) It is the intent of the Legislature in enacting this section to confer upon manufacturers, research institutions, and researchers participating in the clinical trials described in this chapter an immunity from liability to the same extent as conferred upon specified pharmaceutical manufacturers under Brown v. Superior Court, 44 Cal. 3d 1049.

(c) No immunity shall be conferred to the extent that the injury or death was caused by the negligence, gross negligence, or reckless, willful, or wanton misconduct of the manufacturer, research institution, or researcher or the manufacturer, research institution, or the researcher has failed to comply with Section 121310.

(d) The immunity provided by this section shall not apply to a manufacturer, research institution, or researcher who intentionally provided false information to the FDA in connection with an IND application.

(e) Notwithstanding the immunity provided by this section, nothing in this section shall be construed to affect the inapplicability or applicability of the holding in Brown v. Superior Court, 44 Cal. 3d 1049 to other situations involving the same or similar conduct.

121320. No person shall be denied the opportunity to be a research subject because of the inability to pay for medical treatment.

121325. There is hereby created the AIDS Vaccine Clinical Trial Grant Award for the Prevention of Maternal Transmission of HIV Infection. Moneys within the AIDS Clinical Trials Testing Fund, established in accordance with Section 121260, shall, upon appropriation by the Legislature, be available to the department for the purposes of this chapter, that shall include a one-time amount of sixty thousand dollars ($60,000) for the department to develop and process the request for proposal as specified in subdivision (a). Grant awards shall be made available to not more than three manufacturers of an AIDS vaccine approved by the FDA for clinical trials in HIV-positive pregnant women. The purpose is to expedite the completion of an AIDS vaccine to prevent maternal transmission of HIV. The funds are to be used for FDA approved clinical trials.

(a) The department shall issue a request for proposal (RFP) for the clinical trials of an AIDS vaccine to prevent maternal transmission of HIV infection.

(1) The RFP shall be based on the criteria provided in subdivision (d).

(2) Upon issuing the RFP, the department shall publish this fact along with the deadline for grant proposals in the newspapers with the greatest circulation in the major cities of the state, as determined by the department. Additionally, upon issuing the RFP, the same information shall be transmitted to the Secretary of the Senate and the Chief Clerk of the Assembly for publishing in the respective journals of each house of the Legislature.

(b) Any manufacturer may submit a proposal for the grant award in the response to the RFP issued by the department.

(c) The department, taking into consideration the committee's recommendations, shall, for purposes of this chapter, award grants to no more than three California manufacturers after receiving the committee's recommendations.

(d) The department, making use of an RFP, shall include a clear description of the criteria to be used to select the projects that will receive funding pursuant to this chapter. The committee shall make recommendations to the department regarding the content of the RFP. The criteria shall include, but not be limited to, the following:

(1) The potential of the grant recipient to develop a vaccine for the prevention of maternal transmission of HIV infection.

(2) The financial, technical, and managerial commitment of the grant recipient to the development of the vaccine.

(3) The commitment of the grant recipient to agree to provide medical treatment, either directly or through reasonable health insurance coverage, to the participant for any injury caused by the AIDS vaccine in the clinical trial. This agreement shall also be included as part of the participant's informed consent pursuant to Section 121305.

(e) Grant awards may be made without limitation on the amount of funding from the AIDS Clinical Trials Testing Fund that may be allocated to a single manufacturer, provided that the committee has determined that the grant award is in the public interest.

121330. If a manufacturer that is a grant recipient sells, delivers, or distributes an AIDS vaccine that has received FDA approval for use by the general population and that was developed in whole or in part using a grant awarded pursuant to this chapter, the State of California shall be reimbursed for the grant as provided in this section.

Until the total amount of the grant is repaid, repayments in the amount of one dollar ($1) per dose from the sale of the AIDS vaccine shall be deposited by the grant recipient into the General Fund. Upon payment in full of the grant amount into the General Fund, a royalty on the sale of the vaccine from the grant recipient shall be deposited into the General Fund. The percentage amount of the royalty shall be negotiated at the time of the grant award.

121335. It is the intent of the Legislature for the department to make every effort possible to insure a comprehensive and diverse expert representation on the committee. It is the intent of the Legislature to ensure that expert members of the committee include, but are not limited to, ethnic minorities and women.

PART 5. TUBERCULOSIS

CHAPTER 1. TUBERCULOSIS CONTROL

121350. The department shall maintain a program for the control of tuberculosis. The department shall administer the funds made available by the state for the care of tuberculosis patients.

121355. Notwithstanding any other provision of this chapter a county that has elected to come under Section 14150.1 of the Welfare and Institutions Code shall not receive any tuberculosis subsidy or reimbursement from the state under the provisions of this chapter.

121357. The state department shall be the lead agency for all tuberculosis control and prevention activities at the state level.

121360. Pulmonary tuberculosis is an infectious and communicable disease, dangerous to the public health, and all proper expenditures that may be made by any county, pursuant to this chapter, are necessary for the preservation of the public health of the county.

121361. (a) (1) A health facility, local detention facility, or state correctional institution shall not discharge or release any of the following persons unless subdivision (e) is complied with:

(A) A person known to have active tuberculosis disease.

(B) A person who the medical staff of the health facility or of the penal institution has reasonable grounds to believe has active tuberculosis disease.

(2) In addition, persons specified in this subdivision may be discharged from a health facility only after a written treatment plan described in Section 121362 is approved by a local health officer of the jurisdiction in which the health facility is located. Treatment plans submitted for approval pursuant to this paragraph shall be reviewed by the local health officer within 24 hours of receipt of the plans.

(3) The approval requirement of paragraph (2) shall not apply to any transfer to a general acute care hospital when the transfer is due to an immediate need for a higher level of care, nor to any transfer from any health facility to a correctional institution. Transfers or discharges described in this paragraph shall occur only after the notification and treatment plan required by Section 121362 have been received by the local health officer.

(4) This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(b) No health facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to another health facility unless subdivision (e) is complied with. This subdivision shall not apply to transfers within the state correctional system or to interfacility transfers occurring within a local detention facility system.

(c) No state correctional institution or local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) from a state to a local, or from a local to a state, penal institution unless notification and a written treatment plan are received by the chief medical officer of the penal institution receiving the person.

(d) No local detention facility shall transfer a person described in subparagraph (A) or (B) of paragraph (1) of subdivision (a) to a local detention facility in another jurisdiction unless subdivision (e) is complied with and notification and a written treatment plan are received by the chief medical officer of the local detention facility receiving the person.

(e) All discharges, releases, or transfers described in subdivisions (a), (b), (c), and (d) may occur only after notification and a written treatment plan pursuant to Section 121362 has been received by the local health officer. When prior notification would jeopardize the person’s health, the public safety, or the safety and security of the

penal institution, then the notification and treatment plan shall be submitted within 24 hours of discharge, release, or transfer.

121362. Each health care provider who treats a person for active tuberculosis disease, each person in charge of a health facility, or each person in charge of a clinic providing outpatient treatment for active tuberculosis disease shall promptly report to the local health officer at the times that the health officer requires, but no less frequently than when there are reasonable grounds to believe that a person has active tuberculosis disease, and when a person ceases treatment for tuberculosis disease. Situations in which the provider may conclude that the patient has ceased treatment include times when the patient fails to keep an appointment, relocates without transferring care, or discontinues care. The initial disease notification report shall include an individual treatment plan that includes the patient name, address, date of birth, tuberculin skin test results, pertinent radiologic, microbiologic, and pathologic reports whether final or pending, and any other information required by the local health officer. Subsequent reports shall provide updated clinical status and laboratory results, assessment of treatment adherence, name of current care provider if patient transfers care, and any other information required by the local health officer. A facility discharge, release, or transfer report shall include all pertinent and updated information required by the local health officer not previously reported on initial or subsequent reports, and shall specifically include verified patient address, the name of the medical provider who has specifically agreed to provide medical care, clinical information used to assess the current infectious state, and any other information required by the local health officer. Each health care provider who treats a person with active tuberculosis disease, and each person in charge of a health facility or a clinic providing outpatient treatment for active tuberculosis disease, shall maintain written documentation of each patient's adherence to his or her individual treatment plans. Nothing in this section shall authorize the disclosure of test results for human immunodeficiency virus (HIV) unless authorized by Chapter 7 (commencing with Section 120975) of, Chapter 8 (commencing with Section 121025) of, and Chapter 10 (commencing with Section 121075) of, Part 4, of Division 105.

In the case of a parolee under the jurisdiction of the Department of Corrections, the local health officer shall notify the medical officer of the parole region or the physician and surgeon designated by the Director of Corrections when there are reasonable grounds to believe that the parolee has active tuberculosis disease and when the parolee ceases treatment for tuberculosis. Situations where the local health officer may conclude that the parolee has ceased treatment include times when the parolee fails to keep an appointment, relocates without transferring care, or discontinues care.

121363. Each health care provider who treats a person for active tuberculosis disease shall examine, or cause to be examined, all household contacts or shall refer them to the local health officer for examination. Each health care provider shall promptly notify the local health officer of the referral. When required by the local health officer, nonhousehold contacts and household contacts not examined by a health care provider shall submit to examination by the local health officer or designee. If any abnormality consistent with tuberculosis disease is found, steps satisfactory to the local health officer shall be taken to refer the person promptly to a health care provider for further investigation, and if necessary, treatment. Contacts shall be reexamined at times and in a manner as the local health officer may require. When requested by the local health officer, a health care provider shall report the results of any examination related to tuberculosis of a contact.

121364. (a) Within the territory under his or her jurisdiction, each local health officer may order examinations for tuberculosis infection for the purposes of directing preventive measures for persons in the territory, except those incarcerated in a state correctional institution, for whom the local health officer has reasonable grounds to determine are at heightened risk of tuberculosis exposure.

(b) An order for examination pursuant to this section shall be in writing and shall include other terms and conditions as may be necessary to protect the public health.

121365. Each local health officer is hereby directed to use every available means to ascertain the existence of, and immediately investigate all reported or suspected cases of active tuberculosis disease in the jurisdiction, and to ascertain the sources of those infections. In carrying out the investigations, each local health officer shall follow applicable local rules and regulations and all general and special rules, regulations, and orders of the state department. If the local health officer determines that the public health in general or the health of a particular person is endangered by exposure to a person who is known to have active tuberculosis disease, or to a person for whom there are reasonable grounds to believe has active tuberculosis disease, the local health officer may issue any orders he or she deems necessary to protect the public health or the health of any other person, and may make application to a court for enforcement of the orders. Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations thereof.

The orders may include, but shall not be limited to, any of the following:

(a) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility for appropriate examination for active tuberculosis disease of a person who is known to have active tuberculosis disease, or a person for whom there are reasonable grounds to believe that the person has active tuberculosis disease and who is unable or unwilling voluntarily to submit to the examination by a physician or by the local health officer. Any person whom the health officer determines should have an examination for tuberculosis disease may have the examination made by a physician and surgeon of his or her own choice who is licensed to practice medicine under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code under terms and conditions as the local health officer shall determine on reasonable grounds to be necessary to protect the public health. This section does not authorize the local health officer to mandate involuntary anergy testing.

(b) An order requiring a person who has active tuberculosis disease to complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, to follow required infection control precautions for tuberculosis disease. This subdivision does not allow the forceable or involuntary administration of medication.

(c) An order requiring a person who has active tuberculosis disease and who is unable or unwilling otherwise to complete an appropriate prescribed course of medication for tuberculosis disease to follow a course of directly observed therapy. This subdivision does not allow forceable or involuntary administration of medication.

(d) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has infectious tuberculosis disease, or who presents a substantial likelihood of having infectious tuberculosis disease, based upon proven epidemiologic evidence, clinical evidence, X-ray readings, or tuberculosis laboratory test results.

(2) The local health officer finds, based on recognized infection control principles, that there is a substantial likelihood the person may transmit tuberculosis to others because of his or her inadequate separation from others.

(e) An order for the removal to, detention in, or admission into, a health facility or other treatment facility of a person if both of the following occur:

(1) The person has active tuberculosis disease, or has been reported to the health officer as having active tuberculosis disease with no subsequent report to the health officer of the completion of an appropriate prescribed course of medication for tuberculosis disease.

(2) There is a substantial likelihood, based on the person’s past or present behavior, that he or she cannot be relied upon to participate

in or complete an appropriate prescribed course of medication for tuberculosis disease and, if necessary, follow required infection control precautions for tuberculosis disease. The behavior may include, but is not limited to, refusal or failure to take medication for tuberculosis disease, refusal or failure to keep appointments or treatment for tuberculosis disease, refusal or failure to complete the treatment for tuberculosis disease, or disregard for infection control precautions for active tuberculosis disease.

(f) An order for exclusion from attendance at the workplace for persons with infectious tuberculosis disease. The order may, also, exclude the person from any place when the local health officer determines that the place cannot be maintained in a manner adequate to protect others against the spread of tuberculosis disease.

(g) An order for isolation of persons with infectious tuberculosis disease to their place of residence until the local health officer has determined that they no longer have infectious tuberculosis disease.

(h) This section shall apply to all persons except those incarcerated in a state correctional institution.

(i) This section shall not be construed to require a private hospital or other private treatment facility to accept any patient without a payment source, including county responsibilities under Section 17000 of the Welfare and Institutions Code, except as required by Sections 1317 et seq. or by federal law.

121366. The local health officer may detain in a hospital or other appropriate place for examination or treatment, a person who is the subject of an order of detention issued pursuant to subdivision (a), (d), or (e) of Section 121365 without a prior court order except that when a person detained pursuant to subdivision (a), (d), or (e) of Section 121365 has requested release, the local health officer shall make an application for a court order authorizing the continued detention within 72 hours after the request or, if the 72-hour period ends on a Saturday, Sunday, or legal holiday, by the end of the first business day following the Saturday, Sunday, or legal holiday, which application shall include a request for an expedited hearing. After the request for release, detention shall not continue for more than five business days in the absence of a court order authorizing detention. However, in no event shall any person be detained for more than 60 days without a court order authorizing the detention. The local health officer shall seek further court review of the detention within 90 days following the initial court order authorizing detention and thereafter within 90 days of each subsequent court review. In any court proceeding to enforce a local health officer’s order for the removal or detention of a person, the local health officer shall prove the particularized circumstances constituting the necessity for the detention by clear and convincing evidence. Any person who is subject to a detention order shall have the right to be represented by

counsel and upon the request of the person, counsel shall be provided.

121367. (a) An order of a local health officer pursuant to Section 121365 shall set forth all of the following:

(1) The legal authority under which the order is issued, including the particular sections of state law or regulations.

(2) An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order.

(3) The less restrictive treatment alternatives that were attempted and were unsuccessful, or the less restrictive treatment alternatives that were considered and rejected, and the reasons the alternatives were rejected.

(4) The orders shall be in writing, and shall include the name of the person, the period of time during which the order shall remain effective, the location, payer source if known, and other terms and conditions as may be necessary to protect the public health. Upon issuing an order, a copy of the order shall be served upon the person named in the order.

(b) An order for the detention of a person shall do all of the following:

(1) Include the purpose of the detention.

(2) Advise the person being detained that he or she has the right to request release from detention by contacting a person designated on the local health officer's order at the telephone number stated on the order and that the detention shall not continue for more than five business days after the request for release, in the absence of a court order authorizing the detention.

(3) Advise the person being detained that, whether or not he or she requests release from detention, the local health officer is required to obtain a court order authorizing detention within 60 days following the commencement of detention and thereafter shall further seek court review of the detention within 90 days of the court order and within 90 days of each subsequent court review.

(4) Advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(5) Be accompanied by a separate notice that shall include, but not be limited to, all of the following additional information:

(A) That the person being detained has the right to request release from detention by contacting a person designated on the local health officer's order at a telephone number stated on the order, and that the detention shall not continue for more than five business days after the request in the absence of a court order authorizing the detention.

(B) That he or she has the right to arrange to be advised and represented by counsel or to have counsel provided, and that if he or

she chooses to have counsel provided, the counsel will be notified that the person has requested legal representation.

(C) That he or she may supply the addresses or telephone numbers of not more than two individuals to receive notification of the person's detention, and that the local health officer shall, at the patient's request, provide notice within the limits of reasonable diligence to those people that the person is being detained.

121368. Notwithstanding any inconsistent provision of Section 121365, 121366 or 121367, all of the following shall apply:

(a) A person who is detained solely pursuant to subdivision (a) of Section 121365 shall not continue to be detained beyond the minimum period of time required, with the exercise of all due diligence, to make a medical determination of whether a person who is suspected of having tuberculosis disease, has active tuberculosis or whether a person who has active tuberculosis disease has infectious tuberculosis disease. Further detention of the person shall be authorized only upon the issuance of a local health officer's order pursuant to subdivision (d) or (e) of Section 121365.

(b) A person who is detained solely for the reasons described in subdivision (d) of Section 121365 shall not continue to be detained after he or she ceases to be infectious or after the local health officer ascertains that changed circumstances exist that permit him or her to be adequately separated from others so as to prevent transmission of tuberculosis disease after his or her release from detention.

(c) A person who is detained for the reasons described in subdivision (e) of Section 121365 shall not continue to be detained after he or she has completed an appropriate prescribed course of medication.

121369. For the purposes of Sections 121365, 121366, and 121367, all of the following shall apply:

(a) If necessary, language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided in accordance with applicable law.

(b) Nothing in those sections shall be construed to permit or require the forcible administration of any medication without a prior court order.

(c) Any and all orders authorized under those sections shall be made by the local health officer. His or her authority to make the orders may be delegated to the person in charge of medical treatment of inmates in penal institutions within the local health officer's jurisdiction, or pursuant to Section 7. The local health officer shall not make any orders incorporating by reference any other rules or regulations.

121370. No examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination or organization and claims exemption on that ground,

except that the provisions of this code regarding compulsory reporting of communicable diseases and isolation and quarantine shall apply where there is probable cause to suspect that the person is infected with the disease in a communicable stage. Such person shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he or she can be safely quarantined and/or isolated in his or her own home or other suitable place of his or her choice.

121375. The department may inspect and have access to all records of all institutions and clinics, both public and private, where tuberculosis patients are treated.

121380. The department may advise officers of state educational, correctional, and medical institutions regarding the control of tuberculosis and the care of tuberculosis patients.

121390. The department shall lease any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer as provided in Section 120280.

121395. Whenever any person confined in any state institution, as provided in Section 120280, subject to the jurisdiction of the Director of Corrections, dies, and any personal funds or personal property of the person remains in the hands of the Director of Corrections, those funds may be applied in an amount not exceeding three hundred dollars ($300) to the payment of expenses relating to burial; provided, however, that if no such funds are available, the department shall reimburse the Director of Corrections for the expenses in an amount not exceeding three hundred dollars ($300).

121400. If the place of confinement of a person confined under the provisions of Section 120280 is in a county other than the county where he or she was convicted, upon release he or she shall be released in the custody of the sheriff of the county where he or she was convicted, and the sheriff shall forthwith return him or her to the place where he or she was convicted without the necessity of a court order or other process. The sheriff shall prior to the return of the person notify the health officer having jurisdiction of the area to which he or she will be returned of the date he or she will reach that area.

121450. The department may distribute for the purpose of tuberculosis control an annual subvention, paid quarterly, to any local health department that maintains a tuberculosis control program consistent with standards and procedures established by the department. This annual subvention shall be used primarily for the strengthening of tuberculosis prevention activities by local health departments. Further, the department may allocate additional funds to selected local health departments based on high disease incidence, or other standards established by the department. These additional funds shall be expended primarily for the cost of diagnosis, treatment,

and followup services required for an effective tuberculosis control program. Services rendered under this section may not be made dependent on status of residence.

121455. The department may establish standards and procedures for the operation of local tuberculosis control programs. Such standards shall include, but not be limited to, the maintenance of records and reports relative to services rendered and to expenditures made that shall be reported semiannually to the department in a manner as it may specify.

121460. Of the annual appropriation made to the department for tuberculosis control, the department may expend a sum not to exceed 7.5 percent of the total, for administrative costs. In addition, it may, if it deems necessary, withhold a portion of the appropriation to pay for the cost of regional laboratory services and regional hospitalization facilities for patients whose care cannot be reasonably accomplished in facilities available within a local health department, or it may contract with physicians to supervise the medical care of tuberculosis patients in areas where the specialized care is not available. Further, the appropriation shall be available to purchase materials or drugs used in tuberculosis control for distribution to local health departments.

CHAPTER 2. TUBERCULOSIS TESTS FOR PUPILS

121475. In enacting this chapter, it is the intent of the Legislature to provide:

(a) A means for the eventual elimination of tuberculosis.

(b) Persons required to be tested for tuberculosis under this chapter may obtain testing from whatever medical source they desire, subject only to the condition that the testing be performed in accordance with the regulations of the department and that a record of the testing is made in accordance with the regulations.

(c) Exemptions from tuberculosis tests because of personal beliefs.

(d) For the keeping of adequate records of tuberculosis tests so that health departments, schools, and other institutions, parents or guardians, and the persons tested will be able to ascertain that a child is free from active tuberculosis, and so that appropriate public agencies will be able to ascertain the testing needs of groups of children in schools or other institutions.

121480. As used in this chapter, the following terms shall have the following meanings:

(a) ''Governing authority'' means the governing board of each school district or the authority of each other private or public institution responsible for the operation and control of the institution or the principal or administrator of each school or institution.

(b) ''Certificate'' means a document signed by the examining physician and surgeon who is licensed under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or a notice from a public health agency, a unit of the American Lung Association, or any other private or public source, any of which indicates examination for, and freedom from, active tuberculosis.

(c) ''Department'' means State Department of Health Services.

121485. (a) If the local health officer determines that persons seeking first admission to any private or public elementary or secondary school or institution are reasonably suspected of having tuberculosis and further determines that the examination of the persons for tuberculosis is necessary for the preservation and protection of the public health, he or she may issue an order requiring the persons to undergo a tuberculosis examination.

(b) If an order has been issued pursuant to subdivision (a), the governing authority shall not unconditionally admit any person subject to the order as a pupil of any private or public elementary or secondary school, or institution, unless prior to his or her first admission to that institution, he or she provides evidence to the institution of a certificate showing that he or she is free of communicable tuberculosis.

(c) Thereafter, any such pupil may be required to undergo the tuberculosis examinations and provide another certificate showing that he or she is free of communicable tuberculosis, if the local health officer orders the examination.

121490. The examination shall consist of an approved intradermal tuberculin skin test, that, if positive, is followed by an X-ray of the lungs.

121495. (a) A person subject to an order made pursuant to subdivision (a) of Section 121485 who does not have on file the certificate required by this chapter may be admitted by the governing authority on condition that within time periods designated by regulations of the department, he or she will provide the certificate.

(b) The governing authority shall prohibit from further attendance any person admitted conditionally who fails to obtain and provide the required certificate within the time limits allowed in the regulations of the department, unless the person is exempted under Section 121505, until the person has provided the certificate to the governing authority.

121500. The examinations required by this chapter may be administered by any private or public source desired.

121505. The certificate shall not be required for a person who is subject to an order made pursuant to subdivision (a) of Section 121485, if the parent, guardian, or other adult who has assumed responsibility for his or her care and custody in case of a minor, or the

person seeking admission, if an emancipated minor, provides to the governing authority an affidavit stating that the examination required to obtain the certificate is contrary to his or her beliefs. If at any time there should be probable cause to believe that the person is afflicted with active tuberculosis, he or she may be excluded from the school or other institution listed in Section 121485 until the governing board is satisfied that he or she is not so afflicted.

121510. Any person or organization administering tuberculosis examinations shall furnish each person examined, or his or her parent or guardian, as appropriate, with a certificate of the examination results given in a form prescribed by the department.

121515. The governing authority shall cooperate with the local health officer in carrying out any programs ordered by the local health officer for the tuberculosis examinations of persons applying for first admission to any school or institution under its jurisdiction. The governing board of any school district may use funds, property, and personnel of the district for that purpose.

121520. The department, in consultation with the Department of Education, shall adopt and enforce all and regulations necessary to carry out this chapter.

CHAPTER 3. TUBERCULOSIS TESTS FOR EMPLOYEES

121525. (a) Except as provided in Section 121555, no person shall be initially employed by a private or parochial elementary or secondary school, or any nursery school, unless that person produces or has on file with the school a certificate showing that within the last 60 days the person has been examined and has been found to be free of communicable tuberculosis.

(b) Thereafter those employees who are skin test negative shall be required to undergo the foregoing examination at least once each four years or more often if directed by the school upon recommendation of the local health officer for so long as the employee remains skin test negative. Once an employee has a documented positive skin test, the foregoing examination is no longer required and a referral shall be made within 30 days of completion of the examination to the local health officer to determine the need for followup care.

(c) At the discretion of the governing authority of a private school, this section shall not apply to employees who are employed for any period of time less than a school year whose functions do not require frequent or prolonged contact with pupils. The governing authority may, however, require the examination and may as a contract condition require the examination of persons employed under contract if the governing authority believes the presence of the persons in and around the school premises would constitute a health hazard to students.

(d) The governing authority of a private school providing for the transportation of pupils under authorized contract shall require as a condition of the contract that every person transporting pupils produce a certificate showing that within the last 60 days the person has been examined and has been found to be free of communicable tuberculosis, except that any private contracted driver who transports pupils on an infrequent basis, not to exceed once a month, shall be excluded from this requirement.

(e) The examination attested to in the certificate required pursuant to subdivision (d) of this section shall be made available without charge by the local health officer.

''Certificate,'' as used in this chapter, means a document signed by the examining physician and surgeon who is licensed under Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, or a notice from a public health agency or unit of the Tuberculosis Association that indicates freedom from active tuberculosis.

(f) Nothing in this section shall prevent the governing authority of a private, parochial, or nursery school, upon recommendation of the local health officer, from establishing a rule requiring a more extensive or more frequent examination than required by this section.

121530. The examination shall consist of an approved intradermal tuberculosis test, that, if positive, shall be followed by an X-ray of the lungs.

121535. The X-ray film may be taken by a competent and qualified X-ray technician if the X-ray film is subsequently interpreted by a licensed physician and surgeon.

121540. The school shall maintain a file containing an up-to-date certificate for each person covered by this chapter. It shall be the duty of the county health officer of each county to insure that the provisions of this chapter are complied with.

121545. (a) All volunteers in schools covered under this chapter shall also be required to have on file with the school a certificate showing that within the last four years the person has been examined and has been found to be free of communicable tuberculosis.

(b) At the discretion of the governing authority of a private school, this section shall not apply to volunteers whose functions do not necessitate frequent or prolonged contact with pupils.

121550. Nothing in this chapter shall prevent the school from requiring more extensive or more frequent examinations.

121555. (a) A person who transfers his or her employment from one of the schools specified in subdivision (a) of Section 121525 to another shall be deemed to meet the requirements of subdivision (a) of Section 121525 if the person can produce a certificate that shows that he or she was examined within the past four years and was found

to be free of communicable tuberculosis, or if it is verified by the school previously employing him or her that it has a certificate on file.

(b) A person who transfers his or her employment from a public elementary school or secondary school to any of the schools specified in subdivision (a) of Section 121525 shall be deemed to meet the requirements of subdivision (a) of Section 121525 if that person can produce a certificate as provided for in Section 11708 of the Education Code that shows that he or she was examined within the past four years and was found to be free of communicable tuberculosis, or if it is verified by the school district previously employing him or her that it has a certificate on file.

PART 6. VETERINARY PUBLIC HEALTH AND SAFETY

CHAPTER 1. RABIES CONTROL

121575. ''Rabies,'' as used in this chapter, includes rabies, and any other animal disease dangerous to human beings that may be declared by the department as coming under chapter.

121580. ''Quarantine,'' as used in this chapter, means the strict confinement, upon the private premises of the owner, under restraint by leash, closed cage, or paddock, of all animals specified in the order of the department.

121585. ''Rabies area'' shall mean any area not less than a county as determined by the director within a region where the existence of rabies constitutes a public health hazard, as found and declared by the director. A region shall be composed of two or more counties as determined by the director. The status of an area as a rabies area shall terminate at the end of one year from the date of the declaration unless, not earlier than two months prior to the end of the year, it is again declared to be a rabies area in the manner provided in this section. If however, the director at any time finds and declares that an area has ceased to be a rabies area its status shall terminate upon the date of the declaration.

121595. Whenever any case of rabies is reported as existing in any county or city, the department shall make, or cause to be made, a preliminary investigation as to whether the disease exists, and as to the probable area of the state in which the population or animals are endangered.

121600. If upon the investigation the department finds that rabies exists, a quarantine shall be declared against all animals as are designated in the quarantine order, and living within the area specified in the order.

121605. Following the order of quarantine the department shall make or cause to be made a thorough investigation as to the extent of the disease, the probable number of persons and animals exposed, and the area found to be involved.

121610. The department may substitute for the quarantine order regulations as may be deemed adequate for the control of the disease in each area.

121615. All peace officers and boards of health shall carry out the provisions of this chapter.

121620. During the period for which any quarantine order is in force any officer may kill or in his or her discretion capture and hold for further action by the department any animal in a quarantine area, found on public highways, lands, and streets, or not held in restraint on private premises as specified in this chapter.

121625. Any proper official within the meaning of this chapter may examine and enter upon all private premises for the enforcement of this chapter.

121630. Except as provided in Sections 121705 and 121710, every person who possesses or holds any animal in violation of the provisions of this chapter is guilty of an infraction, punishable by a fine not exceeding one thousand dollars ($1,000).

121635. For the purpose of providing funds to pay expenses incurred in connection with the eradication of rabies, the rabies treatment and eradication fund is continued in existence in each county or city in this state.

121640. All money collected for dog license taxes shall be deposited to the credit of this fund with the treasurer of the county or city; but funds now collected from any dog tax may continue to be collected and used for other purposes specified by local ordinances.

121645. Upon the determination by the department that rabies exists in any county or city, a special dog license tax shall immediately become effective, unless a dog tax is already in force the funds from which are available for the payment of expenditures in accordance with this chapter.

121650. This tax shall be levied as follows: An annual tax of one dollar and fifty cents ($1.50) for each male, two dollars and fifty cents ($2.50) for each female, and one dollar and fifty cents ($1.50) for each neuter dog. It shall be collected by the proper authority at the same time and in the same manner as other taxes are collected; except that at the first collection the proportion of the annual tax as corresponds to the number of months the tax has been in operation plus one year advance payment shall be collected.

121655. After this dog license tax has been established in a county or city, it shall be continued in force until an order has been issued by the department declaring that county, or the portion of that county as may be deemed advisable, to be free from rabies or further danger of its spread.

121660. One half of all fines collected by any court or judge for violations of this chapter shall be placed to the credit of the rabies treatment and eradication fund of the county or city where the violation occurred.

121665. Whenever it becomes necessary in the judgment of the department, to enforce this chapter in any county or city, the department may institute special measures of control to supplement the efforts of the local authorities in any county or city whose duties are specified in this chapter.

121670. All expenditures incurred in enforcing the special measures shall be proper charges against the special fund referred to in this chapter, and shall be paid as they accrue by the proper authorities of each county or city where they have been incurred; but all expenditures that may be incurred after the issuance of the order establishing the tax and before the first collection of the tax, shall be paid as they accrue from the general fund of the county or city.

121675. All expenditures in excess of the balance of money in this fund shall likewise be paid as they accrue from the general fund. All money thus expended from the general fund shall be repaid from the special fund when the collections from the tax have provided the money.

121680. Notwithstanding any other provision of this chapter a guide dog serving a blind master shall not be quarantined, in the absence of evidence that he or she has been exposed to rabies, unless his or her master fails:

(a) To keep him or her safely confined to the premises of the master.

(b) To keep him or her available for examination at all reasonable times.

121685. Notwithstanding any other provision of this chapter, a dog used by any state, county, city, or city and county law enforcement agency shall not be quarantined after biting any person if the bite occurred while the dog was being used for any law enforcement purpose. The law enforcement agency shall make the dog available for examination at any reasonable time. The law enforcement agency shall notify the local health officer if the dog exhibits any abnormal behavior.

121690. In rabies areas, all of the following shall apply:

(a) Every dog owner, after his or her dog attains the age of four months, shall no less than once every two years secure a license for the dog as provided by ordinance of the responsible city, city and county, or county. License fees shall be fixed by the responsible city, city and county, or county, at an amount not to exceed limitations otherwise prescribed by state law or city, city and county, or county charter.

(b) Every dog owner, after his or her dog attains the age of four months, shall, at intervals of time not more often than once a year, as may be prescribed by the department, procure its vaccination by a licensed veterinarian with a canine antirabies vaccine approved by, and in a manner prescribed by the department.

(c) All dogs under four months of age shall be confined to the premises of, or kept under physical restraint by, the owner, keeper, or harborer. Nothing in this chapter and Section 120435 shall be construed to prevent the sale or transportation of a puppy four months old or younger.

(d) Any dog in violation of this chapter and any additional provisions that may be prescribed by any local governing body, shall be impounded, as provided by local ordinance.

(e) It shall be the duty of the governing body of each city, city and county, or county to maintain or provide for the maintenance of a pound system and a rabies control program for the purpose of carrying out and enforcing this section.

(f) It shall be the responsibility of each city, county, or city and county to provide dog vaccination clinics, or to arrange for dog vaccination at clinics operated by veterinary groups or associations, held at strategic locations throughout each city, city and county, or county. The vaccination and licensing procedures may be combined as a single operation in the clinics. No charge in excess of the actual cost shall be made for any one vaccination at a clinic. No owner of a dog shall be required to have his or her dog vaccinated at a public clinic if the owner elects to have the dog vaccinated by a licensed veterinarian of the owner's choice.

All public clinics shall be required to operate under antiseptic immunization conditions comparable to those used in the vaccination of human beings.

(g) In addition to the authority provided in subdivision (a), the ordinance of the responsible city, city and county, or county may provide for the issuance of a license for a period not to exceed three years for dogs that have attained the age of 12 months or older and have been vaccinated against rabies. The person to whom the license is issued pursuant to this subdivision may choose a license period as established by the governing body of up to one, two, or three years. However, when issuing a license pursuant to this subdivision, the license period shall not extend beyond the remaining period of validity for the current rabies vaccination. A dog owner who complies with this subdivision shall be deemed to have complied with the requirements of subdivision (a).

121695. Nothing in this chapter and Section 120435 is intended or shall be construed to limit the power of any city, city and county, or county in its authority in the exercise of its police power or in the exercise of its power under any other provisions of law to enact more stringent requirements, to regulate and control dogs within the boundaries of its jurisdiction.

121700. Rabies vaccines for animal use shall not be supplied to other than a veterinary biologic supply firm, a person licensed to practice veterinary medicine under Chapter 11 (commencing with

Section 4800) of Division 2 of the Business and Professions Code, or a public agency.

121705. Any person who willfully conceals information about the location or ownership of an animal subject to rabies, that has bitten or otherwise exposed a person to rabies, with the intent to prevent the quarantine or isolation of that animal by the local health officer is guilty of a misdemeanor.

Any person who violates this section is guilty of a misdemeanor.

121710. Any person who, after notice, violates any order of a local health officer concerning the isolation or quarantine of an animal of a species subject to rabies, that has bitten or otherwise exposed a person to rabies or who, after that order, fails to produce the animal upon demand of the local health officer, is guilty of a misdemeanor, punishable by imprisonment in the county jail for a period not to exceed one year, or by fine of not less than one hundred dollars ($100), nor more than one thousand dollars ($1,000) per day of violation, or by both fine and imprisonment.

CHAPTER 2. AVIAN ZOONOSIS CONTROL

121725. No person, association, organization, partnership, or corporation shall raise and sell, offer for sale, trade, or barter any shell parakeet or budgerigar unless the bird is banded with traceable, seamless, closed bands of standard size, color, and material as specified by the department after consulting with the advisory committee.

121730. No band manufacturer, bird club, association, corporation, society, or person shall issue any bands prescribed under Section 121725 without a permit from the department. A permit shall be granted by the department upon compliance with reasonable and necessary regulations as prescribed by the board.

121735. No manufacturer of bands prescribed under Section 121725 shall sell or market the bands in the state without giving a bond as required by the regulations of the board and without obtaining a permit from the department.

121740. Every band issuing agency shall maintain records and make reports as required by reasonable and necessary regulations of the board. The board may by regulation prescribe the keeping of sales records as it deems necessary to effectuate the purposes of this chapter.

121745. (a) Whenever the director finds that psittacosis, or any other diseases transmissible to man from pet birds, have become a public health hazard to the extent that control measures are necessary or desirable, the board shall adopt additional regulations as it deems necessary for the public health; and these regulations shall apply to all pet birds whether or not of a species otherwise regulated under this chapter. These regulations shall be adopted in accordance

with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) This section shall not be operative during the 1993–94 fiscal year.

121755. All manufacturers selling or marketing bands prescribed in Section 121725 shall collect a fee for the department on each band sold. The board shall provide by regulation the amount of the fee to be collected, the total amount of those fees to yield a sum approximating the estimated cost of the administration of the parakeet banding program. All fees collected by manufacturers under this chapter shall be paid to the department quarterly on or before the last day of the month next succeeding each quarterly period. Such fees shall be paid by the department into the General Fund in the State Treasury.

121760. The violation of any of the provisions of this chapter shall constitute a misdemeanor.

121765. This chapter shall apply to all shell parakeets or budgerigars.

CHAPTER 3. IMPORTATION OF WILD ANIMALS

Article 1. General

121775. As used in this chapter, ''wild animal'' refers to any animal of the class Aves (birds) or class Mammalia (mammals) that either is not normally domesticated in this state or not native to this state.

121780. As used in this chapter, ''enforcement officer'' means any officer, employee, or agent of the department, local health officer, or of any state or local agency with which an agreement has been made to enforce Article 3 (commencing with Section 121850), or local health officer.

121785. The department may enter into agreement with any state or local agency for the enforcement of Article 3 (commencing with Section 121850) of this chapter.

121790. The department shall publish from time to time a list of animals that may not be imported into this state except by permit from the department. Unless a permit is issued pursuant to this chapter, it is unlawful to import into this state any wild animal for which a permit is required by the department.

121795. The department may adopt regulations governing the entry, quarantine, or release from quarantine, of any and all wild animals imported into this state pursuant to this chapter. The regulations shall be designed to protect the public health against diseases known to occur in any such animals.

121800. The violation of any provision of this chapter shall be a misdemeanor.

Article 2. Permits

121825. The department may issue a written permit to import into this state any wild animal specified by the department pursuant to Section 121790, upon determination that the public health and safety will not be endangered by the importation in accordance with the terms and conditions of the permit.

121830. A permit shall be issued only upon written application from the person desiring to import the species, enumerating all of the following:

(a) The number and true scientific name of each species of wild animal for which a permit is requested.

(b) The carrier and probable point of first arrival in this state of each shipment of the species.

(c) The purpose for which they are to be imported.

(d) The name and address of the consignee.

(e) The name and address of the consignor.

(f) The place or premises where the animals shall be held in quarantine pending the completion of the tests, veterinary examinations, and observation period as may be specified by the department as a condition of the permit required under this chapter.

(g) The name and address of the licensed veterinarian who shall conduct the tests and examinations as specified by the department pursuant to this chapter.

121835. Each permit issued shall set forth the following:

(a) The number and true scientific name of the species of wild animal for which the permit is granted.

(b) A statement of the terms and conditions under which the entry of the species is permitted.

(c) The place and conditions of quarantine where required.

(d) A statement of the tests, veterinary examinations, observation period, and quarantine period as may be specified by the department.

121840. Whenever any permit is issued under provisions of this article, one copy shall be sent by the department to the local health officer of the county where the species will be held in quarantine, two copies shall accompany each shipment of wild animals involved.

121845. The department shall charge a fee for the issuance of the import permit provided for under Section 121825. The department shall provide by regulation the amount of the fee to be collected, the total amount of the fees to yield a sum approximating the cost of the administration and enforcement of this chapter. All fees shall be paid by the department into the General Fund.

Article 3. Regulation and Enforcement

121850. Any person who imports, transports into the state, or receives, any live wild animal enumerated in or designated pursuant to Section 121790, shall hold the animal in confinement for inspection and immediately notify the department of the arrival thereof. If there is found in any shipment any species not specified in the permit issued under this chapter and subject thereto, or more than the number of any species specified, the animals shall be refused admittance as provided under Section 121865.

121855. If, during inspection upon arrival any wild animal is found to be diseased, or there is reason to suspect the presence of disease that will or may endanger the public health and safety, the diseased animal, and, if necessary, the entire shipment shall be destroyed by or under the supervision of the enforcing officer, unless the public health and safety will not be endangered by its detention in quarantine for a time and under conditions satisfactory to the enforcing officer for disinfection, treatment, or diagnosis, or no detriment can be caused by its return to point of origin at the option and expense of the owner or bailee.

121860. Whenever any wild animal brought into this state under permit is quarantined as provided in this chapter, the species shall not be released from quarantine except by release in writing from the department. All tests, veterinary examinations, and quarantines shall be at the expense of the owner or bailee of the animals involved. Any species refused release from quarantine under this section shall be destroyed, detained, or returned to its point of origin as provided in Section 121855.

121865. Any live wild animal brought into this state in violation of the provisions of this chapter or any regulations thereunder may, upon notice from the enforcing officer inspecting them or discovering the violation, be returned to the point of origin, or destroyed, within the time specified in the notice, at the option of the owner or bailee.

The exercise of any such option shall be under the direction and control of the enforcing officer and at the expense of the owner or bailee. If the owner or bailee fails to exercise the option within the time specified in the notice, the enforcing officer shall immediately thereafter seize and destroy the animals at the expense of the owner or bailee.

121870. This chapter, or any regulations adopted pursuant thereto, shall not authorize the importation, transportation, or possession of any live wild animals enumerated in Chapter 2 (commencing with Section 2116) of Division 3 of the Fish and Game Code or the regulations of the Fish and Game Commission adopted pursuant thereto, except as provided in Chapter 2 (commencing with Section 2116) of Division 3 of the Fish and Game Code.

CHAPTER 4. ANIMAL CONTROL

121875. This chapter may be cited as ''The Dog Act of 1969.''

121880. For the purposes of this chapter, ''sentry dog'' means a dog trained to work without supervision in a fenced facility and to deter or detain unauthorized persons found within the facility.

121885. For the purposes of this chapter, ''narcotic detection dog'' means a dog trained to locate narcotics by scent.

121890. For the purposes of this chapter, ''tracker or attack dog'' means a dog trained to work with a handler in searching out facilities for burglary suspects and other intruders.

121895. For the purposes of this chapter, ''sentry dog company'' means any person who agrees to furnish trained sentry, attack, or narcotic detection dogs for hire.

121900. For the purposes of this chapter ''dog handler'' means any person trained in the handling of dogs whose training includes the care, feeding, and maintenance of dogs, and the procedures necessary to control the behavior of a dog subject to this chapter.

121905. For the purposes of this chapter ''hire'' shall include, but not be limited to, the renting or leasing of the services of a dog with or without a dog handler, or the sale of a dog with an option to repurchase.

121910. Each sentry dog company shall register each dog subject to this chapter that it handles with the local law enforcement agency and with the state, city, county, or district fire department that has the responsibility for the prevention and suppression of fires in the area where the sentry dog company is located.

121915. Each sentry dog company that handles a dog subject to this chapter shall notify the appropriate local law enforcement agency and the appropriate fire department by mail not more than 15 days before a dog is sent on an assignment of the location and duration of the assignment. The local law enforcement agency and fire department shall maintain a file of the assignments.

121920. Each dog subject to this chapter shall, at all times, wear an identification tag. The identification tag shall be provided by the sentry dog company furnishing the dog for hire. Such identification tag shall contain, but not be limited to, the following information:

(a) The name of the dog.

(b) The name, address, and telephone number of the sentry dog company furnishing the dog for hire. Any telephone number so provided shall be to a telephone that is manned by a person 24 hours per day every day of the year so that calls of the public may be received and answered.

The identification tag required by this section shall be in addition to any tag required or issued by any agency of government to show that a dog has been immunized or inoculated against disease.

121925. Whenever a dog subject to this chapter is being transported anywhere, it shall be well secured in a humane manner as will reasonably prevent its possible escape.

121930. Each dog subject to this chapter shall, wherever and whenever the dog is kept when on actual duty, be visited by a dog handler at least once every 12 hours to insure that the dog's physical condition, its surroundings, and its food and water supply are adequate, and if inadequate, the dog handler shall do whatever may be necessary to correct or remedy the situation. Such dog handler shall be either the owner of, or be employed by or under contract to, the sentry dog company that placed the dog on assignment.

121935. (a) No person shall take a sentry dog or a tracker or attack dog into, or keep a sentry dog or a tracker or attack dog in, any portion of any business establishment that is open to the general public, unless any such dog is accompanied or kept by a dog handler.

(b) No person shall keep any sentry dog or tracker or attack dog in any business establishment or any other place open to the general public at any time unless there is posted at every entrance of the business establishment or place a sign of sufficient size and design to warn persons that such a dog is used at the business establishment or place.

(c) This section does not apply to dogs used and accompanied by peace officers or uniformed employees of private patrol operators and operators of a private patrol service who are licensed pursuant to Chapter 11.5 (commencing with Section 7580) of Division 3 of the Business and Professions Code, while employees are acting within the course and scope of their employment as private patrolmen.

(d) This section does not apply to any dog handler or his or her dog while training the dog or another dog handler.

121940. Any violation of any provision of this chapter shall be punishable by a fine of two hundred dollars ($200).

CHAPTER 5. SALE OF DOGS AND CATS

Article 1. Sale of Dogs by Breeders

122045. (a) This article shall be known and may be cited as the Polanco-Lockyer Pet Breeder Warranty Act.

(b) Every breeder of dogs shall comply with this article. As used in this article, ''dog breeder,'' or ''breeder'' means a person, firm, partnership, corporation, or other association that has sold, transferred, or given away 50 or more dogs during the proceeding calendar year that were bred and reared on the premises of the person, firm, partnership, corporation, or other association.

(c) For the purposes of this article, ''purchaser'' means any person who purchases a dog from a breeder.

(d) This article shall not apply to pet dealers regulated under Article 2 (commencing with Section 122125), or to publicly operated pounds, humane societies, or privately operated rescue organizations.

122050. (a) Every breeder of dogs shall deliver to each purchaser of a dog a written disclosure containing all of the following:

(1) The breeder's name and address. If the breeder is a dealer licensed by the United States Department of Agriculture, the federal dealer identification number shall also be indicated.

(2) The date of the dog's birth and the date the breeder received the dog. If the dog is not advertised or sold as purebred, registered, or registerable, the date of birth may be approximated if not known by the breeder.

(3) The breed, sex, color, and identifying marks at the time of sale, if any. If the dog is from a United States Department of Agriculture licensed source, the individual identifying tag, tattoo, or collar number for that animal. If the breed is unknown or mixed, the record shall so indicate.

(4) If the dog is being sold as being capable of registration, the names and registration numbers of the sire and dam, and the litter number, if known.

(5) A record of inoculations and worming treatments administered, if any, to the dog as of the time of sale, including dates of administration and the type of vaccine or worming treatment.

(6) A record of any veterinarian treatment or medication received by the dog while in the possession of the breeder and either of the following:

(A) A statement, signed by the breeder at the time of sale, that:

(i) The dog has no known disease or illness.

(ii) The dog has no known congenital or hereditary condition that adversely affects the health of the dog at the time of the sale or that is likely to adversely affect the health of the dog in the future.

(B) A record of any known disease, illness, or congenital or hereditary condition that adversely affects the health of the dog at the time of sale, or that is likely to affect the health of the dog in the future, along with a statement signed by a veterinarian licensed in the State of California that authorizes the sale of the dog, recommends necessary treatment, if any, and verifies that the disease, illness, or condition does not require hospitalization or nonelective surgical procedures, nor is it likely to require hospitalization or nonelective surgical procedures in the future. A veterinarian statement is not required for intestinal or external parasites unless their presence makes the dog clinically ill or is likely to make the dog clinically ill. The statement shall be valid for seven days following examination of the dog by the veterinarian.

(b) The written disclosure made pursuant to this section shall be signed by both the breeder certifying the accuracy of the statement,

and by the purchaser of the dog acknowledging receipt of the statement.

(c) In addition, all medical information required to be disclosed pursuant to this section shall be made orally by the breeder to the purchaser.

(d) For purposes of this article, a disease, illness, or congenital or hereditary condition that adversely affects the health of the dog at the time of sale, or is likely to adversely affect the health of the dog in the future, shall be one that is apparent at the time of sale or that should have been known by the breeder from the history of veterinary treatment disclosed pursuant to this section.

(e) For the purpose of this article, ''nonelective surgical procedure'' means a surgical procedure that is necessary to preserve or restore the health of the dog, to prevent the dog from experiencing pain or discomfort, or to correct a condition that would otherwise interfere with the dog's ability to walk, run, jump, or otherwise function in a normal manner.

(f) For the purposes of this article, ''clinically ill'' means an illness that is apparent to a veterinarian based on observation, examination, or testing of the dog, or upon a review of the medical records relating to the dog.

122055. A breeder shall maintain a written record on the health, status, and disposition of each dog for a period of not less than one year after disposition of the dog. The record shall also include all of the information that the breeder is required to disclose pursuant to Section 122050.

122060. Except as provided for in paragraph (6) of subdivision (a) of Section 122050, no breeder shall knowingly sell a dog that is diseased, ill or has a condition, any one of which that requires hospitalization or nonelective surgical procedures. In lieu of the civil penalties imposed pursuant to Section 122110, any breeder who violates this section shall be subject to a civil penalty of up to one thousand dollars ($1,000), or shall be prohibited from selling dogs for up to 30 days, or both. If there is a second offense, the breeder shall be subject to a civil penalty of up to two thousand five hundred dollars ($2,500), or a prohibition from selling dogs for up to 90 days, or both. For a third offense, the breeder shall be subject to a civil penalty of up to five thousand dollars ($5,000), or a prohibition from selling dogs for up to six months, or both. For a fourth and subsequent offense, the breeder shall be subject to a civil penalty of up to ten thousand dollars ($10,000) or a prohibition from selling dogs for up to one year, or both. For the purpose of this section, a violation that occurred over five years prior to the most recent violation shall not be considered.

An action for recovery of the civil penalty and for a court order enjoining the breeder from engaging in the business of selling dogs at retail for the period set forth in this section, may be prosecuted by the district attorney for the county in which the violation occurred,

or the city attorney for the city in that the violation occurred, in the appropriate court.

122065. It shall be unlawful for a breeder to fail to do any of the following:

(a) Maintain facilities where the dogs are kept in a sanitary condition.

(b) Provide dogs with adequate nutrition and potable water.

(c) Provide adequate space appropriate to the age, size, weight, and breed of dog. For purposes of this subdivision, ‘‘adequate space’’ means sufficient space for the dog to stand up, sit down, and turn about freely using normal body movements, without the head touching the top of the cage, and to lie in a natural position.

(d) Provide dogs housed on wire flooring with a rest board, floormat, or similar device that can be maintained in a sanitary condition.

(e) Provide dogs with adequate socialization and exercise. For the purpose of this article, ‘‘socialization’’ means physical contact with other dogs or with human beings.

(f) Wash hands before and after handling each infectious or contagious dog.

(g) Provide veterinary care without delay when necessary.

122070. If a licensed veterinarian states in writing that within 15 days after the purchaser has taken physical possession of a dog following the sale by a breeder, the dog has become ill due to any illness or disease that existed in the dog on or before delivery of the dog to the purchaser, or, if within one year after the purchaser has taken physical possession of the dog after the sale by a breeder, a veterinarian licensed in this state states in writing that the dog has a congenital or hereditary condition which that adversely affects the health of the dog, or which that requires, or is likely in the future to require, hospitalization or nonelective surgical procedures, the dog shall be considered unfit for sale, and the breeder shall provide the purchaser with any of the following remedies that the purchaser elects:

(1) Return the dog to the breeder for a refund of the purchase price, plus sales tax, and reimbursement for reasonable veterinary fees for diagnosis and treating the dog in an amount not to exceed the original purchase price of the dog, including sales tax.

(2) Exchange the dog for a dog of the purchaser’s choice of equivalent value, providing a replacement dog is available, and receive reimbursement for reasonable veterinary fees for diagnosis and treating the dog in an amount not to exceed the original purchase price of the dog, plus sales tax on the original purchase price of the dog.

(3) Retain the dog, and receive reimbursement for reasonable veterinary fees for diagnosis and treating the dog in an amount not

to exceed 150 percent of the original purchase price of the dog, plus sales tax.

(b) If the dog has died, regardless of the date of death of the dog, obtain a refund for the purchase price of the dog, plus sales tax, or a replacement dog of equivalent value of the purchaser's choice, and reimbursement for reasonable veterinary fees for diagnosis and treatment of the dog in an amount not to exceed the purchase price of the dog, plus sales tax, if any of the following conditions exist:

(1) A veterinarian, licensed in this state, states in writing that the dog has died due to an illness or disease that existed within 15 days after the purchaser obtained physical possession of the dog after the sale by a breeder.

(2) A veterinarian, licensed in this state, states in writing that the dog has died due to a congenital or hereditary condition that was diagnosed by the veterinarian within one year after the purchaser obtained physical possession of the dog after the sale by a breeder.

122075. (a) There shall be a rebuttable presumption that an illness existed at the time of sale if the animal dies within 15 days of delivery to the purchaser.

(b) For purposes of Section 122070, a finding by a veterinarian of intestinal or external parasites shall not be grounds for declaring a dog unfit for sale unless their presence makes the dog clinically ill or is likely to make the dog clinically ill.

(c) For purposes of Section 122070, the value of veterinary services shall be deemed reasonable if the services rendered are appropriate for the diagnosis and treatment of illness or congenital or hereditary condition made by the veterinarian and the value of the services is comparable to the value of similar services rendered by other licensed veterinarians in proximity to the treating veterinarian.

122080. To obtain the remedies provided for in Section 122070, the purchaser shall substantially comply with all of the following requirements:

(a) Notify the breeder as soon as possible but no later than five days of the diagnosis by a veterinarian licensed in this state of a medical or health problem, including a congenital or hereditary condition and of the name and telephone number of the veterinarian providing the diagnosis.

(b) Return the dog to the breeder, in the case of illness or congenital or hereditary condition, along with a written statement from a veterinarian licensed in this state, stating the dog to be unfit for purchase due to illness, a congenital or hereditary condition, or the presence of symptoms of a contagious or infectious disease, that existed on or before delivery of the dog to the purchaser, and that adversely affects the health of the dog. The purchaser shall return the dog along with a copy of the veterinarian's statement as soon as possible but no later than five days of receipt of the veterinarian's statement.

(c) Provide the breeder, in the event of death, with a written statement from a veterinarian licensed in this state stating that the dog died from an illness that existed on or before the delivery of the dog to the purchaser. The presentation of the statement shall be sufficient proof to claim reimbursement or replacement and the return of the deceased dog to the breeder shall not be required.

122085. No refund, replacement, or reimbursement of veterinary fees shall be made under Section 122070 if any of the following conditions exist:

(a) The illness, condition, or death resulted from maltreatment or neglect or from an injury sustained or an illness or condition contracted subsequent to the delivery of the dog to the purchaser.

(b) The purchaser fails to carry out the recommended treatment prescribed by the examining veterinarian who made the initial diagnosis. However, this subdivision shall not apply if the cost for the treatment together with the veterinarian's fee for the diagnosis would exceed the purchase price of the dog, plus sales tax.

(c) A veterinarian's statement was provided to the purchaser pursuant to subparagraph (B) of paragraph (6) of subdivision (a) of Section 122050 that disclosed the disease, illness, or condition for which the purchaser seeks to return the dog. However, this subdivision shall not apply if, within one year after the purchaser took physical possession of the dog, a veterinarian licensed in this state states in writing that the disease, illness, or condition requires, or is likely in the future to require, hospitalization or nonelective surgical procedures or that the disease, illness, or condition resulted in the death of the dog.

(d) The purchaser refuses to return to the breeder all documents previously provided to the purchaser for the purpose of registering the dog. This subdivision shall not apply if the purchaser signs a statement certifying that the documents have been inadvertently lost or destroyed.

122090. (a) The veterinarian's statement pursuant to Section 122070 shall contain all of the following information:

(1) The purchaser's name and address.

(2) The date or dates the dog was examined.

(3) The breed and age of the dog, if known.

(4) That the veterinarian examined the dog.

(5) That the dog has or had disease, illness, or a hereditary or congenital condition, as described in Section 122050 that renders it unfit for purchase or resulted in its death.

(6) The precise findings of the examination or necropsy, including laboratory results or copies of laboratory reports.

(b) If a refund for reasonable veterinary expenses is being requested, the veterinarian's statement shall be accompanied by an itemized bill of fees appropriate for the diagnosis and treatment of the illness or congenital or hereditary condition.

(c) Refunds and payment of reimbursable expenses provided for in Section 122070 shall be paid, unless contested, by the breeder to the purchaser not later than 10 business days following receipt of the veterinarian's statement required by Section 122070 or, where applicable, not later than 10 business days after the date on that the dog is returned to the breeder.

122095. (a) In the event that a breeder wishes to contest a demand for any of the remedies specified in Section 122070, the breeder may, except in the case of the death of the dog, require the purchaser to produce the dog for examination by a licensed veterinarian designated by the breeder. The breeder shall pay the cost of this examination.

(b) If the purchaser and the breeder are unable to reach an agreement within 10 business days following receipt by the breeder of the veterinarian's statement pursuant to Section 122070, or following receipt of the dog for examination by a veterinarian designated by the breeder, whichever is later, the purchaser may initiate an action in a court of competent jurisdiction to resolve the dispute or the parties may submit to binding arbitration if mutually agreed upon by the parties in writing.

(c) The prevailing party in the dispute shall have the right to collect reasonable attorney's fees if the other party acted in bad faith in seeking or denying the requested remedy.

122100. Every breeder that sells a dog shall provide the purchaser at the time of sale, and a prospective purchaser upon request, with a written notice of rights, setting forth the rights provided for under this section. The notice shall be contained in a separate document. The written notice of rights shall be in 10-point type. A copy of the written notice of rights shall be signed by the purchaser acknowledging that he or she has reviewed the notice. The notice shall state the following:

"A STATEMENT OF CALIFORNIA LAW GOVERNING THE SALE OF DOGS

The sale of dogs is subject to consumer protection regulation. In the event that a California licensed veterinarian states in writing that your dog is unfit for purchase because it became ill due to an illness or disease that existed within 15 days following delivery to you, or within one year in the case of congenital or hereditary condition, you may choose one of the following:

(1) Return your dog and receive a refund of the purchase price, plus sales tax, and receive reimbursement for reasonable veterinarian fees up to the cost of the dog, plus sales tax.

(2) Return your dog and receive a dog of your choice of equivalent value, providing a replacement dog is available, and receive

reimbursement for reasonable veterinarian fees up to the cost of the dog, plus sales tax.

(3) Keep the dog and receive reimbursement for reasonable veterinarian fees up to 150 percent of the original purchase price of the dog plus sales tax on the original purchase price of the dog.

In the event your dog dies, you may receive a refund for the purchase price of the dog, plus sales tax, or a replacement dog of your choice, of equivalent value, and reimbursement for reasonable veterinary fees for the diagnosis and treatment of the dog, if a veterinarian, licensed in this state, states in writing that the dog has died due to an illness or disease that existed within 15 days after the purchaser obtained physical possession of the dog after the sale by a dog breeder, or states that the dog has died due to a congenital or hereditary condition that was diagnosed by the veterinarian within one year after the purchaser obtained physical possession of the dog after the sale by a dog breeder. These fees may not exceed the purchase price of the dog, plus sales tax.

In order to exercise these rights, you must notify the dog breeder as quickly as possible but no later than five days after learning from your veterinarian that a problem exists. You must tell the dog breeder about the problem and give the dog breeder the name and telephone number of the veterinarian providing the diagnosis.

If you are making a claim, you must also present to the dog breeder a written veterinary statement, in a form prescribed by law, that the animal is unfit for purchase and an itemized statement of all veterinary fees related to the claim. This information must be presented to the dog breeder no later than five days after you have received the written statement from the veterinarian.

In the event that the dog breeder wishes to contest the statement or the veterinarian’s bill, the dog breeder may request that you produce the dog for examination by a licensed veterinarian of the dog breeder’s choice. The dog breeder shall pay the cost of this examination.

In the event of death, the deceased dog need not be returned to the dog breeder if you submit a statement issued by a licensed veterinarian stating the cause of death.

If the parties cannot resolve the claim within 10 business days following receipt of the veterinarian statement or the examination by the dog breeder’s veterinarian, whichever event occurs later, you may file an action in a court of competent jurisdiction to resolve the dispute. If a party acts in bad faith, the other party may collect reasonable attorney’s fees. If the dog breeder does not contest the matter, the dog breeder must make the refund or reimbursement no later than 10 business days after receiving the veterinary certification.

This statement is a summary of key provisions of the consumer remedies available. California law also provides safeguards to protect

dog breeders from abuse. If you have questions, obtain a copy of the complete relevant statutes.

This notice shall be contained in a separate document. The written notice shall be in 10-point type. The notice shall be signed by the purchaser acknowledging that he or she has reviewed the notice. The dog breeder shall permit persons to review the written notice upon request.

NOTE: This disclosure of rights is a summary of California law. The actual statutes are contained in Article 1 (commencing with Section 122045) of Chapter 5 of Part 6 of Division 105 of the Health and Safety Code.''

122105. Nothing in this article shall in any way limit the rights or remedies that are otherwise available to a consumer under any other law. Nor shall this article in any way limit the breeder and the purchaser from agreeing between themselves upon additional terms and conditions that are not inconsistent with this article. However, any agreement or contract by a purchaser to waive any rights under this article shall be null and void and shall be unenforceable.

122110. (a) Except as otherwise specified herein, any person violating any provision of this article other than Section 122060 shall be subject to civil penalty of up to one thousand dollars ($1,000) per violation. An action may be prosecuted in the name of the people of the State of California by the district attorney for the county where the violation occurred in the appropriate court or by the city attorney in the city where the violation occurred.

(b) Nothing in this article limits or authorizes any act or omission that violates Section 597*l* of the Penal Code.

Article 2. Retail Sale of Dogs and Cats

122125. (a) This article shall be known and may be cited as the Lockyer-Polanco-Farr Pet Protection Act.

(b) Every pet dealer of dogs and cats shall conform to the provisions of this article. As used in this article, '' pet dealer'' means a person engaging in the business of selling dogs or cats, or both, at retail, and by virtue of the sales of dogs and cats is required to possess a permit pursuant to Section 6066 of the Revenue and Taxation Code. For purposes of this article, the separate sales of dogs or cats from a single litter shall constitute only one sale under Section 6019 of the Revenue and Taxation Code. This definition does not apply to breeders of dogs regulated pursuant to Article 1 (commencing with Section 122045) nor to any person, firm, partnership, corporation, or other association, that breeds or rears dogs on the premises of the person, firm, partnership, corporation, or other association, that has sold, transferred, or given away fewer than 50 dogs in the preceding year.

(c) For purposes of this article, ‘‘purchaser’’ means a person who purchases a dog or cat from a pet dealer without the intent to resell the animal.

(d) This article shall not apply to publicly operated pounds and humane societies.

122130. Every pet dealer receiving dogs or cats from a common carrier shall transport, or have transported, dogs and cats from the carrier’s premises within four hours after receipt of telephone notification by the carrier of the completion of shipment and arrival of the animal at the carrier’s point of destination.

122135. All dogs or cats received by a retail dealer shall, prior to being placed with other dogs or cats, be examined for sickness. Any dog or cat found to be afflicted with a contagious disease shall be kept caged separately from healthy animals.

122140. Every pet dealer shall deliver to the purchaser of each dog and cat at the time of sale a written statement in a standardized form prescribed by the Department of Consumer Affairs containing the following information:

(a) For cats:

(1) The breeder’s and broker’s name and address, if known, or if not known, the source of the cat. If the person from whom the cat was obtained is a dealer licensed by the United States Department of Agriculture, the person’s name, address, and federal dealer identification number.

(2) The date of the cat’s birth, unless unknown because of the source of the cat and the date the dealer received the cat.

(3) A record of the immunizations and worming treatments administered, if any, to the cat as of the time of sale, including the dates of administration and the type of vaccine or worming treatment.

(4) A record of any known disease or sickness that the cat is afflicted with at the time of sale. In addition, this information shall also be orally disclosed to the purchaser.

(b) For dogs:

(1) The breeder’s name and address, if known, or if not known, the source of the dog. If the person from whom the dog was obtained is a dealer licensed by the United States Department of Agriculture, the person’s name, address, and federal dealer identification number.

(2) The date of the dog’s birth, and the date the dealer received the dog. If the dog is not advertised or sold as purebred, registered, or registerable, the date of birth may be approximated if not known by the seller.

(3) The breed, sex, color, and identifying marks at the time of sale, if any. If the dog is from a United States Department of Agriculture licensed source, the individual identifying tag, tattoo, or collar number for that animal. If the breed is unknown or mixed, the record shall so indicate.

(4) If the dog is being sold as being capable of registration, the names and registration numbers of the sire and dam, and the litter number, if known.

(5) A record of inoculations and worming treatments administered, if any, to the dog as of the time of sale, including dates of administration and the type of vaccine or worming treatment.

(6) A record of any veterinarian treatment or medication received by the dog while in the possession of the pet dealer and either of the following:

(A) A statement, signed by the pet dealer at the time of sale, containing all of the following:

(i) The dog has no known disease or illness.

(ii) The dog has no known congenital or hereditary condition that adversely affects the health of the dog at the time of the sale or that is likely to adversely affect the health of the dog in the future.

(B) A record of any known disease, illness, and any congenital or hereditary condition that adversely affects the health of the dog at the time of sale, or is likely to adversely affect the health of the dog in the future, along with a statement signed by a veterinarian licensed in the State of California that authorizes the sale of the dog, recommends necessary treatment, if any, and verifies that the disease, illness, or condition does not require hospitalization or nonelective surgical procedures, nor is it likely to require hospitalization or nonelective surgical procedures in the future. A veterinarian statement is, not required for intestinal or external parasites unless their presence makes the dog clinically ill or is likely to make the dog clinically ill. The statement shall be valid for seven days following examination of the dog by the veterinarian.

(c) For the purpose of this article, ‘‘nonelective surgical procedure’’ means a surgical procedure that is necessary to preserve or restore the health of the dog, to prevent the dog from experiencing pain or discomfort, or to correct a condition that would interfere with the dog’s ability to walk, run, jump, or otherwise function in a normal manner.

(d) For the purposes of this article, ‘‘clinically ill’’ means an illness that is apparent to a veterinarian based on observation, examination, or testing of the dog, or upon a review of the medical records relating to the dog.

(e) A disclosure made pursuant to subdivision (b) shall be signed by both the pet dealer certifying the accuracy of the statement, and the purchaser of the dog acknowledging receipt of the statement. In addition, all medical information required to be disclosed pursuant to subdivision (b) shall be made orally to the purchaser.

(f) For purposes of this article, a disease, illness, or congenital or hereditary condition that adversely affects the health of a dog at the time of sale or is likely to adversely affect the health of the dog in the future shall be one that is apparent at the time of sale or that should

have been known by the pet dealer from the history of veterinary treatment disclosed pursuant to this section.

122145. A pet dealer shall maintain a written record on the health, status, and disposition of each dog and each cat for a period of not less than one year after disposition of the dog or cat. The record shall also contain all of the information required to be disclosed pursuant to Sections 122140 and 122220. Those records shall be available to humane officers, animal control officers, and law enforcement officers for inspection during normal business hours.

122150. (a) Except as otherwise specified herein, any person violating any provision of this article other than Section 122205 shall be subject to a civil penalty of up to one thousand dollars ($1,000) per violation. The action may be prosecuted in the name of the people of the State of California by the district attorney for the county where the violation occurred in the appropriate court or by the city attorney in the city where the violation occurred.

(b) Nothing in this article limits or authorizes any act or omission that violates Section 597*l* of the Penal Code.

122155. (a) It shall be unlawful for a pet dealer to fail to do any of the following:

(1) Maintain facilities where the dogs are kept in a sanitary condition.

(2) Provide dogs with adequate nutrition and potable water.

(3) Provide adequate space appropriate to the age, size, weight, and breed of dog. Adequate space means sufficient space for the dog to stand up, sit down, and turn about freely using normal body movements, without the head touching the top of the cage, and to lie in a natural position.

(4) Provide dogs housed on wire flooring with a rest board, floormat, or similar device that can be maintained in a sanitary condition.

(5) Provide dogs with adequate socialization and exercise. For the purpose of this article ‘‘socialization’’ means physical contact with other dogs or with human beings.

(6) Wash hands before and after handling each infectious or contagious dog.

(7) Maintain either of the following:

(A) A fire alarm system that is connected to a central reporting station that alerts the local fire department in case of fire.

(B) Maintain a fire suppression sprinkler system.

(8) Provide veterinary care without delay when necessary.

(b) A pet dealer shall not be in possession of a dog that is less than eight weeks old.

122160. (a) If a licensed veterinarian states in writing that within 15 days after the purchaser has taken physical possession of the dog after the sale by a pet dealer, the dog has become ill due to any illness that existed in the dog on or before delivery of the dog to the

purchaser, or, if within one year after the purchaser has taken physical possession of the dog after the sale, a veterinarian licensed in this state states in writing that the dog has a congenital or hereditary condition that adversely affects the health of the dog, or that requires, or is likely in the future to require, hospitalization or nonelective surgical procedures, the dog shall be considered unfit for sale, and the pet dealer shall provide the purchaser with any of the following remedies that the purchaser elects:

(1) Return the dog to the pet dealer for a refund of the purchase price, plus sales tax, and reimbursement for reasonable veterinary fees for diagnosis and treating the dog in an amount not to exceed the original purchase price of the dog, plus sales tax.

(2) Exchange the dog for a dog of the purchaser's choice of equivalent value, providing a replacement dog is available, and reimbursement for reasonable veterinary fees for diagnosis and treating the dog in an amount not to exceed the original purchase price of the dog, plus sales tax.

(3) Retain the dog, and reimbursement for reasonable veterinary fees for diagnosis and treating the dog in an amount not to exceed 150 percent of the original purchase price of the dog, plus sales tax on the original purchase price of the dog.

(b) If the dog has died, regardless of the date of the death of the dog, obtain a refund for the purchase price of the dog, plus sales tax, or a replacement dog of equivalent value of the purchaser's choice and reimbursement for reasonable veterinary fees in diagnosis and treatment of the dog in an amount not to exceed the original purchase price of the dog, plus sales tax, if either of the following conditions exist:

(1) A veterinarian, licensed in this state, states in writing that the dog has died due to an illness or disease that existed within 15 days after the purchaser obtained physical possession of the dog after the sale by a pet dealer.

(2) A veterinarian, licensed in this state, states in writing that the dog has died due to a congenital or hereditary condition that was diagnosed by the veterinarian within one year after the purchaser obtained physical possession of the dog after the sale by a pet dealer.

122165. (a) There shall be a rebuttable presumption that an illness existed at the time of sale if the animal dies within 15 days of delivery to the purchaser.

(b) For purposes of Section 122160, a finding by a veterinarian of intestinal or external parasites shall not be grounds for declaring a dog unfit for sale unless their presence makes the dog clinically ill or is likely to make the dog clinically ill.

(c) For purposes of Section 122160, the value of veterinary services shall be deemed reasonable if the services rendered are appropriate for the diagnosis and treatment of illness or congenital or hereditary condition, made by the veterinarian and the value of

similar services is comparable to the value of similar services rendered by other licensed veterinarians in proximity to the treating veterinarian.

122170. To obtain the remedies provided for in Section 122160, the purchaser shall substantially comply with all of the following requirements:

(a) Notify the pet dealer as soon as possible but not more than five days after the diagnosis by a veterinarian licensed in this state of a medical or health problem, including a congenital or hereditary condition and of the name and telephone number of the veterinarian providing the diagnosis.

(b) Return the dog to the pet dealer, in the case of illness, along with a written statement from a veterinarian licensed in this state, stating the dog to be unfit for purchase due to illness, a congenital or hereditary condition, or the presence of symptoms of a contagious or infectious disease, that existed on or before delivery of the dog to the purchaser, and that adversely affects the health of the dog. The purchaser shall return the dog along with a copy of the veterinarian's statement as soon as possible but not more than five days after receipt of the veterinarian's statement.

(c) Provide the pet dealer, in the event of death, with a written statement from a veterinarian licensed in this state stating that the dog died from an illness that existed on or before the delivery of the dog to the purchaser. The presentation of the statement shall be sufficient proof to claim reimbursement or replacement and the return of the deceased dog to the pet dealer shall not be required.

122175. Notwithstanding Section 122160, no refund, replacement, or reimbursement of veterinary fees shall be made if any of the following conditions exist:

(a) The illness or death resulted from maltreatment or neglect or from an injury sustained or an illness contracted subsequent to the delivery of the dog to the purchaser.

(b) The purchaser fails to carry out the recommended treatment prescribed by the examining veterinarian who made the initial diagnosis. However, this subdivision shall not apply if the cost for the treatment together with the veterinarian's fee for the diagnosis would exceed the purchase price of the dog, including sales tax.

(c) A veterinarian's statement was provided to the purchaser pursuant to subparagraph (B) of paragraph (6) of subdivision (b) of Section 122140 that disclosed the disease, illness, or condition for which the purchaser seeks to return the dog. However, this paragraph shall not apply if, within one year after the purchaser took physical possession of the dog, a veterinarian licensed in this state states in writing that the disease, illness, or condition requires, or is likely in the future to require, hospitalization or nonelective surgical procedures or that the disease, illness, or condition resulted in the death of the dog.

(d) The purchaser refuses to return to the pet dealer all documents previously provided to the purchaser for the purpose of registering the dog. This subdivision shall not apply if the purchaser signs a written statement certifying that the documents have been inadvertently lost or destroyed.

122180. (a) The veterinarian's statement pursuant to Section 122160 shall contain the following information:

(1) The purchaser's name and address.

(2) The date or dates the dog was examined.

(3) The breed and age of the dog, if known.

(4) That the veterinarian examined the dog.

(5) That the dog has or had an illness described in this section that renders it unfit for purchase or resulted in its death.

(6) The precise findings of the examination or necropsy, including laboratory results or copies of laboratory reports.

(b) If a refund for reasonable veterinary expenses is being requested, the veterinary statement shall be accompanied by an itemized bill of fees appropriate for the diagnosis and treatment of the illness or congenital or hereditary condition.

(c) Refunds and payment of reimbursable expenses provided for by Section 122160 shall be paid, unless contested, by the pet dealer to the purchaser not later than 10 business days following receipt of the veterinarian's statement required by Section 122160 or, where applicable, not later than 10 business days after the date on which the dog is returned to the pet dealer.

122185. (a) In the event that a pet dealer wishes to contest a demand for any of the remedies specified in Section 122160, the dealer may, except in the case of the death of the dog, require the purchaser to produce the dog for examination by a licensed veterinarian designated by the pet dealer. The pet dealer shall pay the cost of this examination.

(b) If the purchaser and the pet dealer are unable to reach an agreement within 10 business days following receipt by the pet dealer of the veterinarian's statement pursuant to Section 122160, or following receipt of the dog for examination by a veterinarian designated by the pet dealer, whichever is later, the purchaser may initiate an action in a court of competent jurisdiction to resolve the dispute or the parties may submit to binding arbitration if mutually agreed upon by the parties in writing.

(c) The prevailing party in the dispute shall have the right to collect reasonable attorney's fees if the other party acted in bad faith in seeking or denying the requested remedy.

122190. Every pet dealer that sells a dog shall provide the purchaser at the time of sale, and a prospective purchaser upon request, with a written notice of rights, setting forth the rights provided for under this section. The notice shall be contained in a separate document. The written notice of rights shall be in 10-point

type. A copy of the written notice of rights shall be signed by the purchaser acknowledging that he or she has reviewed the notice. The notice shall state the following:

''A STATEMENT OF CALIFORNIA LAW GOVERNING THE SALE OF DOGS

The sale of dogs is subject to consumer protection regulations. In the event that a California licensed veterinarian states in writing that your dog is unfit for purchase because it became ill due to an illness or disease that existed within 15 days following delivery to you, or within one year in the case of congenital or hereditary condition, you may choose one of the following:

(1) Return your dog and receive a refund of the purchase price, plus sales tax, and receive reimbursement for reasonable veterinarian fees up to the cost of the dog plus sales tax.

(2) Return your dog and receive a dog of your choice of equivalent value, providing a replacement dog is available, and receive reimbursement for reasonable veterinarian fees up to the cost of the dog, plus sales tax.

(3) Keep the dog and receive reimbursement for reasonable veterinarian fees up to 150 percent of the original purchase price of the dog plus sales tax on the original purchase price of the dog.

In the event your dog dies, you may receive a refund for the purchase price of the dog, plus sales tax, or a replacement dog of your choice, of equivalent value, and reimbursement for reasonable veterinary fees for the diagnosis and treatment of the dog, if a veterinarian, licensed in this state, states in writing that the dog has died due to an illness or disease that existed within 15 days after the purchaser obtained physical possession of the dog after the sale by a pet dealer, or states that the dog has died due to a congenital or hereditary condition that was diagnosed by the veterinarian within one year after the purchaser obtained physical possession of the dog after the sale by a pet dealer. These fees may not exceed the purchase price of the dog, plus sales tax.

In order to exercise these rights, you must notify the pet dealer as quickly as possible but no later than five days after learning from your veterinarian that a problem exists. You must tell the pet dealer about the problem and give the pet dealer the name and telephone number of the veterinarian providing the diagnosis.

If you are making a claim, you must also present to the pet dealer a written veterinary statement, in a form prescribed by law, that the animal is unfit for purchase and an itemized statement of all veterinary fees related to the claim. This information must be presented to the pet dealer no later than five days after you have received the written statement from the veterinarian.

In the event that the pet dealer wishes to contest the statement or the veterinarian's bill, the pet dealer may request that you produce the dog for examination by a licensed veterinarian of the pet dealer's choice. The pet dealer shall pay the cost of this examination.

In the event of death, the deceased dog need not be returned to the pet dealer if you submit a statement issued by a licensed veterinarian stating the cause of death.

If the parties cannot resolve the claim within 10 business days following receipt of the veterinarian statement or the examination by the pet dealer's veterinarian, whichever event occurs later, you may file an action in a court of competent jurisdiction to resolve the dispute. If a party acts in bad faith, the other party may collect reasonable attorney's fees. If the pet dealer does not contest the matter, the pet dealer must make the refund or reimbursement no later than 10 business days after receiving the veterinary certification.

If the pet dealer has represented your dog as registerable with a pedigree organization, the pet dealer shall provide you with the necessary papers to process the registration within 120 days following the date you received the dog. If the pet dealer fails to deliver the papers within the prescribed timeframe, you are entitled to return the dog for a full refund of the purchase price, including sales tax, or a refund of 75 percent of the purchase price, including sales tax if you choose to keep the dog.

This statement is a summary of key provisions of the consumer remedies available. California law also provides safeguards to protect pet dealers from abuse. If you have any questions, obtain a copy of the complete relevant statutes.

This notice shall be contained in a separate document. The written notice shall be in 10-point type. The notice shall be signed by the purchaser acknowledging that he or she has reviewed the notice. The pet dealer shall permit persons to review the written notice upon request.

NOTE: This disclosure of rights is a summary of California law. The actual statutes are contained in Article 2 (commencing with Section 122125 of Chapter 5 of Part 6 of Division 105 of the Health and Safety Code.''

122195. Nothing in this article shall in any way limit the rights or remedies that are otherwise available to a consumer under any other law. Nor shall this article in any way limit the pet dealer and the purchaser from agreeing between themselves upon additional terms and conditions that are not inconsistent with this article. However, any agreement or contract by a purchaser to waive any rights under this article shall be null and void and shall be unenforceable.

122200. (a) A pet dealer shall not state, promise, or represent to the purchaser, directly or indirectly, that a dog is registered or

capable of being registered with an animal pedigree registry organization, unless the pet dealer provides the purchaser with the documents necessary for that registration within 120 days following the date of sale of the dog.

(b) In the event that a pet dealer fails to provide the documents necessary for registration within 120 days following the date of sale, in violation of subdivision (a), the purchaser shall, upon written notice to the pet dealer, be entitled to retain the animal and receive a partial refund of 75 percent of the purchase price, plus sales tax, or return the dog along with all documentation previously provided the purchaser for a full refund, including sales tax.

122205. Except as provided for in subparagraph (B) of paragraph (6) of subdivision (b) of Section 122140, no pet dealer shall knowingly sell a dog that is diseased, ill, or has a condition, any one of which requires hospitalization or surgical procedures. In lieu of the civil penalties imposed pursuant to Section 122150, any pet dealer who violates this section shall be subject to a civil penalty of up to one thousand dollars ($1,000), or shall be prohibited from selling dogs at retail for up to 30 days, or both. If there is a second offense, the pet dealer shall be subject to a civil penalty of up to two thousand five hundred dollars ($2,500), or a prohibition from selling dogs at retail for up to 90 days, or both. For a third offense, the pet dealer shall be subject to a civil penalty of up to five thousand dollars ($5,000) or a prohibition from selling dogs at retail for up to six months, or both. For a fourth and subsequent offense, the pet dealer shall be subject to a civil penalty of up to ten thousand dollars ($10,000) or a prohibition from selling dogs at retail for up to one year, or both. For purposes of this section, a violation that occurred over five years prior to the most recent violation shall not be considered.

An action for recovery of the civil penalty and for a court order enjoining the pet dealer from engaging in the business of selling dogs at retail for the period set forth in this section, may be prosecuted by the district attorney for the county where the violation occurred, or the city attorney for the city where the violation occurred, in the appropriate court.

122210. (a) No dog may be offered for sale by a pet dealer to a purchaser until the dog has been examined by a veterinarian licensed in this state. Each dog shall be examined within five days of receipt of the dog and once every 15 days thereafter while the dog is in the possession or custody of the pet dealer. The pet dealer shall provide any sick dog with proper veterinary care without delay.

(b) Any dog diagnosed with a contagious or infectious disease, illness, or condition shall be caged separately from healthy dogs until a licensed veterinarian determines that the dog is free from contagion or infection. The area shall meet the following conditions when contagious or infectious dogs are present:

(1) The area shall not be used to house other healthy dogs or new arrivals awaiting the required veterinary examination.

(2) The area shall not be used for storing open food containers or bowls, dishes, or other utensils that come in contact with healthy dogs.

(3) The area shall have an exhaust fan that creates air movement from the isolation area to an area outside the premises of the pet dealer. The removal of exhaust air from the isolation area may be accomplished by the use of existing heating and air-conditioning ducts, provided no exhaust air is permitted to enter or mix with fresh air for use by the general animal population.

(4) Upon removal of all of the contagious or infectious dogs, the area shall be cleaned and disinfected before any healthy animal can be placed in the area.

(c) If the pet dealer's veterinarian deems the dog to be unfit for purchase due to a disease, illness, or congenital condition, any of which is fatal or that causes, or is likely to cause, the dog to unduly suffer, the veterinarian shall humanely euthanize the dog. The veterinarian shall provide the pet dealer with a written statement as to why the dog was euthanized. Otherwise, the pet dealer shall have a veterinarian treat the dog, or may surrender the dog to a humane organization that consents to the receipt thereof.

(d) In the event a dog is returned to a pet dealer due to illness, disease, or a congenital or hereditary condition requiring veterinary care, the pet dealer shall provide the dog with proper veterinary care.

122215. Every retail dealer shall post conspicuously on the cage of each dog offered for sale a notice indicating the state where the dog was bred and brokered.

122220. (a) Every pet dealer shall post conspicuously within close proximity to the cages of dogs offered for sale, a notice containing the following language in 100-point type:

''Information on the source of these dogs, and veterinary treatments received by these dogs is available for review.''

''You are entitled to a copy of a statement of consumer rights.''

(b) Every pet dealer shall, upon request for information regarding a dog, make immediately available to prospective purchasers all of the information required to be disclosed to purchasers pursuant to subdivision (b) of Section 122140 and pursuant to Section 122190.

Article 3. Dog Pedigree Registries

122300. For purposes of this article:

(a) ‘‘Dog dealer’’ means any person, firm, partnership, corporation, or other association that engages in the acquisition of dogs for retail sale to the public. ‘‘Dog dealer’’ does not include duly incorporated nonprofit humane societies dedicated to the care of unwanted animals that make animals available for adoption, whether or not a fee for the adoption is charged, or pet dealers who do not in the normal course of business sell dogs, but who sometimes exhibit dogs for adoption.

(b) ‘‘Dog breeder’’ means any person, firm, partnership, corporation, or other association that breeds and sells dogs at wholesale or retail.

(c) ‘‘Dog pedigree registry’’ means any of various private agencies that serve to keep track of the breed, lineage, physical characteristics, and historical data regarding dogs that are registered with the agency.

122305. Every dog dealer that sells registered dogs or that claims that the dogs being sold are registered or are registerable with a dog pedigree registry shall post conspicuously within close proximity to the dogs offered for sale, a notice containing the following language in at least 100-point type:

‘‘Pedigree registration does not assure proper breeding conditions, health, quality, or claims to lineage.’’

122310. (a) For every dog sold by a dog dealer or dog breeder that is sold with any representation that the dog is registered or registerable with a dog pedigree registry, the following fully completed disclosure shall be made, orally and in writing on a separate sheet from any other statements, including, but not limited to, the name of the dog dealer or breeder and the name of the relevant dog pedigree registry:

‘‘Disclosure by

DOG PEDIGREE REGISTRATION DISCLOSURE

Description of dog: _____

_____

The dog you are purchasing is registered/registerable [circle one] with the _____ [enter name of registry].

Registration means only that _____ [enter name of registry] maintains information regarding the parentage and identity of this dog, it does not guarantee the quality or health of this dog, and it does not guarantee quality lineage. Since dog pedigree registries depend in large part on the honesty and accuracy of persons registering dogs, registration does not guarantee the accuracy of the lineage recorded nor that this dog is purebred.

Acknowledged: _____ _____"
Retail purchaser's signature Date

(b) The disclosure in subdivision (a) shall be signed and dated by the retail purchaser of the dog acknowledging receipt of a copy of the statement and the dog dealer or dog breeder shall retain a copy.

122315. (a) Any dog dealer or dog breeder who fails to comply with the disclosure requirements in Section 122305 or 122310, as the case may be, shall be liable to the retail purchaser for civil damages in an amount equal to three times the cost of the dog. Claim for payment under this section shall be made within one year from the date of purchase of the dog.

(b) The remedies provided in this section shall be in addition to any other remedies or penalties authorized by other provisions of law.

SEC. 8. Division 106 (commencing with Section 123100) is added to the Health and Safety Code, to read:

DIVISION 106. PERSONAL HEALTH CARE (INCLUDING MATERNAL, CHILD, AND ADOLESCENT)

PART 1. GENERAL ADMINISTRATION

CHAPTER 1. PATIENT ACCESS TO HEALTH RECORDS

123100. The Legislature finds and declares that every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided. Similarly, persons having responsibility for decisions respecting the health care of others should, in general, have access to information on the patient's condition and care. It is, therefore, the intent of the Legislature in enacting this chapter to establish procedures for providing access to health care records or summaries of those records by patients and by those persons having responsibility for decisions respecting the health care of others.

123105. As used in this chapter:

(a) ''Health care provider'' means any of the following:

(1) A health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.

(2) A clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2.

(3) A home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2.

(4) A physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Act.

(5) A podiatrist licensed pursuant to Article 22 (commencing with Section 2460) of Chapter 5 of Division 2 of the Business and Professions Code.

(6) A dentist licensed pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code.

(7) A psychologist licensed pursuant to Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.

(8) An optometrist licensed pursuant to Chapter 7 (commencing with Section 3000) of Division 2 of the Business and Professions Code.

(9) A chiropractor licensed pursuant to the Chiropractic Initiative Act.

(10) A marriage, family, and child counselor licensed pursuant to Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.

(11) A clinical social worker licensed pursuant to Chapter 14 (commencing with Section 4990) of Division 2 of the Business and Professions Code.

(b) ''Mental health records'' means patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder. ''Mental health records'' includes, but is not limited to, all alcohol and drug abuse records.

(c) ''Patient'' means a patient or former patient of a health care provider.

(d) ''Patient records'' means records in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient. ''Patient records'' includes only records pertaining to the patient requesting the records or whose representative requests the records. ''Patient records'' does not include information given in confidence to a health care provider by a person other than another health care provider or the patient, and that material may be removed from any records prior to inspection or copying under Section 123110 or 123115. ''Patient records'' does not include information contained in aggregate form, such as indices, registers, or logs.

(e) ''Patient's representative'' or ''representative'' means a parent or the guardian of a minor who is a patient, or the guardian or conservator of the person of an adult patient, or the beneficiary or personal representative of a deceased patient.

(f) ''Alcohol and drug abuse records'' means patient records, or discrete portions thereof, specifically relating to evaluation and treatment of alcoholism or drug abuse.

123110. (a) Notwithstanding Section 5328 of the Welfare and Institutions Code, and except as provided in Sections 123115 and 123120, any adult patient of a health care provider, any minor patient authorized by law to consent to medical treatment, and any patient

representative shall be entitled to inspect patient records upon presenting to the health care provider a written request for those records and upon payment of reasonable clerical costs incurred in locating and making the records available. However, a patient who is a minor shall be entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent. A health care provider shall permit this inspection during business hours within five working days after receipt of the written request. The inspection shall be conducted by the patient or patient's representative requesting the inspection, who may be accompanied by one other person of his or her choosing.

(b) Additionally, any patient or patient's representative shall be entitled to copies of all or any portion of the patient records that he or she has a right to inspect, upon presenting a written request to the health care provider specifying the records to be copied, together with a fee to defray the cost of copying, that shall not exceed twenty-five cents ($0.25) per page or fifty cents ($0.50) per page for records that are copied from microfilm and any additional reasonable clerical costs incurred in making the records available. The health care provider shall ensure that the copies are transmitted within 15 days after receiving the written request.

(c) Copies of X-rays or tracings derived from electrocardiography, electroencephalography, or electromyography need not be provided to the patient or patient's representative under this section, if the original X-rays or tracings are transmitted to another health care provider upon written request of the patient or patient's representative and within 15 days after receipt of the request. The request shall specify the name and address of the health care provider to whom the records are to be delivered. All reasonable costs, not exceeding actual costs, incurred by a health care provider in providing copies pursuant to this subdivision may be charged to the patient or representative requesting the copies.

(d) This section shall not be construed to preclude a health care provider from requiring reasonable verification of identity prior to permitting inspection or copying of patient records, provided this requirement is not used oppressively or discriminatorily to frustrate or delay compliance with this section. Nothing in this chapter shall be deemed to supersede any rights that a patient or representative might otherwise have or exercise under Section 1158 of the Evidence Code or any other provision of law. Nothing in this chapter shall require a health care provider to retain records longer than required by applicable statutes or administrative regulations.

(e) This chapter shall not be construed to render a health care provider liable for the quality of his or her records or the copies provided in excess of existing law and regulations with respect to the quality of medical records. A health care provider shall not be liable to the patient or any other person for any consequences that result

from disclosure of patient records as required by this chapter. A health care provider shall not discriminate against classes or categories of providers in the transmittal of X-rays or other patient records, or copies of these X-rays or records, to other providers as authorized by this section.

Every health care provider shall adopt policies and establish procedures for the uniform transmittal of X-rays and other patient records that effectively prevent the discrimination described in this subdivision. A health care provider may establish reasonable conditions, including a reasonable deposit fee, to ensure the return of original X-rays transmitted to another health care provider, provided the conditions do not discriminate on the basis of, or in a manner related to, the license of the provider to which the X-rays are transmitted.

(f) Any health care provider described in paragraphs (4) to (10), inclusive, of subdivision (a) of Section 123105 who willfully violates this chapter is guilty of unprofessional conduct. Any health care provider described in paragraphs (1) to (3), inclusive, of subdivision (a) of Section 123105 that willfully violates this chapter is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100). The state agency, board, or commission that issued the health care provider's professional or institutional license shall consider a violation as grounds for disciplinary action with respect to the licensure, including suspension or revocation of the license or certificate.

(g) This section shall be construed as prohibiting a health care provider from withholding patient records or summaries of patient records because of an unpaid bill for health care services. Any health care provider who willfully withholds patient records or summaries of patient records because of an unpaid bill for health care services shall be subject to the sanctions specified in subdivision (f).

123115. (a) The representative of a minor shall not be entitled to inspect or obtain copies of the minor's patient records in either of the following circumstances:

(1) With respect to which the minor has a right of inspection under Section 123110.

(2) Where the health care provider determines that access to the patient records requested by the representative would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well being. The decision of the health care provider as to whether or not a minor's records are available for inspection under this section shall not attach any liability to the provider, unless the decision is found to be in bad faith.

(b) When a health care provider determines there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of mental health records requested by

the patient, the provider may decline to permit inspection or provide copies of the records to the patient, subject to the following conditions:

(1) The health care provider shall make a written record, to be included with the mental health records requested, noting the date of the request and explaining the health care provider's reason for refusing to permit inspection or provide copies of the records, including a description of the specific adverse or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted.

(2) The health care provider shall permit inspection by, or provide copies of, the mental health records to a licensed physician and surgeon or licensed psychologist designated by request of the patient.

(3) The health care provider shall inform the patient of the provider's refusal to permit him or her to inspect or obtain copies of the requested records, and inform the patient of the right to require the provider to permit inspection by, or provide copies to, a licensed physician and surgeon, licensed psychologist, or licensed clinical social worker designated by written authorization of the patient.

(4) The health care provider shall indicate in the mental health records of the patient whether the request was made under paragraph (2).

123120. Any patient or representative aggrieved by a violation of Section 123110 may, in addition to any other remedy provided by law, bring an action against the health care provider to enforce the obligations prescribed by Section 123110. Any judgment rendered in the action may, in the discretion of the court, include an award of costs and reasonable attorney fees to the prevailing party.

123125. (a) This chapter shall not require a health care provider to permit inspection or provide copies of alcohol and drug abuse records where, or in a manner, prohibited by Section 408 of the federal Drug Abuse Office and Treatment Act of 1972 (Public Law 92-255) or Section 333 of the federal Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (Public Law 91-616), or by regulations adopted pursuant to these federal laws. Alcohol and drug abuse records subject to these federal laws shall also be subject to this chapter, to the extent that these federal laws do not prohibit disclosure of the records. All other alcohol and drug abuse records shall be fully subject to this chapter.

(b) This chapter shall not require a health care provider to permit inspection or provide copies of records or portions of records where or in a manner prohibited by existing law respecting the confidentiality of information regarding communicable disease carriers.

123130. (a) A health care provider may prepare a summary of the record, according to the requirements of this section, for

inspection and copying by a patient. If the health care provider chooses to prepare a summary of the record rather than allowing access to the entire record, he or she shall make the summary of the record available to the patient within 10 working days from the date of the patient's request. However, if more time is needed because the record is of extraordinary length or because the patient was discharged from a licensed health facility within the last 10 days, the health care provider shall notify the patient of this fact and the date that the summary will be completed, but in no case shall more than 30 days elapse between the request by the patient and the delivery of the summary. In preparing the summary of the record the health care provider shall not be obligated to include information that is not contained in the original record.

(b) A health care provider may confer with the patient in an attempt to clarify the patient's purpose and goal in obtaining his or her record. If as a consequence the patient requests information about only certain injuries, illnesses, or episodes, this subdivision shall not require the provider to prepare the summary required by this subdivision for other than the injuries, illnesses, or episodes so requested by the patient. The summary shall contain for each injury, illness, or episode any information included in the record relative to the following:

(1) Chief complaint or complaints including pertinent history.

(2) Findings from consultations and referrals to other health care providers.

(3) Diagnosis, where determined.

(4) Treatment plan and regimen including medications prescribed.

(5) Progress of the treatment.

(6) Prognosis including significant continuing problems or conditions.

(7) Pertinent reports of diagnostic procedures and tests and all discharge summaries.

(8) Objective findings from the most recent physical examination, such as blood pressure, weight, and actual values from routine laboratory tests.

(c) This section shall not be construed to require any medical records to be written or maintained in any manner not otherwise required by law.

(d) The summary shall contain a list of all current medications prescribed, including dosage, and any sensitivities or allergies to medications recorded by the provider.

(e) Subdivision (c) of Section 123110 shall be applicable whether or not the health care provider elects to prepare a summary of the record.

(f) The health care provider may charge no more than a reasonable fee based on actual time and cost for the preparation of

the summary. The cost shall be based on a computation of the actual time spent preparing the summary for availability to the patient or the patient's representative. It is the intent of the Legislature that summaries of the records be made available at the lowest possible cost to the patient.

123135. Except as otherwise provided by law, nothing in this chapter shall be construed to grant greater access to individual patient records by any person, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation, or government officer or agency. Therefore, this chapter does not do any of the following:

(a) Relieve employers of the requirements of the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code).

(b) Relieve any person subject to the Insurance Information and Privacy Protection Act (Article 6.6 (commencing with Section 791) of Chapter 1 of Part 2 of Division 1 of the Insurance Code) from the requirements of that act.

(c) Relieve government agencies of the requirements of the Information Practices Act of 1977 (Title 1.8 (commencing with Section 1798) of Part 4 of Division 3 of the Civil Code).

123140. The Information Practices Act of 1977 (Title 1.8 (commencing with Section 1798) of Part 4 of Division 3 of the Civil Code) shall prevail over this chapter with respect to records maintained by a state agency.

123145. (a) Providers of health services that are licensed pursuant to Sections 1205, 1253, 1575 and 1726 have an obligation, if the licensee ceases operation, to preserve records for a minimum of seven years following discharge of the patient, except that the records of unemancipated minors shall be kept at least one year after the minor has reached the age of 18 years, and in any case, not less than seven years.

(b) The department or any person injured as a result of the licensee's abandonment of health records may bring an action in a proper court for the amount of damage suffered as a result thereof. In the event that the licensee is a corporation or partnership that is dissolved, the person injured may take action against that corporation's or partnership's principle officers of record at the time of dissolution.

(c) Abandoned means violating subdivision (a) and leaving patients treated by the licensee without access to medical information to which they are entitled pursuant to Section 123110.

123148. Notwithstanding any other provision of law, a health care professional at whose request a test is performed shall, upon a written or oral request of a patient who is the subject of a clinical laboratory test, provide the patient with the results of the test in plain language conveyed in the manner deemed most appropriate by the health care

professional who requested the test. The test results to be reported to the patient pursuant to this section shall be recorded in the patient's medical record and shall be reported to the patient within a reasonable time period after the test results are received at the offices of the health care professional who requested the test.

123149. (a) Providers of health services, licensed pursuant to Sections 1205, 1253, 1575, and 1726, that utilize electronic recordkeeping systems only, shall comply with the additional requirements of this section. These additional requirements do not apply to patient records if hard copy versions of the patient records are retained.

(b) Any use of electronic recordkeeping to store patient records shall ensure the safety and integrity of those records at least to the extent of hard copy records. All providers set forth in subdivision (a) shall ensure the safety and integrity of all electronic media used to store patient records by employing an offsite backup storage system, an image mechanism that is able to copy signature documents, and a mechanism to ensure that once a record is input, it is unalterable.

(c) Original hard copies of patient records may be destroyed once the record has been electronically stored.

(d) The printout of the computerized version shall be considered the original as defined in Section 255 of the Evidence Code for purposes of providing copies to patients, the Division of Licensing and Certification, and for introduction into evidence in accordance with Sections 1550 and 1551 of the Evidence Code, in administrative or court proceedings.

(e) Access to electronically stored patient records shall be made available to the Division of Licensing and Certification staff promptly, upon request.

(f) This section does not exempt licensed clinics, health facilities, adult day health care centers, and home health agencies from the requirement of maintaining original copies of patient records that cannot be electronically stored.

(g) Any health care provider subject to this section, choosing to utilize an electronic recordkeeping system, shall develop and implement policies and procedures to include safeguards for confidentiality and unauthorized access to electronically stored patient health records, authentication by electronic signature keys, and systems maintenance.

(h) Nothing contained in this chapter shall affect the existing regulatory requirements for the access, use, disclosure, confidentiality, retention of record contents, and maintenance of health information in patient records by health care providers.

(i) This chapter does not prohibit any provider of health care services from maintaining or retaining patient records electronically.

CHAPTER 2. DESTRUCTION OF RECORDS AND EXHIBITS OF HUMAN HEALTH

123150. The board of supervisors may authorize the destruction or the disposition to a public or private medical library of any X-ray photographs and case records that are more than five years old and that were taken by the county health officer in the performance of his or her duties with regard to tuberculosis if any of the following conditions are complied with:

(a) The county health officer has determined that the X-ray photographs or a series of X-ray photographs in conjunction with case records do not show the existence of tuberculosis in the infectious stage.

(b) The individual of whom the X-ray photographs were taken has been deceased not less than two years or the 102nd anniversary of the individual's birthdate has occurred and the county health officer cannot reasonably ascertain whether the individual is still living.

(c) The place of residence of the individual of whom the X-ray photographs were taken has been unknown to the county health officer for 10 years.

123155. The board of supervisors of any county, in addition to its other powers and duties may acquire or construct exhibits and displays depicting all or parts of the human body and functions thereof for the purpose of educating the public with regard to human health, and maintain, operate and manage the exhibits and displays in any county or other public building. It may enter into contracts or leases with any other governmental agency or any nonprofit association or corporation, including a county medical association, for the construction and acquisition of the exhibits and displays, and for the maintenance, operation and management of the exhibits and displays in any county or other public building, without consideration except the agreement of the contracting or leasing agency, association or corporation to construct, acquire, maintain, operate and manage the exhibits and displays for the purpose of public health education and upon any other terms and conditions as may be agreed upon by the board and the contracting or leasing agency, association or corporation.

CHAPTER 3. CATASTROPHIC HEALTH INSURANCE

123175. The Legislature finds and declares as follows:

(a) A catastrophic illness or injury may financially devastate an individual or the family of that individual because of extraordinary medical expenses. It is vitally necessary to the public health and welfare of the State of California that:

(1) Its residents not be burdened with those financial costs. Most health insurance policies contain a monetary limitation on the

amount of money that can be expended on a particular illness or individual, leaving any balance to be paid by the patient. The state has enacted this chapter to promote the availability of additional insurance to help pay extensive medical costs.

(2) The state government not be financially burdened by residents who may become indigent due to these catastrophic health costs.

(b) It is the intent of the Legislature in enacting this chapter to institute a program to inform state residents of the need for catastrophic health insurance, and to make this insurance available to residents through an independent insurer at no cost or liability to the state.

123180. As used in this chapter:

(a) ''Catastrophic health insurance'' means a supplementary insurance contract that indemnifies a California resident for medical expenses, including at least the costs of the basic health care services that result from an illness, injury, or disease, and that are greater than fifty thousand dollars ($50,000), subject to a lifetime benefit limit of one million dollars ($1,000,000).

(b) ''Resident'' means any individual who lives in California for at least 90 consecutive days.

(c) ''Insurer'' as used in this chapter includes a disability insurer that covers hospital, medical, or surgical expenses, and a nonprofit hospital service plan.

(d) ''Basic health care services'' includes, but is not limited to, the following:

(1) Inpatient hospital treatment, including room and board, general nursing services, diagnostic tests, supplies, and other medically necessary services.

(2) Outpatient services for surgery, presurgical diagnostic tests, emergency care, and chemotherapy.

(3) Surgery and anesthesia.

(4) Hospital and office visits and consultations.

(5) X-rays and laboratory tests; allergy tests, injections, and sera.

(6) Maternity care for the subscriber or enrolled spouse.

(7) Psychotherapy.

(8) Chemotherapy and radiation therapy.

(9) Physical, speech, occupational and respiratory therapies.

(10) Prescription drugs.

(11) Prostheses and durable medical equipment, such as artificial limbs, hospital beds, and wheelchairs.

(12) Cardiac rehabilitation program.

(13) Local ambulance service.

(14) Alcohol and drug abuse rehabilitation.

(15) Rehabilitative care.

(16) Outpatient skilled nursing care (up to two hours per day for up to 50 days per calendar year).

(17) Home health care and hospice services provided by an approved home health agency or hospice agency.

123185. The director shall, in consultation with, and approval of the Department of Insurance, do all of the following:

(a) Contract with an insurer or insurers to provide any resident catastrophic health insurance.

(b) Inform residents of the availability of catastrophic health insurance.

(c) Provide oversight for all contract obligations of the insurer.

(d) Approve all advertising and marketing materials used by an insurer in connection with catastrophic health insurance provided under this chapter in order to ensure accuracy and fairness. The advertising standards used shall be those set out in Section 1360.

(e) Determine the cost of the oversight function and make provisions to cover all administrative costs.

123190. The director may appoint a full-time employee, and other staff as required, to implement this chapter.

123195. (a) A contract provided for by this chapter shall not be required to cover a preexisting medical condition of the resident during the first 10 months the resident is covered by catastrophic health insurance provided under this chapter. Charges for a preexisting condition shall not apply toward the deductible during the first 10 months of coverage. Charges for other conditions during that initial period shall apply toward the deductible.

(b) The contract shall also prohibit the insurer from discriminating against prospective insureds in their underwriting practices on the basis of demographic factors, such as age, or preexisting medical conditions.

123200. The state is not liable in any way for any claims arising out of an arrangement for insurance established under this chapter. The insurer shall bear the cost of all claims, and shall indemnify the state against all claims and the cost of defending against all claims in connection with an arrangement for catastrophic health insurance established under this chapter.

123205. The director shall enter into contracts pursuant to subdivision (a) of Section 123185 only with insurers that meet all of the following criteria, as determined by the director:

(a) The insurer shall be actuarially sound.

(b) The insurer shall be fully self-supported by its policy premiums or charges and investments.

(c) The insurer shall use advertising that is accurate.

123210. (a) The term of any contract entered into pursuant to subdivision (a) of Section 123185 shall be determined by the director, but shall not exceed three years.

(b) The contract shall contain a provision authorizing the director to terminate the contract upon giving 60 days' written notice to the insurer of any of the following causes for termination:

(1) The department has determined that management practices of the insurer or the current financial condition of the insurer interferes with the efficient and timely payment of catastrophic health insurance benefits.

(2) Continuing failure of the insurer to timely pay the benefits of its policies of catastrophic health insurance or provide catastrophic health insurance services in accordance with the contract.

(3) Other continuing unsatisfactory performance by the insurer under the contract, based upon complaints received from insureds or other sources, if the insurer has failed to take reasonable, effective, and prompt actions to resolve the complaints.

(c) The contract shall contain a provision authorizing the director to terminate the contract without cause upon any annual anniversary date of the contract by giving at least 60 days' notice to the insurer.

(d) The director may give up to 120 days' notice to terminate if it is determined to be in the best interest of plan participants.

(e) The director shall annually certify that participating providers meet the conditions of the program. In carrying out this requirement, the director shall consult with the Department of Insurance to obtain any audits performed by those agencies that may be used in evaluating the performance of each provider.

123215. Premiums or charges paid for catastrophic health insurance provided pursuant to this chapter shall include an increment to defray the reasonable administrative costs of the department in administering this chapter that shall be transmitted by insurers to the department as provided in the contract.

123220. If studies or research demonstrate that it is in the best interest of the program, the director may adopt regulations setting forth modifications to the coverage provided under the program. No modification shall apply to any coverage provided by a policy or contract issued prior to the operative date of the regulation, except that the modification shall apply to coverage provided after any renewal of the policy or contract occurring after the operative date of the regulation.

PART 2. MATERNAL, CHILD, AND ADOLESCENT HEALTH

CHAPTER 1. GENERAL PROVISIONS

Article 1. Maternal, Child, and Adolescent Health

123225. The department shall maintain a program of maternal and child health.

123227. (a) The Maternal and Child Health Branch of the State Department of Health Services shall administer a comprehensive shelter-based services grant program to battered women's shelters pursuant to this section.

(b) The Maternal and Child Health Branch shall administer grants to battered women's shelters that propose to expand existing services or create new services, and to establish new battered women's shelters to provide services, in any of the following four areas:

(1) Emergency shelter to women and their children escaping violent family situations.

(2) Transitional housing programs to help women and their children find housing and jobs so that they are not forced to choose between returning to a violent relationship or becoming homeless. The programs may offer up to 18 months of housing, case management, job training and placement, counseling, support groups, and classes in parenting and family budgeting.

(3) Legal and other types of advocacy and representation to help women and their children pursue the appropriate legal options.

(4) Other support services for battered women identified by the advisory council, including, but not limited to, creative and innovative service approaches such as community response teams.

(c) In implementing the grant program pursuant to this section, the State Department of Health Services shall consult with an advisory council, to remain in existence until January 1, 1996. The council shall be composed of not to exceed 13 voting members and two nonvoting members appointed as follows:

(1) Seven members appointed by the Governor.

(2) Three members appointed by the Speaker of the Assembly.

(3) Three members appointed by the Senate Committee on Rules.

(4) Two nonvoting ex officio members who shall be Members of the Legislature, one appointed by the Speaker of the Assembly and one appointed by the Senate Committee on Rules. Any Member of the Legislature appointed to the council shall meet with, and participate in the activities of, the council to the extent that participation is not incompatible with his or her position as a Member of the Legislature.

The membership of the council shall consist of domestic violence advocates, battered women service providers, and representatives of women's organizations, law enforcement, and other groups involved with domestic violence. At least one-half of the council membership shall consist of domestic violence advocates or battered women service providers from organizations such as the California Alliance Against Domestic Violence.

It is the intent of the Legislature that the council membership reflect the ethnic, racial, cultural, and geographic diversity of the state.

(d) The department shall collaborate closely with the council in the development of funding priorities, the framing of the Request for Proposals, and the solicitation of proposals.

(e) Administrative costs of the State Department of Health Services incurred pursuant to the grant program shall not exceed 5 percent of the funds allocated for the program.

(f) The shelters funded pursuant to this section shall reflect the ethnic, racial, economic, cultural, and geographic diversity of the state. It is the intent of the Legislature that services funded by this program include services in underserved and minority communities.

(g) As a condition of receiving funding pursuant to this section, battered women's shelters shall provide matching funds or in-kind contributions equivalent to 10 percent of the grant they would receive. The matching funds or in-kind contributions may come from other governmental or private sources.

(h) The State Department of Health Services shall issue a Request for Proposals and shall encumber the funds or complete negotiations for agreements no later than May 1, 1995.

123230. The department may investigate, and disseminate educational information relating to, conditions affecting the health of the children of this state.

123235. The program may include the provision of educational, preventative, diagnostic and treatment services, including medical care, hospitalization and other institutional care and aftercare, appliances and facilitating services directed toward reducing infant mortality and improving the health of mothers and children. The department may make grants or contracts or advance funds from any funds that are made available for the purposes of the Maternal and Child Health Program Act (Section 27).

123240. (a) The Maternal and Child Health Branch of the department shall conduct a pilot project to assess the effectiveness of daily ambulatory uterine monitoring devices and services in reducing preterm births in Medi-Cal eligible women.

(b) The department shall implement the pilot program to assess the incidence of preterm births in 1,000 women at high risk of preterm birth, 500 of whom shall be provided daily ambulatory uterine monitoring services between the 23rd and 36th weeks of gestation and 500 of whom shall be provided routine prenatal care augmented by training in palpatation. Women participating in the pilot program shall be Medi-Cal eligible women. To the maximum extent possible these services shall be prescribed by providers participating in other programs administered by the Maternal and Child Health Branch of the department or the comprehensive perinatal program.

(c) Women shall be deemed to be at high risk if they have multiple gestation or any two of the following risk factors for preterm labor; uterine malformation, a history of preterm labor or births, cervical incompetence, cervical dilation or effacement, and those patients who have been treated during the current pregnancy for preterm labor.

(d) The department shall select five counties to participate in the project, at least one of which shall be a rural county, and shall reimburse providers of ambulatory uterine monitoring services a fee based on reasonable costs.

(e) (1) The department shall also contract for an evaluation of the pilot project to ascertain whether use of the ambulatory uterine monitoring services significantly reduces the incidence of preterm births. The evaluation shall compare the experimental and control groups and identify the following for each group:

(A) The number of preterm births.

(B) The number of hospital days used by the mother prior to delivery.

(C) The number of hospital days used by the mother and child after delivery, including neonatal intensive care.

(D) The number of children born with developmental disabilities or conditions that may lead to developmental disabilities.

(E) The costs of providing prenatal services.

(2) The evaluation shall also project the costs associated with the health care provided to the mother and child during the course of the pilot project and, if feasible, shall project the longer term health care costs of children born prematurely, including costs of services provided to the developmentally disabled.

(3) The department may enter into the contract on a sole source basis.

(f) (1) The pilot project established pursuant to this section shall be considered successful if it shows that the experimental group, when compared to the control group, had all of the following:

(A) A 20-percent reduction in the number of premature births.

(B) A 20-percent reduction in the number of antepartum hospitalization days.

(C) A 20-percent reduction in the number of neonatal intensive care unit days for premature births.

(D) A 20-percent reduction in total patient costs.

(2) The department shall submit the evaluation to the Legislature by September 1, 1990.

(g) (1) The department shall immediately seek any federal waivers necessary to ensure full federal financial participation in the pilot program established pursuant to this section.

(2) The department shall not implement the pilot program under this section until necessary federal waivers are received.

123245. The Maternal and Child Health Program Act (Section 27) does not give the power to force compulsory medical or physical examination of children.

123250. Upon request the department shall advise all public officers, organizations, and agencies interested in the health and welfare of mothers and children in the state.

Article 2. Women, Infants, and Children's Nutrition

123275. The Legislature finds that medical, educational and psychological evidence increasingly points to adequate nutrition as a determinant not only of good physical health but also of full intellectual development and educational achievement, with adequate nutrition in the earliest months and years being particularly important for full development of the child's mind and body, that problems of child nutrition cut across income lines and can result not only from low income but also from parental ignorance or neglect and that there is a need for a statewide child nutrition program that has the potential of reaching all pregnant women and mothers of infants.

123280. The department may conduct a statewide program for providing nutritional food supplements to low-income pregnant women, low-income postpartum and lactating women, and low-income infants and children under five years of age, who have been determined to be at nutritional risk by a health professional, based on criteria established by the department. Any program established pursuant to this section shall do all of the following:

(a) Comply with all the requirements of this article.

(b) Be conducted only if a special project is authorized by inclusion in the Budget Act or notification is provided to the Legislature pursuant to Section 28 of the Budget Act, and federal funds are appropriated therefor.

(c) Be known as the California Special Supplemental Food Program for Women, Infants, and Children.

123285. As used in this article, the following definitions shall apply:

(a) ''Health professional'' means a physician and surgeon, registered nurse, nutritionist, dietitian, or state or local medically trained health official, who is competent to professionally evaluate nutritional need and to authorize supplemental foods, as determined by the state department.

(b) ''Low income'' means an income of not more than 185 percent of the poverty level as determined by the federal poverty income guidelines promulgated by the United States Department of Health and Human Services.

(c) ''Recipient'' means low-income pregnant women, low-income postpartum and lactating women, and low-income infants and children under five years of age, who are determined to be at nutritional risk by a health professional, based on criteria established by the state department.

(d) ''Nutrition coupon'' means a check that is limited as to value, food type, and food quantity and that has a limited period of validity.

123290. The department, under any program established pursuant to this article, shall do all of the following:

(a) Establish guidelines to determine resource allocation giving consideration to an area's nutritional need.

(b) Designate the counties within which a program will be conducted, with the approval of those counties.

(c) Establish the minimum nutritional requirements for recipients.

(d) Designate specific supplemental foods to meet the minimum nutritional requirements for recipients.

(e) Develop and maintain a system for the delivery of supplemental foods to recipients through the distribution of supplemental foods designated in subdivision (d) and nutrition coupons when other methods of delivery are impractical.

(f) (1) Develop and coordinate a smoking cessation component of program operations, with consideration of local agency plans, needs, and available tobacco education resources.

(2) In consultation with the directors of local agencies and with other individuals with expertise in the field of smoking cessation, identify and promulgate a strategy for smoking cessation in the state plan of operation and administration of the WIC program, including, but not limited to all of the following:

(A) Designating an agency staff member to coordinate smoking cessation efforts.

(B) Providing training on smoking cessation and tobacco education to designated staff members of local agencies who are responsible for counseling participants in the program.

(3) Develop and implement procedures to ensure that tobacco use screening and education, including, but not limited to, smoking cessation counseling and referrals where appropriate, are offered to all participants.

(g) (1) Establish guidelines and criteria to be used by participating local agencies, when determining recipient eligibility, that require, in addition to a recipient being a low-income pregnant woman, or a low-income postpartum and lactating woman, or a low-income infant or child under five years of age, that the recipient be at nutritional risk.

(2) A health professional on the staff of the local agency shall determine if a person is at nutritional risk through a medical or nutritional assessment. This determination may be based on referral data submitted by a health professional not on the staff of the local agency. The person's height or length and weight shall be measured, and a hematological test for anemia, such as a hemoglobin or hematocrit test, shall be performed. However, the tests shall not be required for infants under six months of age. In addition, the blood test shall not be required for children who were determined to be within the normal range at their last program certification. However, the blood test shall be performed on the children at least once a year. A breastfeeding woman may be certified if the child she is

breastfeeding is determined to be at nutritional risk and the woman meets the income eligibility criteria.

(h) Operate the program as an adjunct to existing health services.

(i) Seek federal funds to carry out this article.

123295. Nutrition coupons in an amount sufficient to meet the nutritional needs of a recipient for one month shall be granted to a recipient by facilities and persons referred to in subdivision (f) of Section 123290 upon the written finding of nutritional need by the recipient's physician or other health professional.

123300. The department may, under any program established pursuant to this article, investigate the feasibility of contracting with one or more banks in the area served by the program for the redemption of nutrition coupons.

123305. The department, under any program established pursuant to this article, may collect data to determine the need for and the continuation of a supplemental nutritional program for recipients under this article.

123310. The department, under any program established pursuant to this article, shall authorize retail food vendors, by written agreement, to accept nutrition coupons. The department shall authorize an appropriate number and distribution of food vendors in order to assure adequate participant convenience and access and to assure that state or local officials can effectively manage review of authorized food vendors in their jurisdictions. The department shall establish criteria to limit the number of retail food vendors with which the department enters into agreements. The criteria, at a minimum, shall include:

(a) The prices the vendor charges for foods in relation to other stores in the area.

(b) The ability of the department to ensure that authorized supplemental foods will be provided through in-store compliance purchases.

(c) The adequacy of the shelf stock of the authorized supplemental foods.

(d) Past performance of the vendor in compliance with this article and with the Food Stamp Program.

123315. The department, under any program established pursuant to this article, shall ensure that, at a minimum, the authorized vendor shall do all of the following:

(a) Redeem nutrition coupons only from persons bearing appropriate identification provided by the department.

(b) Redeem nutrition coupons for only those foods specified thereon.

(c) Redeem nutrition coupons at an amount that is the same as, or lesser than, that charged other customers for identical foods.

(d) Redeem and deposit nutrition coupons during specified valid periods.

(e) Deposit the nutrition coupons directly in the vendor's bank account and not transfer them for cash payment, credit, or any other benefit to any party other than the vendor's bank or the state.

(f) Maintain for a period of at least three years records, that shall include, but not be limited to, all of the following:

(1) Inventory records showing all purchases, both wholesale and retail, in the form of invoices that identify the quantity and prices of specified authorized supplemental foods.

(2) Sales and use tax returns.

(3) Books of account.

(4) Other pertinent records that the department determines are necessary to substantiate the volume and prices charged to the state department through the nutrition coupons redeemed by the vendor.

123320. The department shall inform the retail food vendors of, and include in the written agreement with, the vendors, guidelines consistent with Section 123315 and shall print on each coupon the following:

(a) Specific supplemental foods and the quantities thereof for which the coupon may be redeemed.

(b) The valid period of the nutrition coupon.

(c) The maximum value for which the nutrition coupon may be redeemed.

123325. A retail food vendor or any other person who knowingly redeems coupons in excess of the price charged other customers for identical foods, or who provides anything of value other than the specified foods, or who fails to provide inventory records to substantiate purchases for resale of authorized supplemental foods is subject to all sanctions set forth in federal regulation for the Special Supplemental Food Program for Women, Infants, and Children, that is provided for in Section 246 and following of Title 7 of the Code of Federal Regulations. The department may disqualify a food vendor who is currently disqualified from the Food Stamp Program.

123330. Any person or persons who have embezzled, willfully misapplied, stolen, or fraudulently obtained funds or benefits pursuant to this article shall be subject to the penalties set forth in federal regulations for the Special Supplemental Food Program for Women, Infants, and Children, that is provided for in Section 246 and following of Title 7 of the Code of Federal Regulations.

123335. Any officer, employee, or agent of the department may enter the place of business of any vendor transacting nutrition coupons to verify food prices, to witness or investigate procedures, to conduct financial audits, or to otherwise determine compliance of the vendor with this article and the vendor agreement.

123340. (a) Except as provided in subdivision (c), if any amount is due and payable and unpaid as a result of an overpayment to a vendor or local agency established under this article that is identified through an audit or examination conducted by or on behalf of the

director and the department has issued an audit or examination finding, or an administrative decision resulting from an administrative appeal of the audit or examination finding that has become final, the director may file in the office of the County Clerk of Sacramento County and with the county clerk of the county in which the vendor has his or her principal place of business, a certificate containing the following:

(1) The amount due and owing and unpaid plus the applicable interest at a rate equal to the monthly average of the rate received on investments in the Pooled Money Investment Fund commencing on the date that an audit or examination finding, made pursuant to Section 316.5 is mailed to the vendor or local agency.

(2) A statement that the director has complied with this article prior to the filing of the certificate.

(3) A request that judgment be entered against the vendor or local agency in the amount set forth in the certificate.

The county clerk immediately upon the filing of the certificate, shall enter a judgment for the State of California against the vendor or local agency in the amount set forth in the certificate.

Notwithstanding any provision of law to the contrary, the Special Supplemental Food Program for Women, Infants, and Children shall pay the normal fee charged by the county for the certificate of judgment.

Nothing in this subdivision shall prevent the director from using any other means available in law to recover amounts due and owing and unpaid from the vendor or local agency.

(b) The dates when the department may file the certificate and seek judgment from the county clerk, as provided in subdivision (a), depends on whether the audit finding is appealed by the vendor or local agency.

(1) If the audit finding or lower level administrative decision is not appealed, the department may file the certificate the day after the end of the appeal period or anytime thereafter, but not later than three years after the payment became due and owing.

(2) If the audit finding or lower level administrative decision is appealed to the director, the department may file the certificate no earlier than 90 days after the issuance of the final decision by the director, but no later than three years after the issuance of the final decision.

(c) If the vendor seeks judicial review of the final decision of the director pursuant to Section 1094.5 of the Code of Civil Procedure, and notice of the action is properly served on the director within 90 days of the issuance of the final decision, the department shall not file any certificate as provided in subdivision (a).

If the vendor does not seek judicial review of the final decision of the director or does not properly serve notice within 90 days from the

date of the final decision of the director, the department may file the certificate and obtain judgment pursuant to subdivision (a).

123345. An abstract of judgment obtained pursuant to subdivisions (a) and (b) of Section 123335 or a copy thereof may be recorded with the county recorder of any county. From the time of recording, the judgment shall constitute a lien upon all real or personal property owned by the vendor at the time, or that the vendor may afterwards, but before the lien expires, acquire. The lien shall have the force, effect, and priority of a judgment lien and shall continue for 10 years from the time of recording of the abstract of judgment obtained pursuant to subdivisions (a) and (b) of Section 123335 unless sooner released or otherwise discharged.

The lien may, within 10 years from the date of recording of the abstract of judgment or within 10 years from the date of the last extension of the lien in the manner herein provided, be extended by recording a new abstract in the office of the county recorder of any county. From the date of the recording the lien shall be extended for 10 years unless sooner released or otherwise discharged.

123350. The department shall arrange for the conduct of periodic audits of participating local agencies.

123355. The department shall provide a hearing procedure whereby any food vendor or local agency may appeal any adverse action taken by the department affecting the vendor's or local agency's participation in the California Supplemental Food Program for Women, Infants, and Children. The hearing procedure shall be in accordance with the requirements of the federal regulations for the Special Supplemental Food Program for Women, Infants, and Children, that is contained in Section 246 et seq. of Title 7 of the Code of Federal Regulations.

CHAPTER 2. MATERNAL HEALTH

Article 1. Determination of Pregnancy

123375. (a) Except as otherwise provided in subdivision (b), no person shall sell, offer for sale, give away, distribute, or otherwise furnish materials intended to determine the presence of pregnancy, unless that person has obtained a certificate of acceptability from the department declaring that the materials have been approved as to efficacy and safety by the department.

(b) Subdivision (a) shall not apply to materials intended to determine the presence of pregnancy, that are sold, offered for sale, given away, distributed, or otherwise furnished to a physician and surgeon licensed to practice in this state, a pharmacist licensed to practice in this state, a licensed primary care clinic, a licensed health facility, or a public health agency.

(c) Any person other than a person described in subdivision (b) who intends to sell, offer for sale, give away, distribute or otherwise furnish materials intended to determine the presence of pregnancy shall first make application to the state department for certification of the materials. The department shall also require that an application for certification shall be accompanied by samples of any materials that are the subject of the application as the department may reasonably require.

Any violation of this section is a misdemeanor.

123380. Local public health agencies shall make pregnancy testing services available free or at cost to the person using the services. The results of any pregnancy test shall be confidential.

123385. It is the intent of the Legislature that the program authorized pursuant to this article be entirely self-supporting, and for this purpose the state department is authorized to establish a schedule of fees for applications for certificates of acceptability that shall provide revenues that shall not exceed the amount necessary, but shall be sufficient to cover all costs incurred in the administration of this article.

Article 2. Abortion

123400. This chapter shall be known and may be cited as the Therapeutic Abortion Act.

123405. A holder of the physician's and surgeon's certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion, only if each of the following requirements is met:

(a) The abortion takes place in a hospital that is accredited by the Joint Commission on Accreditation of Hospitals.

(b) The abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals. In any case in which the committee of the medical staff consists of no more than three licensed physicians and surgeons, the unanimous consent of all committee members shall be required in order to approve the abortion.

(c) The Committee of the Medical Staff finds that one or more of the following conditions exist:

(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother.

(2) The pregnancy resulted from rape or incest.

123407. The Committee of the Medical Staff shall not approve the performance of an abortion on the ground that the pregnancy resulted from rape or incest except in accordance with the following procedure:

(a) Upon receipt of an application for an abortion on the grounds that the pregnancy resulted from rape or incest, the committee shall immediately notify the district attorney of the county in which the alleged rape or incest occurred of the application, and transmit to the district attorney the affidavit of the applicant attesting to the facts establishing the alleged rape or incest. If the district attorney informs the committee that there is probable cause to believe that the pregnancy resulted from a violation of Section 261 or Section 285 of the Penal Code, the committee may approve the abortion. If, within five days after the committee has notified the district attorney of the application, the committee does not receive a reply from the district attorney, it may approve the abortion. If the district attorney informs the committee that there is no probable cause to believe the alleged violation did occur, the committee shall not approve the abortion, except as provided in subdivision (b) of this section.

(b) If the district attorney informs the committee that there is no probable cause to believe the alleged violation did occur, the person who applied for the abortion may petition the superior court of the county in that the alleged rape or incest occurred, to determine whether the pregnancy resulted from a violation of Section 261 or Section 285 of the Penal Code. Hearing on the petition shall be set for a date no later than one week after the date of filing of the petition.

The district attorney shall file an affidavit with the court stating the reasons for his or her conclusion that the alleged violation did not occur, and this affidavit shall be received in evidence. The district attorney may appear at the hearing to offer further evidence or to examine witnesses.

If the court finds that it has been proved, by a preponderance of the evidence, that the pregnancy did result from a violation of Section 261 or Section 285 of the Penal Code, it shall issue an order so declaring, and the committee may approve the abortion. Any hearing granted under this section may, at the court's discretion, be held in camera. The testimony, findings, conclusions or determinations of the court in a proceeding under this section shall be inadmissible as evidence in any other action or proceeding, although nothing herein shall be construed to prevent the appearance of any witness who testified at a proceeding under this section, or to prevent the introduction of any evidence that may have been introduced at a proceeding under this section, in any other action or proceeding.

(c) Notwithstanding any other provision of this section, an abortion shall be approved on the ground of a violation of subdivision (1) of Section 261 of the Penal Code only when the woman at the time of the alleged violation, was below the age of 15 years.

(d) Notwithstanding any other provision of this section, the testimony of any witness in a proceeding under this section shall be admissible as evidence in any prosecution of that witness for perjury.

123410. The committee of the medical staff referred to in Section 123405 must, in all instances, consist of not less than two licensed physicians and surgeons, and if the proposed termination of pregnancy will occur after the 13th week of pregnancy, the committee must consist of at least three such licensed physicians and surgeons. In no event shall the termination be approved after the 20th week of pregnancy.

123415. The term ''mental health'' as used in Section 123405 means mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint.

123420. (a) No employer or other person shall require a physician, a registered nurse, a licensed vocational nurse, or any other person employed or with staff privileges at a hospital, facility, or clinic to directly participate in the induction or performance of an abortion, if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the abortion.

No such employee or person with staff privileges in a hospital, facility, or clinic shall be subject to any penalty or discipline by reason of his or her refusal to participate in an abortion. No such employee of a hospital, facility, or clinic that does not permit the performance of abortions, or person with staff privileges therein, shall be subject to any penalty or discipline on account of the person's participation in the performance of an abortion in other than the hospital, facility, or clinic.

No employer shall refuse to employ any person because of the person's refusal for moral, ethical, or religious reasons to participate in an abortion, unless the person would be assigned in the normal course of business of any hospital, facility, or clinic to work in those parts of the hospital, facility, or clinic where abortion patients are cared for. No provision of this article prohibits any hospital, facility, or clinic that permits the performance of abortions from inquiring whether an employee or prospective employee would advance a moral, ethical, or religious basis for refusal to participate in an abortion before hiring or assigning that person to that part of a hospital, facility, or clinic where abortion patients are cared for.

The refusal of a physician, nurse, or any other person to participate or aid in the induction or performance of an abortion pursuant to this subdivision shall not form the basis of any claim for damages.

(b) No medical school or other facility for the education or training of physicians, nurses, or other medical personnel shall refuse admission to a person or penalize the person in any way because of the person's unwillingness to participate in the performance of an abortion for moral, ethical, or religious reasons. No hospital, facility, or clinic shall refuse staff privileges to a physician because of the

physician's refusal to participate in the performance of abortion for moral, ethical, or religious reasons.

(c) Nothing in this article shall require a nonprofit hospital or other facility or clinic that is organized or operated by a religious corporation or other religious organization and licensed pursuant to Chapter 1 (commencing with Section 1200) or Chapter 2 (commencing with Section 1250) of Division 2, or any administrative officer, employee, agent, or member of the governing board thereof, to perform or to permit the performance of an abortion in the facility or clinic or to provide abortion services. No such nonprofit facility or clinic organized or operated by a religious corporation or other religious organization, nor its administrative officers, employees, agents, or members of its governing board shall be liable, individually or collectively, for failure or refusal to participate in any such act. The failure or refusal of any such corporation, unincorporated association or individual person to perform or to permit the performance of such medical procedures shall not be the basis for any disciplinary or other recriminatory action against such corporations, unincorporated associations, or individuals. Any such facility or clinic that does not permit the performance of abortions on its premises shall post notice of that proscription in an area of the facility or clinic that is open to patients and prospective admittees.

(d) This section shall not apply to medical emergency situations and spontaneous abortions.

Any violation of this section is a misdemeanor.

123425. The refusal of any person to submit to an abortion or surgical sterilization or to give consent therefor shall not be grounds for loss of any privileges or immunities to which the person would otherwise be entitled, nor shall submission to an abortion or surgical sterilization or the granting of consent therefor be a condition precedent to the receipt of any public benefits. The decision of any person to submit to an abortion or surgical sterilization or to give consent therefor shall not be grounds for loss of any privileges or immunities to which the person would otherwise be entitled, nor shall the refusal to submit to an abortion or surgical sterilization or to give consent therefor be a condition precedent to the receipt of any public benefits.

123430. The department shall by regulation establish and maintain a system for the reporting of therapeutic abortions so as to determine the demographic effects of abortion and assess the experience in relation to legal and medical standards pertaining to abortion practices. The reporting system shall not require, permit, or include the identification by name or other means of any person undergoing an abortion. The department shall make a report to the Legislature not later than the 30th calendar day each even-numbered year on its findings related to therapeutic abortions and their effects.

The department shall seek, in addition to any other funds made available to it, federal funds in order to carry out the purposes of this article.

123435. The rights to medical treatment of an infant prematurely born alive in the course of an abortion shall be the same as the rights of an infant of similar medical status prematurely born spontaneously.

123440. (a) It is unlawful for any person to use any aborted product of human conception, other than fetal remains, for any type of scientific or laboratory research or for any other kind of experimentation or study, except to protect or preserve the life and health of the fetus. ''Fetal remains,'' as used in this section, means a lifeless product of conception regardless of the duration of pregnancy. A fetus shall not be deemed to be lifeless for the purposes of this section, unless there is an absence of a discernible heartbeat.

(b) In addition to any other criminal or civil liability that may be imposed by law, any violation of this section constitutes unprofessional conduct within the meaning of the Medical Practice Act, Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

123445. (a) Except as provided in subdivision (b), at the conclusion of any scientific or laboratory research or any other kind of experimentation or study upon fetal remains, the fetal remains shall be promptly interred or disposed of by incineration.

Storage of the fetal remains prior to the completion of the research, experimentation, or study shall be in a place not open to the public, and the method of storage shall prevent any deterioration of the fetal remains that would create a health hazard.

(b) Subdivision (a) shall not apply to public or private educational institutions.

Any violation of this section is a misdemeanor.

123450. (a) Except in a medical emergency requiring immediate medical action, no abortion shall be performed upon an unemancipated minor unless she first has given her written consent to the abortion and also has obtained the written consent of one of her parents or legal guardian.

(b) If one or both of an unemancipated, pregnant minor's parents or her guardian refuse to consent to the performance of an abortion, or if the minor elects not to seek the consent of one or both of her parents or her guardian, an unemancipated pregnant minor may file a petition with the juvenile court. If, pursuant to this subdivision, a minor seeks a petition, the court shall assist the minor or person designated by the minor in preparing the petition and notices required pursuant to this section. The petition shall set forth with specificity the minor's reasons for the request. The court shall ensure that the minor's identity is confidential. The minor may file the petition using only her initials or a pseudonym. An unemancipated

pregnant minor may participate in the proceedings in juvenile court on her own behalf, and the court may appoint a guardian ad litem for her. The court shall, however, advise her that she has a right to court-appointed counsel upon request. The hearing shall be set within three days of the filing of the petition. A notice shall be given to the minor of the date, time, and place of the hearing on the petition.

(c) At the hearing on a minor's petition brought pursuant to subdivision (b) for the authorization of an abortion, the court shall consider all evidence duly presented, and order either of the following:

(1) If the court finds that the minor is sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, and that the minor has, on that basis, consented thereto, the court shall grant the petition.

(2) If the court finds that the minor is not sufficiently mature and sufficiently informed to make the decision on her own regarding an abortion, the court shall then consider whether performance of the abortion would be in the best interest of the minor. In the event that the court finds that the performance of the abortion would be in the minor's best interest, the court shall grant the petition ordering the performance of the abortion without consent of, or notice to, the parents or guardian. In the event that the court finds that the performance of the abortion is not in the best interest of the minor, the court shall deny the petition.

Judgment shall be entered within one court day of submission of the matter.

(d) The minor may appeal the judgment of the juvenile court by filing a written notice of appeal at any time after the entry of the judgment. The Judicial Council shall prescribe, by rule, the practice and procedure on appeal and the time and manner in which any record on appeal shall be prepared and filed. These procedures shall require that the notice of the date, time, and place of hearing, which shall be set within five court days of the filing of notice of appeal, shall be mailed to the parties by the clerk of the court. The appellate court shall ensure that the minor's identity is confidential. The minor may file the petition using only her initials or a pseudonym. Judgment on appeal shall be entered within one court day of submission of the matter.

(e) No fees or costs incurred in connection with the procedures required by this section shall be chargeable to the minor or her parents, or either of them, or to her legal guardian.

(f) It is a misdemeanor, punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in the county jail of up to 30 days, or both, for any person to knowingly perform an abortion on an unmarried or unemancipated minor without complying with the requirements of this section.

Article 3. Community-Based Perinatal System

123475. The Legislature finds that a community-based system of comprehensive perinatal care, including prenatal care, delivery service, postpartum care, and neonatal and infant care are necessary services that have been demonstrated effective in preventing or reducing maternal, perinatal, and infant mortality and morbidity.

123480. It is the intent of the Legislature in enacting this article to maintain, to the extent resources are available, a permanent statewide community-based comprehensive perinatal system to provide care and services to low-income pregnant women and their infants who are considered underserved in terms of comprehensive perinatal care.

It is also the intent of the Legislature that the statewide, community-based, comprehensive perinatal health care program be developed by the department to conform with the guidelines set forth in this article, and be integrated and coordinated with the perinatal access program in Article 2.5 (commencing with Section 288).

It is further the intent of the Legislature that these guidelines allow each applicant the flexibility to design a system specific to the nature of the community and the needs of the clients.

It is further the intent of the Legislature that the director, in allocating funds available for programs that provide comprehensive perinatal care, follow the guidelines and principles developed in this article.

123485. The following definitions shall govern the construction of this article:

(a) ''Community-based comprehensive perinatal care'' means a range of prenatal, delivery, postpartum, infant, and pediatric care services delivered in an urban community or neighborhood, rural area, city or county clinic, city or county health department, freestanding birth center, or other health care provider facility by health care practitioners trained in methods of preventing complications and problems during and after pregnancy, and in methods of educating pregnant women of these preventive measures, and who provide a continuous range of services. The health care practitioners shall, through a system of established linkages to other levels of care in the community, consult with, and, when appropriate, refer to, specialists.

(b) ''Low income'' means all persons of childbearing age eligible for Medi-Cal benefits under Chapter 7 (commencing with Section 14000) and all persons eligible for public social services for which federal reimbursement is available, including potential recipients. ''Potential recipients'' shall include the pregnant woman and her infant in a family where current social, economic and health

conditions of the family indicate that the family would likely become a recipient of financial assistance within the next five years.

(c) ''Prenatal care'' means care received from conception until the completion of labor and delivery.

(d) ''Perinatal care'' means care received from the time of conception through the first year after birth.

(e) ''State department'' means the department, unless otherwise designated.

123490. (a) The department shall develop and maintain a statewide comprehensive community-based perinatal services program and enter into contracts, grants, or agreements with health care providers to deliver these services in a coordinated effort to the extent permitted under federal law and regulation. These contracts, grants, or agreements shall be made in medically underserved areas or areas with demonstrated need. Nothing in this section shall be construed to prevent reallocation of resources or use of new moneys for the development of new community-based comprehensive perinatal systems in underserved areas or areas with demonstrated need, and supplementation of systems already in existence.

(b) As a condition of receiving funds from the Maternal and Child Health program, contractors shall bill the Medi-Cal program for services provided to Medi-Cal recipients.

123495. (a) The department shall seek any federal waiver or waivers that may be necessary to maximize funds from the federal government including, but not limited to, funds provided under Title 19 of the Social Security Act to provide funds for a full range of preventive perinatal services.

(b) The department shall, in preparing its budget for submission each year, coordinate all funding sources intended primarily for perinatal care made available through the Budget Act to maximize the delivery of perinatal care services and to avoid duplication of programs and funding.

(c) The department shall develop and implement a uniform sliding fee schedule for women provided perinatal care through the perinatal services program. The fee schedule shall be based on family size and income, but in no case shall the fee exceed the actual cost of the services provided. The department shall not implement any schedule developed pursuant to this section sooner than 30 days after the department has provided the chairperson of the Joint Legislative Budget Committee and the chairperson of the fiscal committee of each house with the developed schedule.

All free clinics, as defined in paragraph (2) of subdivision (a) of Section 1204 shall be exempt from this subdivision.

All organizations funded under the Public Health Service Act, Sections 254b and 254c of Title 42 of the United States Code, shall be permitted to utilize those sliding fee scales mandated by federal law

or regulation in lieu of the sliding fee scale adopted by the department.

123500. The department shall monitor the delivery of services under contracts, grants, and agreements provided for in this article through a uniform health data collection system that utilizes epidemiologic methodology. The department may collect data from providers receiving funds through this program as necessary to evaluate program effectiveness.

123505. The goals of the community-based comprehensive perinatal health care system shall be:

(a) To decrease and maintain the decreased level of perinatal, maternal, and infant mortality and morbidity in the State of California.

(b) To support methods of providing comprehensive prenatal care that prevent prematurity and the incidence of low birth weight infants.

123510. The program objectives of the community-based comprehensive perinatal health care system shall be the following:

(a) To ensure continuing availability and accessibility to early prenatal care within the areas presently served and to develop a community-based comprehensive perinatal system in other areas of the state that are medically underserved or have demonstrated need.

(b) To assure the appropriate level of maternal, newborn and pediatric care services necessary to provide the healthiest outcome for mother and infant.

(c) To ensure postpartum, family planning, and followup care through the first year of life, and referral to an ongoing primary health care provider.

(d) To include support and ancillary services such as nutrition, health education, public health nursing, and social work that have been demonstrated to decrease maternal, perinatal, and infant mortality and morbidity, as components of comprehensive perinatal care.

(e) To ensure that care shall be available regardless of the patient’s financial situation.

(f) To ensure, to the extent possible, that the same quality of care shall be available to all pregnant women.

(g) To promote program flexibility by recognizing the needs within an area and providing for unique programs to meet those needs.

(h) To emphasize preventive health care as a major component of any perinatal program, and to support outreach programs directed at low-income pregnant women that will encourage early entry into, and appropriate utilization of, the perinatal health care system.

123515. In processing and awarding contracts, grants, or agreements pursuant to this article, the department shall evaluate

the ability of applicants to meet, to the maximum extent possible, the following criteria:

(a) The applicant's prior experience in providing community-based, comprehensive perinatal care and services to low-income women and infants.

(b) The applicant's ability to provide comprehensive perinatal care, either directly or through subcontract. Those services comprising comprehensive perinatal care include, but are not limited to, the following:

(1) Initial and ongoing physical assessment.

(2) Psychosocial assessments and counseling, and referral when appropriate.

(3) Nutrition assessments, counseling and referral to counseling on food supplement programs, vitamins, and breast-feeding.

(4) Health educational assessments, and intervention and referral, including childbirth preparation and parenting.

(5) Outreach and community education.

(6) Laboratory, radiology, and other specialized services as indicated.

(7) Delivery, postpartum followup, and pediatric care through the first year of life.

(c) The quality of care that is being, or has been provided to low-income women and infants by health care providers.

(d) Whether the area that is, or that will be, serviced by the applicant is medically underserved or has otherwise demonstrated the need for comprehensive, community-based perinatal services.

(e) The applicant's ability to use an appropriate multidisciplinary staff working as a team, in consultation with obstetricians, pediatricians, and family practitioners when appropriate, to provide a full range of comprehensive perinatal care services. Staffing patterns shall reflect, to the maximum extent feasible, at all levels, the cultural, linguistic, ethnic, and other social characteristics of the community served. This staff shall include at least one of those persons described in paragraphs (1) to (3), inclusive, of this subdivision, as follows, and may include, but not be limited to, a combination of those persons described in paragraphs (4) to (10), inclusive, of this subdivision, as follows:

(1) An obstetrician.

(2) A pediatrician.

(3) A family practice physician.

(4) Certified nurse midwives, public health nurses, nurse practitioners, or physician assistants.

(5) Nutritionists.

(6) Social workers.

(7) Health and childbirth educators.

(8) A family planning counselor.

(9) Community outreach peer workers.

(10) A translator.

123520. (a) In developing a comprehensive system, health care providers funded under this article may perform the following activities to ensure that a full range of program components of a comprehensive, community-based health care system are available, accessible, and utilized by pregnant women and infants:

(1) Coordinate specific linkages with one another.

(2) Subcontract the services specified in this article.

(3) Provide additional services not specifically listed in this article. These additional services shall include, but shall not be limited to the Women, Infants, and Children (WIC) food supplement program, services offered by local health departments, and public and private social welfare agencies. Nothing contained in this article shall be construed to prohibit a subcontractor from being reimbursed pursuant to a fee for service, capitation, or other payment mechanism.

(b) All services and educational materials shall be provided in the primary languages of the clients served, provided that there are at least 5 percent or 100 persons, whichever is less, of the total beneficiary population served annually by each facility, who share language other than English and who are limited-English speaking. ''Limited-English speaking'' means a person who uses a language other than English in order to communicate effectively.

(c) Health care providers applying for a contract, grant, or agreement under this article shall indicate the manner in which their service elements will be coordinated with existing community resources and services and with hospitals of all levels in the area to ensure each client receives the appropriate level or care at the appropriate time. The department may require written agreements between contractors and hospital or hospitals in the area regarding delivery services, and protocols for referral and transfer when special treatment services are required. The department may, when requested by the grantee or contractor, assist in achieving coordination and written agreements pertaining to the delivery of these services.

123525. The provisions contained in this article shall be subject to the normal Budget Act process and shall be operative to the extent funds are appropriated for this purpose.

Article 4. Perinatal Health Care

123550. The Legislature finds and declares that prenatal care, delivery service, postpartum care and neonatal and infant care are essential services necessary to assure maternal and infant health. These services are not currently distributed so as to meet the minimum maternal and infant health needs of many Californians. A regionalized perinatal health system can provide these essential

services; however, many underserved areas lack the staff or expertise to develop these systems.

123555. The department shall develop and implement a uniform sliding fee schedule, based on family size and income, for women provided perinatal care through the Perinatal Care Services Program. The department shall not implement any schedule developed pursuant to this section sooner than 30 days after the department has provided the Chairperson of the Joint Legislative Budget Committee and the chairperson of the fiscal committee of each house with the developed schedule.

123560. Unless the context otherwise requires, the definitions in this section govern the construction of this article:

(a) ''Perinatal health system'' means all of the prenatal care, delivery care, postpartum care, and neonatal and infant care services available to a region identified by the department pursuant to this article.

(b) ''Regionalized perinatal health system'' means coordinated measures intended to ensure that a perinatal health system provides at least minimum services necessary to meet the maternal and infant health needs of the region and intended to ensure that it does so as efficiently and cost-effectively as possible.

(c) ''High-risk pregnant woman'' means a woman considered highly likely for any reason to suffer personal mortality or morbidity from her pregnancy, or to deliver a defective, disabled, high-risk, or stillborn infant.

(d) ''High-risk infant'' means a newborn considered highly likely for any reason to suffer personal mortality or morbidity or to suffer long-lasting defect or disability.

(e) ''High-risk geographic area'' means a region in this state in which the proportion of high-risk pregnant women or high-risk infants exceeds the average for the population of California as a whole.

(f) ''High-risk population'' means a demographic group in which the proportion of high-risk women or high-risk infants exceeds the average for the population of California as a whole.

123565. The department shall maintain a program that addresses the special needs of high-risk pregnant women and infants. The program shall include the following:

(a) Identification of high-risk geographical areas and populations.

(b) Identification and evaluation of deficiencies in perinatal health systems.

(c) Assistance in the development of regionalized perinatal health systems, particularly in underserved areas, to meet unmet needs.

(d) Assistance in implementing regionalized perinatal health systems.

(e) Collection and analyses of data on perinatal health systems and needs.

(f) Monitoring of results.

(g) Assist in implementing and maintaining a high-risk infant follow-up program.

123570. (a) In assisting in the development of the regionalized perinatal health systems, the department shall consult with the office, the State Department of Developmental Services, county health officials, health systems agencies, health professionals and health facilities expected to participate in the systems, and community groups.

(b) In carrying out this article, the department shall coordinate the regionalized perinatal health systems with all other maternal and infant health programs conducted by or for the department, the office, the State Department of Developmental Services, and all other state agencies, to ensure full regional coordination.

123575. It is the intent of the Legislature that the program created by Sections 123550 to 123570, inclusive, be funded through the normal budgetary process beginning in the 1980–81 fiscal year.

123600. By July 1, 1991, the Health and Welfare Agency shall develop and disseminate a model needs assessment protocol for pregnant and postpartum substance abusing women in conjunction with the appropriate professional organizations in the areas of hospital administration, substance abuse prevention and treatment, social services, public health, and appropriate state agencies, including the State Department of Social Services, the department, the State Department of Developmental Services, and the State Department of Alcohol and Drug Programs. This model may be utilized by hospitals and counties pursuant to Section 123605.

123605. (a) Each county shall establish protocols between county health departments, county welfare departments, and all public and private hospitals in the county, regarding the application and use of an assessment of the needs of, and a referral for, a substance exposed infant to a county welfare department pursuant to Section 11165.13 of the Penal Code.

(b) The assessment of the needs shall be performed by a health practitioner, as defined in Section 11165.8 of the Penal Code, or a medical social worker. The needs assessment shall be performed before the infant is released from the hospital.

(c) The purpose of the assessment of the needs is to do all of the following:

(1) Identify needed services for the mother, child, or family, including, where applicable, services to assist the mother caring for her child and services to assist maintaining children in their homes.

(2) Determine the level of risk to the newborn upon release to the home and the corresponding level of services and intervention, if any, necessary to protect the newborn’s health and safety, including a referral to the county welfare department for child welfare services.

(3) Gather data for information and planning purposes.

123610. It is the intent of the Legislature that funding for Sections 123600 and 123605 be provided in the annual Budget Act.

Article 5. Perinatal Care Guidance (Reserved)

CHAPTER 3. CHILD HEALTH

Article 1. Infant Mortality and Morbidity Prevention

123650. (a) The department shall develop a plan to identify causes of infant mortality and morbidity in California and to study recommendations on the reduction of infant mortality and morbidity in California.

(b) The study plan shall be completed on or before July 1, 1988, and shall be developed in conjunction with, and reviewed by, each of the following organizations:

(1) The California Medical Association.
(2) The California Nurses Association.
(3) The California Hospital Association.
(4) The American College of Obstetrics and Gynecologists.
(5) The American College of Nurse Midwives.
(6) The California Academy of Family Physicians.
(7) The American Academy of Pediatrics.
(8) The California Association of Freestanding Birth Centers.
(9) The American Public Health Association.
(10) The Medical Board of California.
(11) The Board of Registered Nurses.
(12) The Department of Consumer Affairs.
(13) The office.
(14) The California Association of Midwives.

123655. The study plan shall incorporate in its design the findings of MCH Title V Research Contract DHS 8689088, the ''Maternal Neonatal and Fetal Mortality Study.''

The department shall issue a report to the Legislature on or before July 1, 1989, concerning causal factors in infant mortality and morbidity.

Article 2. Black Infant Health (Reserved)

Article 3. Sudden Infant Death Syndrome

123725. (a) For purposes of this section, the following definitions shall apply:

(1) ''SIDS'' means sudden infant death syndrome.

(2) ‘‘SIDS Advisory Council’’ or ‘‘advisory council’’ means the Sudden Infant Death Syndrome Advisory Council established pursuant to subdivision (b).

(b) The department shall establish a Sudden Infant Death Syndrome Advisory Council. The advisory council shall consist of nine members who shall be chosen by the director in consultation with regional SIDS parent advisory councils. At least one-third of the members of the advisory council chosen by the director shall be representatives of SIDS parents’ groups. The membership of the advisory council shall also include, but not be limited to, a coroner, a medical examiner, a public health nurse, a physician and surgeon with expertise in SIDS, and a representative from a police or fire department.

(c) The SIDS Advisory Council shall do all of the following:

(1) Provide guidance to the state department in the development of training, educational, and research programs regarding SIDS.

(2) Provide ongoing guidance to the Governor and the Legislature regarding the need for specific programs regarding SIDS for specific targeted groups of persons.

(3) In conjunction with the state department or a person with whom the state department contracts to provide SIDS education, convene a statewide conference annually to examine the progress in discovering the cause of SIDS, explore the progress of newly established programs and services related to SIDS, identify future needs for legislation and program development regarding SIDS, and make recommendations on the needs of programs regarding SIDS. Conference participants shall include professionals and service providers in the area of SIDS, family members of SIDS victims, and the staff of members of the Legislature and departments of the state.

(d) The members of the advisory council shall serve at the pleasure of the director. The members of the advisory council shall serve without compensation, but shall be reimbursed for necessary and travel expenses incurred in the performance of the duties of the advisory council.

(e) The requirements contained in this section shall be subject to the annual Budget Act and shall be operative only to the extent that funds are appropriated for the purposes of this section.

123730. The department shall keep each county health officer advised of the most current knowledge relating to the nature and causes of sudden infant death syndrome.

123735. (a) As used in this section, ‘‘SIDS’’ means sudden infant death syndrome.

(b) The department shall contract with a person to provide regular and ongoing SIDS education and training programs for those who interact with parents and caregivers following a death from SIDS, including, but not limited to, the following:

(1) County public health nurses.

(2) Coroners and coroners' investigators.
(3) Forensic pathologists.
(4) Emergency room physicians and surgeons, nurses, and other staff.
(5) Licensed day care providers.
(6) SIDS parent groups.
(7) Medical examiners.

(c) The department shall contract with a person to produce, update, and distribute literature on SIDS for specific target populations of persons who interact with parents and caregivers following a death from SIDS, including, but not limited to, the following:
(1) Clergy.
(2) Fire and police departments.
(3) Emergency medical service staff.
(4) Morticians.
(5) Funeral directors.
(6) SIDS parent groups.

(d) The requirements of this section shall be subject to the annual Budget Act and shall be operative only to the extent funds are appropriated for the purposes of this section.

123740. (a) For purposes of this section the following definitions shall apply:

(1) ''Appropriately trained public health professional'' means a public health nurse or a social worker who is knowledgeable about the incidence of sudden infant death syndrome and the care and support of persons who have experienced a death of this nature, and who has basic grief counseling skills.

(2) ''Contact'' is a face-to-face visit, a group visit, or a telephone call that provides one or more of the following services:
(A) An assessment of the family, child care provider, or both.
(B) Crisis intervention and counseling.
(C) A referral to a community service.
(D) A followup assessment of the family's, the child care provider's, or both family's and child care provider's progress.

(3) ''Immediately'' means within three working days of receiving notice from the coroner or other reporting agent of a death presumedly caused by sudden infant death syndrome.

(4) ''Local health officer'' means a health officer for a city, county, or city and county.

(b) Upon being informed by the coroner pursuant to Section 102865 of any case in which sudden infant death syndrome is the presumed cause of death, the local health officer or his or her designated agent, who is an appropriately trained public health professional, after consultation with the infant's physician of record, when possible, shall immediately contact the person or persons who had custody and control of the infant, including foster parents, when

applicable, for the purposes of providing to that person information, support, referral, and followup services relating to sudden infant death syndrome. If the infant was in child care, the local health officer or his or her designated agent who is an appropriately trained public health professional also shall immediately contact the child care provider.

(c) The local health officer shall perform the duties required by this section throughout the jurisdiction of that local health officer.

123745. The department shall monitor, or contract with a person to monitor, whether the county health officer or his or her designated agent is performing the duties required by Section 123740 and whether they are being performed within the timeframes specified in Section 123740.

Article 4. Infant Medical Dispatch Centers

123750. The Legislature finds that intensive care nurseries for at-risk infants are often at capacity. It further finds that serious delays can occur in placing critically ill newborn infants in intensive care nurseries due to calls being placed to many hospitals. Additionally, valuable staff time is often taken by a capacity nursery in attempting to find another nursery with an available bed. It is further found that, due to the lack of a centralized dispatch system, at-risk infants are often not placed in the intensive care nursery nearest their homes.

Therefore, the Legislature finds that in order to protect the health of critically ill newborn children and to more efficiently utilize space and staff in intensive care nurseries it is necessary to establish 24-hour-a-day, year-round medical dispatch centers linking all hospitals providing obstetrical services with intensive care nurseries.

123753. The department shall establish two dispatch centers, each to be located at a hospital containing an intensive care nursery that has been approved by the department.

123755. One of the centers established pursuant to Section 123750 shall be located to serve the region of the state north of the Tehachapi Mountains, and one of the centers shall be located to serve the region south of the Tehachapi Mountains.

123760. The centers shall locate bedspace for critically ill newborn infants nearest their homes, locate and dispatch transport for the infants and for appropriate medical personnel, advise the obstetrical nursery regarding maintenance care of the infant until transport is effected, and keep a daily record of the availability of bedspace in all intensive care nurseries.

Nothing in this article shall obligate the state for transport costs other than those already authorized by law.

123765. Funds appropriated to carry out the purposes of this article shall be used for leasing or purchasing communication

equipment or time; and for hiring, training, or contracting for personnel and administration of the centers.

123770. Public and private nonprofit health facilities, organizations, and educational institutions are eligible to receive center funds under this article.

123775. Each infant medical dispatch center established pursuant to this article shall annually report on the progress of the project, the status of the data base obtained pursuant to Section 123760, and any necessary changes to meet the goals prescribed in Section 123760 to the Legislature on or before November 1 of each year.

Article 5. California Children's Services

123800. This article shall be known and may be cited as the Robert W. Crown California Children's Services Act.

123805. The department shall establish and administer a program of services for physically defective or handicapped persons under the age of 21 years, in cooperation with the federal government through its appropriate agency or instrumentality, for the purpose of developing, extending and improving the services. The department shall receive all funds made available to it by the federal government, the state, its political subdivisions or from other sources. The department shall have power to supervise those services included in the state plan that are not directly administered by the state. The department shall cooperate with the medical, health, nursing and welfare groups and organizations concerned with the program, and any agency of the state charged with the administration of laws providing for vocational rehabilitation of physically handicapped children.

The reference to ''the age of 21 years'' in this section is unaffected by Section 1 of Chapter 1748 of the Statutes of 1971 or any other provision of that chapter.

123810. The department succeeds to and is vested with the duties, purposes, responsibilities, and jurisdiction heretofore exercised by the State Department of Benefit Payments with respect to moneys, funds, and appropriations available to the department for the purposes of processing, audit, and payment of claims received for the purposes of this article.

123815. The department shall have possession and control of all records, papers, equipment, and supplies held for the benefit or use of the Director of Benefit Payments in the performance of his duties, powers, purposes, responsibilities, and jurisdiction that are vested in the department by Section 123810.

123820. All officers and employees of the Director of Benefit Payments who on July 1, 1978, are serving in the state civil service, other than as temporary employees, and engaged in the performance of a function vested in the department by Section 123810 shall be

transferred to the department. The status, positions, and rights of these persons shall not be affected by the transfer and shall be retained by them as officers and employees of the department pursuant to the State Civil Service Act, except as to positions exempt from civil service.

123822. All claims for services provided under this article shall be submitted to the state fiscal intermediary for payment no later than January 1, 1999. The State Department of Health Services shall work in cooperation with the counties to develop a timeline for implementing the centralized billing system. If a department review of those counties participating in the centralized billing system demonstrates that as of January 1, 2000, any county has incurred increased costs as a result of submitting claims for services to the state fiscal intermediary, that county may be exempt from this section.

123825. It is the intent of the Legislature through this article to provide, to the extent practicable, for the necessary medical services required by physically handicapped children whose parents are unable to pay for these services, wholly or in part. This article shall also include the necessary services rendered by the program to physically handicapped children treated in public schools that provide services for physically handicapped children.

123830. ''Handicapped child,'' as used in this article, means a physically defective or handicapped person under the age of 21 years who is in need of services. The director shall establish those conditions coming within a definition of ''handicapped child'' except as the Legislature may otherwise include in the definition. Phenylketonuria, hyaline membrane disease, cystic fibrosis, and hemophilia shall be among these conditions.

The reference to ''the age of 21 years'' in this section is unaffected by Section 1 of Chapter 1748 of the Statutes of 1971 or any other provision of that chapter.

123835. The department shall keep the program abreast of advances in medical science, leading to the inclusion of other handicapping conditions and services within the limits of and consistent with the most beneficial use of funds appropriated for this purpose. With the approval of the agency administrator the department may carry out pilot studies to determine the need for, or the feasibility of, including other handicapping conditions and services in the program within the limits of available funds appropriated for the program.

123840. ''Services,'' as used in this article, means any or all of the following:

(a) Expert diagnosis.
(b) Medical treatment.
(c) Surgical treatment.
(d) Hospital care.
(e) Physical therapy.

(f) Occupational therapy.
(g) Special treatment.
(h) Materials.
(i) Appliances and their upkeep, maintenance, care and transportation.
(j) Maintenance, transportation, or care incidental to any other form of ''services.''

123845. ''California Children's Services Program,'' as used in this article, means the program of services established and operated pursuant to this article.

123850. The board of supervisors of each county shall designate the county department of public health or the county department of social welfare as the designated agency to administer the California Children's Services Program. Counties with total population under 200,000 persons may administer the county program independently or jointly with the department. Counties with a total population in excess of 200,000 persons shall administer the county program independently. Except as otherwise provided in this article, the director shall establish standards relating to the local administration and minimum services to be offered by counties in the conduct of the California Children's Services Program.

123855. The department or designated county agency shall cooperate with, or arrange through, local public or private agencies and providers of medical care to seek out handicapped children, bringing them expert diagnosis near their homes. Case finding shall include, but not be limited to, children with impaired sense of hearing. This section does not give the department or designated agency power to require medical or other form of physical examination without consent of parent or guardian.

123860. In accordance with applicable regulations of the United States Children's Bureau, the department and designated county agencies shall provide a diagnosis for handicapped children. Within the limits of available funds, the department and designated local agencies may accept for diagnosis a handicapped child believed to have a severe chronic disease or severe physical handicap, as determined by the director, irrespective of whether the child actually has an eligible medical condition specified in Section 123830. The department shall cause a record to be kept listing all conditions diagnosed by the program and shall publish the information annually, including data on the number and kinds of diagnosed medical conditions that do not come within the definition of ''handicapped child'' as specified in Section 123830.

123865. Whenever the parents or estate of a handicapped child is wholly or partly unable to furnish for the child necessary services, the parents or guardian may apply to the agency of the county that has been designated by the board of supervisors of the county of residence under the terms of Section 123850 to administer the

provisions for handicapped children. Residence shall be determined in accordance with Sections 243 and 244 of the Government Code.

123870. (a) The department shall establish uniform standards of financial eligibility for treatment services under the California Children's Services Program. Financial eligibility for treatment services under this program shall be limited to persons in families with an adjusted gross income of forty thousand dollars ($40,000) or less in the most recent tax year, as calculated for California state income tax purposes. However, the director may authorize treatment services for persons in families with higher incomes if the estimated cost of care to the family in one year is expected to exceed 20 percent of the family's adjusted gross income.

(b) Necessary medical therapy treatment services under the California Children's Services Program rendered in the public schools shall be exempt from financial eligibility standards and enrollment fee requirements for the services when rendered to any handicapped child whose educational or physical development would be impeded without the services.

(c) All counties shall use the uniform standards for financial eligibility and enrollment fees established by the department. All enrollment fees shall be used in support of the California Children's Services Program.

(d) Annually, every family with a child eligible to receive services under this article shall pay a fee of twenty dollars ($20), that shall be in addition to any other program fees for which the family is liable. This assessment shall not apply to any child who is eligible for full scope Medi-Cal benefits without a share of cost, for children receiving therapy through the California Children's Services Program as a related service in their individualized education plans, or for children from families having incomes of less than 100 percent of the federal poverty level.

123872. In addition to the other eligibility requirements set forth in this article, prior to being determined financially eligible for services under this article, the applicant family shall agree to repay the California Children's Services Program for any treatment services authorized by the program in an amount not to exceed the proceeds of any judgment, award, or settlement for damages as a result of a lawsuit or pursuant to an agreement relating to a California Children's Services medically eligible condition.

123875. When the California Children's Service medical therapy unit conference team, based on a medical referral recommending medically necessary occupational or physical therapy in accordance with subdivision (b) of Section 7575 of the Government Code, finds that a handicapped child, as defined in Section 123830, needs medically necessary occupational or physical therapy, that child shall be determined to be eligible for therapy services. If the California Children's Services medical consultant disagrees with the

determination of eligibility by the California Children's Services medical therapy unit conference team, the medical consultant shall communicate with the conference team to ask for further justification of its determination, and shall weigh the conference team's arguments in support of its decision in reaching his or her own determination.

This section shall not change eligibility criteria for the California Children's Services programs as described in Sections 123830 and 123860.

This section shall not apply to children diagnosed as specific learning disabled, unless they otherwise meet the eligibility criteria of the California Children's Services.

123880. The department and designated agencies shall not deny eligibility or aid under the California Children's Services Program because an otherwise eligible person is receiving treatment services under a teaching program at an accredited medical school facility or accredited school or college of podiatric medicine, whether or not all or part of the treatment services are performed by the staff at the facility, school, or college, provided that treatment services at the facility, school, or college are under the general supervision of a California Children's Services Program panel physician and surgeon, including a family physician, and podiatrist.

123885. Panel members as set forth in Section 123880 shall be board-certified and have expertise in the care of children.

123890. (a) The state department shall not deny a hospital's request to provide treatment to burn victims who are eligible under the California Children's Services Program solely on the basis that the hospital does not have separate facilities for child and adult burn victims, provided that the hospital has approval from the department to operate a burn center pursuant to Section 1255.

(b) Subdivision (a) shall only be applied to burn units located in hospitals where there are no regional burn centers, or any other existing burn center, within an 85-mile radius of the hospital.

(c) Subdivision (a) shall only apply if the hospital seeking the exemption had a state-approved burn center in operation as of January 1, 1982, and if there is no hospital specializing in children's services within an 85-mile radius of the hospital seeking the subdivision (a) exemption.

(d) Hospitals having qualified and received a subdivision (a) exemption, shall demonstrate, at the request of the department, that the nursing staff providing burn care to children victims have satisfactorily completed post-graduate training in pediatrics.

123895. The designated agency shall determine the financial eligibility of the family according to standards established by the department. The agency will also determine if the parents are residents of the county, if the guardian of the child is a resident of the county, or if the emancipated minor is a resident of the county where

application for services is made. If the agency finds that the family, guardian, or emancipated minor is a resident of the county and financially eligible for services, it shall make a record of the facts and shall certify this child for care under the program.

123900. (a) Beginning September 1, 1991, in addition to any other standards of eligibility pursuant to this article, each family with a child otherwise eligible to receive services under this article shall pay an annual enrollment fee as a requirement for eligibility for services, except as specified in subdivision (f).

(b) The department shall determine the annual enrollment fee, that shall be a sliding fee scale based upon family size and income, and shall be adjusted by the department to reflect changes in the federal poverty level.

(c) ''Family size'' shall include the child, his or her natural or adoptive parents, siblings, and other family members who live together and whose expenses are dependent upon the family income.

(d) ''Family income'' for purposes of this article, shall include the total gross income, or their equivalents, of the child and his or her natural or adoptive parents.

(e) Payment of the enrollment fee is a condition of program participation. The enrollment fee is independent of any other financial obligation to the program.

(f) The enrollment fee shall not be charged in any of the following cases:

(1) The only services required are for diagnosis to determine eligibility for services, or are for medically necessary therapy pursuant to Section 123875.

(2) The child is otherwise eligible to receive services and is eligible for full Medi-Cal benefits at the time of application or reapplication.

(3) The family of the child otherwise eligible to receive services under this article has a gross annual income of less than 200 percent of the federal poverty level.

(g) Failure to pay or to arrange for payment of the enrollment fee within 60 days of the due date shall result in disenrollment and ineligibility for coverage of treatment services 60 days after the due date of the required payment.

(h) The county shall apply the enrollment fee scale established by the department and shall collect the enrollment fee. The county may arrange with the family for periodic payment during the year if a lump-sum payment will be a hardship for the family. The agency director of California Children's Services may, on a case-by-case basis, waive or reduce the amount of a family's enrollment fee if, in the director's judgment, payment of the fee will result in undue hardship.

(i) By thirty days after the effective date of this section or August 1, 1991, whichever is later, the department shall advance to each county, as a one-time startup amount, five dollars and fifty cents

($5.50) for each county child who was receiving services under this article on June 30, 1990, and who was not a Medi-Cal beneficiary. This one-time payment shall be in addition to the 4.1 percent of the gross total expenditures for diagnoses, treatment, and therapy by counties allowed under subdivision (c) of Section 123955.

(j) Each county shall submit to the state, as part of its quarterly claim for reimbursement, an accounting of all revenues due and revenues collected as enrollment fees.

123905. A county of under 200,000 population, administering its county program jointly with the department, shall forward to the department a statement certifying the family of the handicapped child as financially eligible for treatment services. The department shall authorize necessary services within the limits of available funds. Payment for services shall be made by the department, with reimbursement from the county for its proportionate share as specified in this article.

123910. The department may, without the possession of a county certification, pay the expenses for services required by any physically handicapped child out of any funds received by it through gift, devise, or bequest or from private, state, federal, or other grant or source.

The department may authorize or contract with any person or institution properly qualified to furnish services to handicapped children. It may pay for services out of any funds appropriated for the purpose or from funds it may receive by gift, devise, or bequest.

The department may receive gifts, legacies, and bequests and expend them for the purpose of this article, but not for administrative expense.

123915. When the department provides, or arranges for the provision of, services to physically handicapped children directly, as in the case of nonresident physically handicapped children, it shall enter into an agreement with parents, guardians or persons responsible for the care of handicapped children for payment of the enrollment fee.

123920. Upon the request of another state or of a federal agency, the department may pay the expenses of services required by any physically handicapped child who is not a resident of the state; provided, that the cost of the services is fully covered by special grants or allotments received from the state or federal agency for that purpose.

123925. The department and designated agencies shall maintain surveillance and supervision over the services provided handicapped children under authorization by the program to assure a high quality of service and shall cause a record to be kept showing the condition and improvement of these handicapped children.

123930. This article does not authorize any treatment service without the written consent of a parent or guardian except as a person under 18 years of age is an emancipated minor.

123935. A handicapped child shall not be denied services pursuant to this article because he or she is mentally retarded.

123940. (a) (1) Annually, the board of supervisors shall appropriate a sum of money for services for handicapped children of the county, including diagnosis, treatment, and therapy services for physically handicapped children in public schools, equal to 25 percent of the actual expenditures for the county program under this article for the 1990–91 fiscal year, except as specified in paragraph (2).

(2) If the state certifies that a smaller amount is needed in order for the county to pay 25 percent of costs of the county's program from this source. The smaller amount certified by the state shall be the amount that the county shall appropriate.

(b) In addition to the amount required by subdivision (a), the county shall allocate an amount equal to the amount determined pursuant to subdivision (a) for purposes of this article from revenues allocated to the county pursuant to Chapter 6 (commencing with Section 17600) of Division 9 of the Welfare and Institutions Code.

(c) The state shall match county expenditures for this article from funding provided pursuant to subdivisions (a) and (b).

(d) The county may appropriate and expend moneys in addition to those set forth in subdivision (a) and (b) and the state shall match the expenditures, on a dollar-for-dollar basis, to the extent that state funds are available for this article.

(e) Nothing in this section shall require the county to expend more than the amount set forth in subdivision (a) plus the amount set forth in subdivision (b) nor shall it require the state to expend more than the amount of the match set forth in subdivision (c).

123945. For those counties with a total appropriation of county funds not exceeding one hundred twenty-five thousand dollars ($125,000), and upon the expenditure of the county funds equivalent to a county appropriation pursuant to Section 123940, the department may, to the extent funds are available from state appropriated funds for the California Children's Services Program and upon certification of the county that there are insufficient revenues from the account established pursuant to Chapter 6 (commencing with Section 17600) of Division 9 of the Welfare and Institutions Code, pay for services for cases deemed by the department to represent emergencies or cases where medical care cannot be delayed without great harm to the child.

123950. The designated county agency shall administer the medical-therapy program in local public schools for physically handicapped children. As provided in Section 123940, the state and counties will share in the cost of support of therapist salaries in these

schools in the ratio of one dollar ($1) of state or federal funds reimbursed quarterly to one dollar ($1) of county funds. The director shall establish standards for the maximum number of therapists employed in the schools eligible for state financial support in this program, the services to be provided, and the county administrative services subject to reimbursement by the state.

The department may adopt regulations to implement this section as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. For the purposes of the Administrative Procedure Act, the adoption of the regulations shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, these emergency regulations shall not be subject to the review and approval of the Office of Administrative Law.

Notwithstanding any other provision of law, if the department determines that emergency regulations are necessary to implement any part of this article, there shall be deemed to be good cause for the regulations to take effect prior to public notice and hearing.

Notwithstanding subdivision (h) of Section 11346.1 and Section 11349.6 of the Government Code, the department shall transmit these regulations directly to the Secretary of State for filing. The regulations shall become effective immediately upon filing by the Secretary of State.

The Office of Administrative Law shall provide for the printing and publication of these regulations in the California Code of Regulations. Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, these regulations shall not be repealed by the Office of Administrative Law and shall remain in effect until revised or repealed by the department.

123955. (a) The state and the counties shall share in the cost of administration of the California Children's Services Program at the local level.

(b) (1) The director shall adopt regulations establishing minimum standards for the administration, staffing, and local implementation of this article subject to reimbursement by the state.

(2) The standards shall allow necessary flexibility in the administration of county programs, taking into account the variability of county needs and resources, and shall be developed and revised jointly with state and county representatives.

(c) The director shall establish minimum standards for administration, staffing and local operation of the program subject to reimbursement by the state.

(d) Until July 1, 1992, reimbursable administrative costs, to be paid by the state to counties, shall not exceed 4.1 percent of the gross total expenditures for diagnosis, treatment and therapy by counties as specified in Section 123940.

(e) Beginning July 1, 1992, this subdivision shall apply with respect to all of the following:

(1) Counties shall be reimbursed by the state for 50 percent of the amount required to meet state administrative standards for that portion of the county caseload under this article that is ineligible for Medi-Cal to the extent funds are available in the state budget for the California Children's Services Program.

(2) On or before September 15 of each year, each county program implementing this article shall submit an application for the subsequent fiscal year that provides information as required by the state to determine if the county administrative staff and budget meet state standards.

(3) The state shall determine the maximum amount of state funds available for each county from state funds appropriated for CCS county administration. If the amount appropriated for any fiscal year in the Budget Act for county administration under this article differs from the amounts approved by the department, each county shall submit a revised application in a form and at the time specified by the department.

(f) The department and counties shall maximize the use of federal funds for administration, of the programs implemented pursuant to this article, including using state and county funds to match funds claimable under Title 19 of the Social Security Act.

123960. The department shall require of participating local governments the provision of program data including, but not limited to, the number of children treated, the kinds of disabilities, and the costs of treatment, to enable the department, the Department of Finance, and the Legislature to evaluate in a timely fashion and to adequately fund the California Children's Services Program.

123965. A handicapped child placed for adoption, determined to be financially eligible for care at the time of placement, shall not be denied services pursuant to this article based upon the income of the adopting parents, nor shall the adopting parents be required to enter into any agreement to pay toward the costs of services authorized for the care. This section shall only apply to physical handicaps present, and diagnosed, at the time of adoption. Residence, for the purposes of this section, shall be that of the adopting parents.

123970. The department and the placing adoption agency at the time of placement shall notify all prospective adopting parents in writing, that funds received under the California Children's Services Program shall terminate if the adopting parents move out of the state. However, the department and the placing adoption agency shall

advise the prospective adopting parents that they may be eligible for the funds in the new state, subject to any applicable qualifications.

123975. (a) The department, in consultation with selected representatives of participating neonatal intensive care units, shall establish a system to screen newborn infants at high risk for deafness and create and maintain a system of followup and assessment for infants identified by the screening in neonatal intensive care units participating in the California Children's Services Program.

This section shall not be applicable to a newborn child whose parent or guardian objects to the tests on the ground that the tests conflict with his or her religious beliefs or practices.

(b) It is the intent of the Legislature, in enacting this section, to ensure the establishment and maintenance of protocols and quality of standards.

(c) The department shall implement this section for infants in neonatal intensive care units participating in the California Children's Services Program.

123980. If the recipient of services provided by the California Children's Services Program, his or her guardian, conservator, personal representative, estate, or survivors, or any of them brings an action against a third person who may be liable for the injury, notice of institution of legal proceedings, notice of settlement, and all other notices required by this code shall be given to the State Director of Health Services in Sacramento and to the county-managed California Children's Services Program. The director may provide notice to the Attorney General. All of these notices shall be given by the attorney retained to assert the beneficiary's claim, or by the injured party beneficiary, his or her guardian, conservator, personal representative, estate, or survivors, if no attorney is retained.

123982. Except as otherwise provided by law, the amount of any judgment, award, or settlement relating to a medical condition for which treatment services have been provided under the California Children's Services Program shall be subject to a claim by the state department and the designated county agency for reimbursement of the costs of the benefits provided, and to any lien filed against that judgment, award, or settlement. The department or the county designated agency, through its civil legal adviser, may, to enforce this right, institute and prosecute legal proceedings against the person who has received benefits under this article, his or her guardian, conservator, or other personal representative, or his or her estate. In the event of a judgment, award, or settlement in a suit or claim against a third person who is liable for the medical condition for which treatment services have been provided under the California Children's Services Program, the court or other agency shall first order paid from the judgment, award, or settlement the actual costs of the care and treatment furnished, or to be furnished, under the California Children's Services Program.

123985. (a) A bone marrow transplant for the treatment of cancer shall be reimbursable under this article, when all of the following conditions are met:

(1) The bone marrow transplant is recommended by the recipient's attending physician.

(2) The bone marrow transplant is performed in a hospital that is approved for participation in the California Children's Services program.

(3) The bone marrow transplant is a reasonable course of treatment and is approved by the appropriate hospital medical policy committee.

(4) The bone marrow transplant has been deemed appropriate for the recipient by the program's medical consultant. The medical consultant shall not disapprove the bone marrow transplant solely on the basis that it is classified as experimental or investigational.

(b) The program shall provide reimbursement for both donor and recipient surgery.

(c) Any county that has a population of not more than 600,000, as determined by the most recent decennial census conducted by the United States Bureau of the Census, shall be exempt from complying with the 25-percent matching requirement provided for under this article, for any bone marrow transplant reimbursable under this section.

123990. The department shall adopt regulations to implement the amendments of this article in 1991. The adoption of the regulations shall be deemed to be an emergency, and necessary for the immediate preservation of the public peace, health, safety, and general welfare.

123995. (a) The department shall require all applicants to the program who may be eligible for cash grant assistance or for Medi-Cal benefits to apply for Medi-Cal.

(b) This section shall not be interpreted to prohibit the coverage of services in emergency cases.

Article 6. Child Health And Disability Prevention Program

124025. The Legislature finds and declares that many physical and mental disabilities can be prevented, or their impact on an individual lessened, when they are identified and treated before they become chronic and irreversible damage occurs. The Legislature finds and declares that a community-based program of early identification and referral for treatment of potential handicapping conditions will be effective in reducing the incidence of the conditions and will benefit the health and welfare of the citizens of this state.

It is the intent of the Legislature in enacting this article and Section 120475 to establish child health and disability prevention programs,

that shall be financed and have standards established at the state level and that shall be operated at the local level, for the purpose of providing early and periodic assessments of the health status of children. It is further intended that child health and disability prevention programs shall make maximum use of existing health care resources and shall utilize, as the first source of screening, the child's usual source of health care so that health screening programs are fully integrated with existing health services, that health care professionals be appropriately represented and utilized in these programs, that outreach programs be developed to stimulate the use of preventive health services, and that services offered pursuant to this article be efficiently provided and be of the highest quality.

124030. As used in this article and Section 120475:

(a) ''State board'' means the State Maternal, Child, and Adolescent Health Board.

(b) ''Department'' means the department.

(c) ''Director'' means the director.

(d) ''Governing body'' means the county board of supervisors or boards of supervisors in the case of counties acting jointly.

(e) ''Local board'' means local maternal, child, and adolescent health board.

(f) ''Local health jurisdiction'' means county health department or combined health department in the case of counties acting jointly or city health department within the meaning of Section 101185.

124035. The department shall administer this article and Section 120475 and shall adopt minimum standards for the approval of community child health and disability prevention programs and regulations as necessary. The standards shall allow necessary flexibility in the administration of county programs, taking into account the variability of county needs and resources. However, the standards, rules, and regulations may be adopted only with the advice and written recommendations of the board. Standards shall be adopted for:

(a) Education and experience requirements for directors of community child health and disability prevention programs.

(b) Health screening, evaluation, and diagnostic procedures for child health and disability prevention programs.

(c) Public and private facilities and providers that may participate in community child health and disability prevention programs.

The department shall adopt a five-year state plan for child health and disability prevention services by October 1, 1977. The plan shall include a method for allocating child health and disability prevention funds to counties. The plan shall be reviewed and revised as necessary to provide a basis for allocating state child health and disability prevention program funds throughout the state.

Nothing in this section shall be construed as prohibiting programs provided pursuant to this article from being conducted in public and

private school facilities; provided that, with respect to private school facilities, no services provided thereon pursuant to this article and financed by public funds shall result in any material benefit to, or be conducted in a manner that furthers any educational or other mission of, such a school or any person or entity maintaining the school.

124040. The governing body of each county or counties shall establish a community child health and disability prevention program for the purpose of providing early and periodic assessments of the health status of children in the county or counties by July 1, 1974. However, this shall be the responsibility of the department for all counties that contract with the state for health services. Contract counties, at the option of the board of supervisors, may provide services pursuant to this article in the same manner as other county programs, provided the option is exercised prior to the beginning of each fiscal year. Each plan shall include, but is not limited to, the following requirements:

(a) Outreach and educational services.

(b) Agreements with public and private facilities and practitioners to carry out the programs.

(c) Health screening and evaluation services including, for all children eligible for Medi-Cal, a physical examination, immunizations appropriate for their age and health history, and laboratory procedures appropriate for their age and population group.

(d) Referral for diagnosis or treatment when needed, including, for all children eligible for Medi-Cal, referral for treatment by a provider participating in the Medi-Cal program of the conditions detected, and methods for assuring referral is carried out.

(e) Recordkeeping and program evaluations.

The health screening and evaluation part of each community child health and disability prevention program plan shall include, but is not limited to, the following for each child:

(a) A health and development history.

(b) An assessment of physical growth.

(c) An examination for obvious physical defects.

(d) Ear, nose, mouth, and throat inspection, including inspection of teeth and gums, and for all children three years of age and older who are eligible for Medi-Cal, referral to a dentist participating in the Medi-Cal program.

(e) Screening tests for vision, hearing, anemia, tuberculosis, diabetes, and urinary tract conditions.

(f) An assessment of nutritional status.

(g) An assessment of immunization status.

(h) Where appropriate, testing for sickle cell trait, lead poisoning, and other tests that may be necessary to the identification of children with potential disabilities requiring diagnosis and possibly treatment.

(i) For all children eligible for Medi-Cal, necessary assistance with scheduling appointments for services and with transportation.

(j) The department shall report to the Legislature, by April 15, 1986, on all necessary steps to improve access to preventive dental care for children eligible for Medi-Cal, such as streamlining reimbursement procedures, increasing fees for specific preventive dental procedures, or increasing fees in specific geographic areas.

(k) Dentists receiving referrals of children eligible for Medi-Cal under this section shall employ procedures to advise the child's parent or parents of the need for and scheduling of annual appointments.

Standards for procedures to carry out health screening and evaluation services and to establish the age at which particular tests should be carried out shall be established by the director, with review and recommendation by the board. However, a governing body may include additional health screening and evaluation procedures in its program if approved by the director and the board.

Each community child health and disability prevention program shall, pursuant to standards set by the director, establish a record system that contains a health case history for each child so that costly and unnecessary repetition of screening, immunization and referral will not occur and appropriate health treatment will be facilitated as specified in Section 124085.

124045. A city that operates an independent health agency may elect to provide the services described in this article with the approval of the department. In this instance, the powers granted a governing body of a county shall be vested in the governing body of the city.

124050. Each community child health and disability program shall have a director meeting qualification standards by the department, appointed by the governing body, except for counties contracting with the state for health services.

124055. Any community child health and disability prevention program may contract to furnish services to any other county if the contract is approved by the director.

124060. (a) On or before September 15 of each year, each county program director shall submit a budget update for the subsequent fiscal year that provides the following information:

(1) A summary of the previous year's activity, including the number of children screened, the number of children referred for diagnosis and treatment, by condition, and the cost of screening services.

(2) A summary description of the results of cases in that a treatable disability was identified and referral made.

(3) A projection and cost estimates of the number of children to be screened for the fiscal year for which the budget is being submitted.

(b) The multiyear base community child health and disability prevention plan shall include the following:

(1) An assessment of the adequacy and availability of the facilities and providers to provide health screening diagnostic and treatment services.

(2) A description of the child health and disability prevention program to be offered, including expected participating providers and outreach mechanisms to be utilized.

(3) A summary description of the current year's activity, including the number of children screened, the number of children referred for diagnosis and treatment, by condition, and the cost of screening services.

(4) A description of how existing school health resources, including school health personnel, are to be utilized for outreach and other services.

(5) Budget estimates, including all sources of revenue, for the budget.

(c) On or before September 15 of each year each governing board shall submit an update to the multiyear base community child health and disability prevention plan.

The director shall determine the amount of state funds available for each county for specified services under an approved multiyear base community child health and disability prevention plan, as updated, from state funds appropriated for child health and disability prevention services.

If the amount appropriated in the Budget Act for the fiscal year as enacted into law differs from the amount in the budget submitted by the Governor for the fiscal year, each governing board shall submit an additional revised update in the form and at the time specified by the department.

Notwithstanding any other provision of this article, no new community child health and disability prevention plan shall be submitted by a county until September 15, 1983. Each county plan and budget approved for the 1981–82 fiscal year shall be updated on or before September 15 by the governing body of each county for the 1982–83 and 1983–84 fiscal years pursuant to regulations adopted by the department. On or before September 15, 1983, the governing body of each county shall prepare and submit to the department a multiyear base plan and budget for the 1984–85 fiscal year that shall be annually updated on or before September 15 of each subsequent year pursuant to regulations adopted by the department.

The department shall develop and implement the format and procedures for the preparation and submission of a multiyear base plan update in order for the counties to have sufficient time prior to September 15, 1983, to prepare and submit their multiyear base plan by September 15, 1983.

For the purposes of simplifying and reducing plan requirements, the Legislature intends that the annual update shall not duplicate any of the material in the multiyear base plan, but serve as a progress report both evaluating what has been accomplished over the past year and describing in more detail what will be accomplished in relation to each of the elements in the base plan during the coming year.

124065. Counties shall be reimbursed for the amount required by the county to carry out its community child health and disability prevention program in accordance with the approved community child health and disability prevention plan. Claims for state reimbursement shall be made in the manner as the director shall provide. Each claim for state reimbursement shall be payable from the appropriation made for the fiscal year when the expenses upon which the claim is based are incurred.

There shall be no reimbursement for expenditures for the treatment of disabilities identified as a result of the program or for capital improvements or the purchase or construction of buildings, except for the equipment items and remodeling expenses as may be allowed by regulations adopted by the director.

124070. Counties shall be reimbursed for the amount required by the county to carry out its community child health and disability prevention program in accordance with the approved community child health and disability prevention plan. Claims for state reimbursement shall be made in a manner as the director shall provide. Each claim for state reimbursement shall be payable from the appropriation made for the fiscal year in which the expenses upon which the claim is based are incurred.

There shall be no reimbursement for expenditures for the treatment of disabilities identified as a result of the program, except for the costs of immunizations necessary to bring the child current in his or her immunization status as provided for by regulations of the department, or for capital improvements or the purchase or construction of buildings, except for the equipment items and remodeling expenses as may be allowed by regulations adopted by the director.

124075. (a) In order to ensure the maximum utilization of the California Medical Assistance Program and other potential reimbursement sources, the department shall develop a schedule and method of reimbursement at reasonable rates for services rendered pursuant to this article. The reimbursement schedule shall include provision for well child examinations as well as for administrative expenses incurred by providers pursuant to meeting this article. Inquiry shall be made of all recipients of services under this article as to their entitlement for third-party reimbursement for medical services. Where an entitlement exists it shall be billed. Notwithstanding subdivision (c) of Section 14000 of the Welfare and

Institutions Code and Section 14005 of that code, the California Medical Assistance Program shall be billed for services rendered pursuant to this article for every Medi-Cal eligible beneficiary.

(b) The department and counties shall maximize the use of federal funds for carrying out this article, including using state or county funds to match funds claimable under Title 19 of the Social Security Act. Services and administrative support costs claimable under federal law shall include, but not be limited to, outreach, health education, case management, resource development, and training at state and local levels. Any federal funds received shall augment and not replace funds appropriated from the General Fund for carrying out the purposes of this article.

124080. The department may contract with a private entity for the performance of processing claims for state reimbursement, so long as the cost of the contract is no more than 85 percent of the cost of the service if performed in state service and there is compliance with other applicable provisions of the Government Code including, but not limited to, Sections 19130 to 19132, inclusive.

124085. On and after July 1, 1976, each child eligible for services under this article shall, within 90 days after entrance into the first grade, provide a certificate approved by the department to the school where the child is to enroll documenting that within the prior 18 months the child has received the appropriate health screening and evaluation services specified in Section 124040. A waiver signed by the child's parents or guardian indicating that they do not want or are unable to obtain the health screening and evaluation services for their children shall be accepted by the school in lieu of the certificate. If the waiver indicates that the parent or guardian was unable to obtain the services for the child, then the reasons why should be included in the waiver.

124090. Any child between birth and 90 days after entrance into the first grade and all persons under 21 years of age who are eligible for the California Medical Assistance Program shall be eligible for services from the child health and disabilities prevention program in the county where they are a resident. The department, with review and recommendation by the board, shall adopt regulations specifying age groups that shall be given certain types of screening tests and recommendations for referral.

The first source of referral shall be the child's usual source of health care. If referral is required and no regular source of health care can be identified, the facility or provider providing health screening and evaluation services shall provide a list of three qualified sources of care, without prejudice for or against any specific source.

124095. Each community child health and disability prevention program shall provide the child or his or her parent or guardian with a copy of the results of the health screening and evaluation, as well

as an explanation of the meaning of the results, and shall, where the need indicates, refer the child for further diagnosis and treatment.

124100. (a) In cooperation with the county child health and disability prevention program, the governing body of every school district or private school that has children enrolled in kindergarten shall provide information to the parents or guardians of all children enrolled in kindergarten of this article and Section 120475. Every school district or private school that has children enrolled in the first grade shall report by January 15 of each year to the county child health and disability prevention program, the department, and the Department of Education the following information:

(1) The total number of children enrolled in first grade.

(2) The number of children who have had a health screening examination, as evidenced by the certificate required by Section 124085.

(3) The number of children whose parents or guardian have given written waiver pursuant to Section 124085 that they do not want their child to receive a health screening examination.

(b) Each county child health and disability prevention program shall reimburse school districts for information provided pursuant to this section. The Superintendent of Public Instruction may withhold state average daily attendance funds to any school district for any child for whom a certification or parental waiver is not obtained.

124105. (a) This section shall be known and may be cited as the ''Hughes Children's Health Enforcement Act.''

(b) The Legislature recognizes the importance of health to learning and to a successful academic career. The Legislature also recognizes the important role of schools in ensuring the health of pupils through health education and the maintenance of minimal health standards among the pupil population. Therefore, it is the intent of the Legislature that schools ensure that pupils receive a health screening before the end of the first grade.

(c) The department shall compile district information, using the information reported pursuant to Section 124100, and report to the Legislature the percentage levels of compliance with Section 124085 on an annual basis commencing January 1, 1994, utilizing data from the prior school year.

(d) The governing board of each school district shall exclude from school, for not more than five days, any first grade pupil who has not provided either a certificate or a waiver, as specified in Section 124085, on or before the 90th day after the pupil's entrance into the first grade. The exclusion shall commence with the 91st calendar day after the pupil's entrance into the first grade, unless school is not in session that day, then the exclusion shall commence on the next succeeding schoolday. A child shall not be excluded under this section if the pupil's parent or guardian provides to the district either a certificate or a waiver as specified in Section 124085.

(e) The governing board of a school district may exempt any pupil from the exclusion described in subdivision (d) if, at least twice between the first day and the 90th day after the pupil's entrance into the first grade, the district has contacted the pupil's parent or guardian and the parent or guardian refuses to provide either a certificate or a waiver as specified in Section 124085. The number of exemptions from exclusion granted by a school district pursuant to this subdivision may not exceed 5 percent of a school district's first grade enrollment. It is the intent of the Legislature that exemptions from exclusion be used in extraordinary circumstances, including, but not limited to, family situations of great dysfunction or disruption, such as substance abuse by parents or guardians, child abuse, or child neglect.

(f) It is the intent of the Legislature that, upon a pupil's enrollment in kindergarten or first grade, the governing board of the school district notify the pupil's parent or guardian of the obligation to comply with Section 124085 and of the availability for low-income children of free health screening for up to 18 months prior to entry into first grade through the Child Health Disabilities Prevention Program.

(g) It is the intent of the Legislature that school districts provide information to parents regarding the requirements of Section 124085 within the notification of immunization requirements. Moreover, the Legislature intends that the information sent to parents encourage parents to obtain health screenings simultaneously with immunizations.

124110. All information and results of the health screening and evaluation of each child shall be confidential and shall not be released without the informed consent of a parent or guardian of the child.

The results of the health screening and evaluation shall not be released to any public or private agency, even with the consent of a parent or guardian, unless accompanied by a professional interpretation of what the results mean.

Article 7. Childhood Lead Poisoning Prevention Act

124125. The Legislature hereby finds and declares that childhood lead exposure represents the most significant childhood environmental health problem in the state today; that too little is known about the prevalence, long-term health care costs, severity, and location of these problems in California; that it is well known that the environment is widely contaminated with lead; that excessive lead exposure causes acute and chronic damage to a child's renal system, red blood cells, and developing brain and nervous system; that at least one in every 25 children in the nation has an elevated blood lead level; and that the cost to society of neglecting this problem may be enormous.

The Legislature further finds and declares that knowledge about where and to what extent harmful childhood lead exposures are occurring in the state could lead to the prevention of these exposures, and to the betterment of the health of California's future citizens. Therefore, it is the intent of the Legislature in enacting this article to establish a state Childhood Lead Poisoning Prevention Program within the department to accomplish all of the following:

(a) To compile information concerning the prevalence, causes, and geographic occurrence of high childhood blood lead levels.

(b) To identify and target areas of the state where childhood lead exposures are especially significant.

(c) To analyze information collected pursuant to this article and, where indicated, design and implement a program of medical followup and environmental abatement and followup that will reduce the incidence of excessive childhood lead exposures in California.

124130. (a) All medical laboratories shall report to the department each detected case of a blood lead level greater than 25 micrograms of lead per deciliter of human blood or the equivalent standard as measured in micrograms of protoporphyr in per gram of hemoglobin. The blood lead findings, the names, ages, and addresses of the patients involved in each detected case and any additional information necessary to implement this article shall be reported to the department in a manner prescribed by the director.

(b) All information reported pursuant to this section shall be confidential, as provided in Section 100330.

(c) All medical laboratories testing for blood lead levels shall participate in a blood lead and free erythrocyte protoporphyrin (FEP) proficiency testing program.

(d) Laboratories that fail to meet reporting requirements will be assessed fines of up to five hundred dollars ($500) at the discretion of the director.

124135. (a) By July 1, 1987, the department shall identify target areas in which to conduct a childhood lead screening program.

(b) The targeted areas shall include at least one area within the urban San Francisco/Alameda County area, one area within, the urban Los Angeles/Orange County/San Diego area, and one area within the Central Valley Sacramento/Fresno area, and other areas if scientifically indicated as determined by the director.

(c) These target areas shall be described by census tract and shall be selected based on the prevalence of the following factors:

(1) Older housing.

(2) Lead-emitting industry.

(3) History of heavy automobile traffic.

(4) Use or disposal of hazardous materials or waste.

(5) Populations where cultural or ethnic factors or both may result in a higher risk of ingestion of lead.

(6) Population of children between the ages of 12 months and 6 years.

124140. By October 1, 1988, the department shall complete a screening program for childhood lead in the targeted areas identified pursuant to Section 124135, and in other areas where scientifically indicated. Further, where environmental abatement is found to be indicated, the department shall carry out field trials of alternative abatement technologies.

124145. On January 1, 1989, the department shall submit a report to the relevant legislative policy committees, and to the relevant legislative budget subcommittees for their review, describing the results of the screening program, the significance of the results, and the department's recommendations for further actions, where indicated.

124150. The Legislature hereby finds and declares that the activities conducted by the department pursuant to Sections 124130, 124135, and 124140 have confirmed and supported the findings specified in Section 124125 and, in addition, have resulted in the following findings:

(a) Very few children are currently tested for elevated blood lead levels in California. The lead registry established pursuant to Section 124130 has been effective at identifying incidents of occupational lead poisoning; however, because childhood lead screening is not now required in California, the registry is unable to serve as the exclusive mechanism to identify children with elevated blood lead levels. Additional blood lead screening needs to be done to identify children at high risk of lead poisoning.

(b) Based on emerging information about the severe deleterious affects of low levels of lead on children's health, the lead danger level is expected to be lowered from 25 to 15 micrograms of lead per deciliter of human blood.

(c) Lead poisoning poses a serious health threat for significant numbers of California children. Based on lead registry reports and targeted screening results, the department has estimated that tens of thousands of California children may be suffering from blood lead levels greater than the danger level.

(d) The implications of lead exposure to children and pregnant women from lead brought home on the clothing of workers is unknown, but may be significant.

(e) Levels of lead found in soil and paint around and on housing constitute a health hazard to children living in the housing. No regulations currently exist to limit allowable levels of lead in paint surfaces in California housing.

124155. (a) The department shall design and implement a screening program for lead exposure of children not older than seven years old in migrant labor camps where lead-based paint has been identified pursuant to Section 50710.5.

(b) The department may implement the screening program through the local health departments utilizing the department's protocols. Notwithstanding any other provision of law, the department may contract with a nonprofit organization to assist in administration of the program. The contract shall not be subject to competitive bidding requirements.

124160. The department shall continue to direct the Childhood Lead Poisoning Prevention Program to implement a program to identify and conduct medical followup of high-risk children, and to establish procedures for environmental abatement and followup designed to reduce the incidence of excessive childhood lead exposures in California. In implementing this program, the department shall utilize its own studies, as well as relevant information from the scientific literature and childhood lead poisoning programs from outside California. The particular activities specified in this section shall be initiated by January 1, 1990, and completed on or before January 1, 1993. The program shall include at least all of the following components:

(a) Lead screening. The department shall:

(1) Design and implement at least one pilot blood lead screening project targeting children at high risk of elevated blood lead levels. In designing any pilot projects, the department shall give special consideration to conducting screening through the Child Health Disability and Prevention Program.

(2) Conduct a pilot screening project to evaluate blood lead levels among children of workers exposed to lead in their occupations.

(3) Develop and issue health advisories urging health care providers to conduct routine annual screening of high-risk children between the ages of one and five years of age.

(4) Study the options for, and feasibility of, implementing a mandatory childhood blood lead testing program in California. The study shall include an evaluation of the voluntary response and cooperation of health care providers to the health advisory program specified in paragraph (3). The results of this study shall be submitted to the Legislature by July 1, 1991.

(5) Develop a program to assist local health departments in identifying and following up cases of elevated blood lead levels.

(6) Develop and conduct programs to educate health care providers regarding the magnitude and severity of, and the necessary responses to, the childhood lead poisoning problem in California.

(b) The department, in consultation with the Department of Housing and Community Development, shall adopt regulations governing the abatement of lead paint in and on housing, including, but not limited to, standards for enforcement, testing, abatement, and disposal.

(c) The department shall conduct a study to evaluate whether abatement of lead in soil is effective at reducing blood lead levels in children.

124165. After January 1, 1993, the department, through the Childhood Lead Poisoning Prevention Program, shall continue to take steps that it determines are necessary to reduce the incidence of excessive childhood lead exposure in California.

CHAPTER 4. ADOLESCENT HEALTH

Article 1. California Adolescent Family Life Act of 1988

124175. The Legislature hereby finds and declares that:

(a) Adolescent pregnancy and parenthood is a problem with significant social, medical, educational, and economic consequences to the teen parent and child, her family, and the State of California.

(b) In an attempt to address the problems of pregnant and parenting adolescents, the Governor, in 1985, created the Adolescent Family Life Demonstration Program, that was designed to bring pregnant and parenting teenagers into programs that provide services of demonstrated cost benefit and effectiveness by organizing networks of local agencies focused on providing services to adolescents and ensuring the most timely and effective utilization of services.

(c) Independent evaluations indicate that the program has been successful and effective in achieving its intended goals of providing pregnant adolescents with prenatal care, reducing the incidence of low birthweight babies born to adolescent mothers, keeping or reenrolling pregnant and parenting adolescents in school, and reducing the rate of repeat teen pregnancies.

124180. (a) The department may conduct the Adolescent Family Life Program to assure that pregnant adolescents receive comprehensive continuous prenatal care in order to deliver healthy babies; to establish networks within regions to provide to pregnant and parenting teens and their children necessary services including medical care, psychological and nutritional counseling, maternity counseling, adoption counseling, academic and vocational programs, and day care; to provide a continuous case manager to each family unit; and to maintain a data base to measure outcomes of adolescent pregnancies. Specific procedures to operate this program will be defined and carried out through standards and guidelines established by the department.

(b) No grant funds may be used for essential services to pregnant adolescents or schoolage parents unless the services are not available in the county or are insufficient to meet the basic needs of the population to be served; in that case, funds may be used for essential services only as set forth in the approved grant application. No grant

funds may be expended for abortions, abortion referrals, or abortion counseling.

124185. (a) The department, through its program of maternal and child health, shall award contract augmentations to four Adolescent Family Life Programs that meet the requirements of this section and develop plans for a comprehensive coordinated substance abuse prevention, intervention, and counseling program, designed specifically to meet the developmental, social, and educational needs of high-risk pregnant or parenting adolescents. The program shall, to the extent practicable, feasible, and appropriate, leverage existing programs and funding rather than creating new, duplicative programs and services.

(b) The department shall adopt guidelines and criteria setting forth the terms and conditions upon which the department will offer contract augmentations pursuant to this section. The department also shall disseminate information designed to publicize the availability of contract augmentations for a comprehensive coordinated substance abuse prevention, intervention, and counseling program to high-risk pregnant or parenting adolescents.

(c) The department shall encourage Adolescent Family Life Programs with small caseloads to develop plans and submit applications that reflect sharing of services among two or more programs.

(d) At least one program that is awarded a contract augmentation shall be located in northern California, at least one program shall be located in central California, and at least one program shall be located in southern California.

(e) This section shall become operative on July 1, 1994.

124190. A comprehensive coordinated substance abuse prevention, intervention, and counseling program, as used in Section 124185, shall include, but not be limited to, programs that:

(a) Have demonstrated a capacity for developing interagency cooperative approaches to reduce the incidence of high-risk pregnant or parenting adolescents. This shall include documentation of program development and plans for coordination and collaboration with existing perinatal substance abuse programs in the county, including state pilot projects on perinatal substance abuse established under the direction of the Local Perinatal Substance Abuse Coordinating Council.

(b) Employ maximum utilization of existing available programs and facilities.

(c) Have developed goals and objectives for reducing the incidence of high-risk pregnant and parenting adolescents.

(d) Are culturally and linguistically appropriate to the population being served.

(e) Include staff development training by substance abuse counselors.

(f) This section shall become operative on July 1, 1994.

124195. The department shall require reports to be prepared by all programs funded pursuant to this article. A summary of the reports and recommendations regarding the programs shall be submitted by the department to the Legislature on or before December 31, 1996. The summary shall include all of the following:

(a) An accounting of the incidence of high-risk pregnant or parenting adolescents who are abusing alcohol or drugs, or a combination of alcohol and drugs.

(b) An accounting of the health outcomes of infants of high-risk pregnant and parenting adolescents including: infant morbidity, mortality, rehospitalization, low birth weight, premature birth, developmental delay, and other related areas.

(c) An accounting of school enrollment among high-risk pregnant and parenting adolescents.

(d) An assessment of the effectiveness of the counseling services in reducing the incidence of high-risk pregnant and parenting adolescents who are abusing alcohol or drugs, or a combination of alcohol and drugs.

(e) The effectiveness of the component of other health programs aimed at reducing substance use among pregnant and parenting adolescents.

(f) The need for an availability of substance abuse treatment programs in the program areas that are appropriate, acceptable, and accessible to teenagers.

(g) This section shall become operative on July 1, 1994.

124200. Funding for the purpose of this article shall be provided through funds appropriated to the department through the annual Budget Act.

Article 2. Child and Adolescent Resource Program

124225. (a) The Legislature finds that recent responsibilities for assessing and treating the mental disorders of children and adolescents have been required of county mental health programs creating an unmet need for personnel in the field of mental health who have expertise in preventing, diagnosing, and treating the mental and emotional disorders of children.

(b) Recent attention to child abuse cases has increased the awareness of the special needs of children who are victims of abuse and of those who are then called to the courtroom as witnesses. Mental health personnel with special training are also needed for these children.

124230. It is the purpose of the Legislature, in enacting this article, to encourage the Regents of the University of California to augment the academic child and adolescent programs at the medical

schools of the University of California. The programs shall include, but not be limited to, one or more of the following elements:

(a) Clinical or postgraduate educational programs in child and adolescent psychiatry to instruct and train students in recognizing and treating children with mental and emotional problems, both organic and functional.

(b) Provision of continuing education for specialists in the care and treatment of children and adolescents with mental and emotional problems.

(c) Research into the causes, prevention, and treatment of mental disorders of children.

124235. By February 1, 1987, the Regents of the University of California are requested to submit to the Legislature a report on their assessment of the need for, and relative priority of, increased university programs for training specialists in the care and treatment of children and adolescents with mental and emotional problems in this state. It is requested that the report include, but not be limited to, all of the following:

(a) A description of the university's programs for the training of specialists in the care and treatment of children and adolescents with mental and emotional problems.

(b) A determination of the need for and relative priority of increased university training and research in this field.

(c) The estimated costs of programs to train additional specialists.

CHAPTER 5. DENTAL DISEASE (RESERVED)

PART 3. FAMILY PLANNING

124300. Within any county where 10 percent or more of the population, as determined by the Population Research Unit of the Department of Finance, speaks any one language other than English as its native language, every local health department shall make copies of circulars and pamphlets relating to family planning that are made available to the public also available in the other language.

The department, upon request, shall make a translation available in other than English those family planning informational materials normally distributed to the general public.

PART 4. PRIMARY HEALTH CARE

CHAPTER 1. GENERAL PROVISIONS

124400. (a) The Legislature makes the following findings and declarations:

(1) There is a maldistribution of health services in California resulting in underserved rural and urban areas and underserved population groups.

(2) Most rural areas of the state do not have adequate health services because there are insufficient personnel and facilities to provide the services. The lack of adequate services has a negative impact on the health and safety of the public.

(3) In many urban areas of the state there are inadequate health services for low-income populations. Financial barriers create access problems. These barriers to health services have a negative impact on the health and safety of these groups and the public.

(4) Population groups, such as American Indians and seasonal agricultural and migratory workers, lack access to adequate and appropriate health services. The lack of adequate services has a negative impact on the health and safety of these groups and the public.

(5) State assistance will be needed to assure financial stability of primary care resources for these specified population groups.

(b) It is therefore the intent of the Legislature that the state develop an overall strategy to ensure the maintenance of adequate primary health care resources for special population groups.

124405. (a) The department shall develop a statewide plan for health services for special population groups identified pursuant to subdivision (b) of Section 124425 by January 1, 1985, and shall evaluate and update the plan every two years. The plan shall include, but not be limited to, an assessment of resources, an assessment of unmet needs, an evaluation of prior years program goals and objectives, and a two-year action plan for at least the following program areas:

(1) Health of seasonal agricultural and migratory workers and their families.

(2) American Indian health services.

(3) Rural health services.

(4) California health services corps.

(5) Grants-in-aid to clinics.

(b) The plan shall describe the types, locations, and effectiveness of the programs specified in paragraphs (1) to (5), inclusive, and contain an assessment of resources needed to maintain the plan consistent with the Primary Care Services Act (Section 27).

(c) The plan may be a consolidation of individual program reports due to the Legislature during the year the plan is updated. The plan may also be integrated with other plans the department is required to develop concerning maternal and child health programs and services for special population groups.

(d) The statewide plan shall be initially developed in consultation with the Primary Care Clinics Advisory Committee and the California Conference of Local Health Officers and biannually

updated as provided in this section in consultation with individuals and groups representing special populations and areas, with local governments, and with the office.

124410. Notwithstanding any other provision of law, the department may, if requested by the nonprofit or public agency and to the extent funds are available, provide for advance payments for services to be performed under any agreement entered into pursuant to the Primary Care Services Act (Section 27) and that is otherwise in compliance with the requirements contained in Section 100350. Individual advance payments made to any nonprofit or public agency that requests those payments shall be made in a timely fashion and shall not exceed 25 percent of the total amount of the grant award.

124415. Notwithstanding any other provision of law, the department may, in addition to the advance payment under Section 124410, provide for prospective payments for services to be performed under any agreement entered into pursuant to the Primary Care Services Act (Section 27). These prospective payments may be provided each month to a contracting agency on one of the following bases:

(a) One-twelfth of the total funding award each month.

(b) One-twelfth of 75 percent of the funding award, if a 25 percent advance payment is also provided.

Prospective payments may be made to those nonprofit or public agencies that request prospective payments and may be adjusted if necessary during the project period after the submission and review of required program reports.

124420. Each agreement for a project shall require the contracting agency to seek third-party reimbursements, including Medi-Cal and private insurance, for any person served under the agreement and shall require that the reimbursements be used for purposes consistent with the Primary Care Services Act (Section 27). Each agreement may require the contracting agency to provide reports to the department on reimbursements.

124425. (a) It is the intent of the Legislature that funds authorized by the Primary Care Services Act (Section 27) be provided to organizations and agencies that are located in underserved areas or that are serving population groups identified pursuant to subdivision (b).

(b) Every two years the director shall develop a list of underserved rural and urban areas and underserved population groups. The director shall take into consideration the list of urban and rural areas designated as medically underserved by the California Health Manpower Policy Commission and by the office and federal medically underserved areas and population groups designated by federal agencies.

(c) The director shall develop the list of underserved rural and urban areas and underserved population groups, set forth in subdivision (b), after consulting and receiving written recommendations from the Primary Care Clinics Advisory Committee and after consulting with appropriate groups and individuals, including individuals representing underserved populations and local government.

124430. (a) It is the intent of the Legislature that programs in the Primary Care Services Act (Section 27) be funded annually through the budgetary process.

(b) In administering funds pursuant to the Primary Care Services Act (Section 27), the department shall use the funds only for the purpose of funding grants specifically authorized by that act.

(c) No local assistance funds may be used for state administration purposes under the Primary Care Services Act (Section 27).

124435. An applicant for funds pursuant to the Primary Care Services Act (Section 27) shall transmit a copy of an application to any person who makes a written request therefor at the same time that the application is transmitted to the state.

124440. The department may enter into agreements with any clinic that is licensed under subdivision (a) of Section 1204 or exempt from licensure under subdivision (c) of Section 1206, and which requests the agreements, for up to three consecutive years.

The contracts shall be limited to the provision of health services to persons authorized to receive health services under the programs specified in the Primary Care Services Act (Section 27).

The department shall retain the right to terminate contracts under the general provisions of the contract language prior to the three years for failure to comply with the performance terms and conditions set forth in the contracts.

The multiple-year contracts shall be modified to reflect any cost-of-living adjustments that are provided to the programs specified in this section, provided the cost-of-living adjustments are granted pursuant to the Budget Act. The contracts may also be amended to reflect changes in the base budget amount, scope of work, and other contract language changes as necessary. Nothing shall prohibit the department from establishing a three-year budget and annually amending the contract to change the budget amount, scope of work, and other contract language changes as necessary. Nothing shall prohibit the contract from being modified based on the mutual consent of the contractor and the department. Advance payments in the original contract and in each one-year extension are permitted, but shall not exceed 25 percent of the funds provided for each fiscal year.

On or before January 1, 1990, the department at any time shall report to the Legislative Analyst as to the personnel-year and General Fund savings that have been associated with this authority.

CHAPTER 2. PRIMARY CLINIC REVOLVING FUND

Article 1. General Provisions

124475. The Legislature finds and declares all of the following:

(a) Clinics are valuable partners in the state's efforts to improve access to health services.

(b) Clinics have an established record of providing quality health services to medically uninsured persons at a reasonable cost.

(c) Clinics are experienced in serving the culturally diverse populations of this state and have developed comprehensive health services packages that meet special population needs.

(d) Clinics are major partners with all levels of government as contractors and grantees in programs that serve the poor, low income, minorities, and other target populations with special needs in both urban and rural areas of California.

(e) The state's grant and contract approval process are so complicated and time consuming that clinics are faced annually with severe cash-flow problems.

(f) The length of time required for the state to process and execute payment of claims submitted by clinics, creates severe cash-flow problems for the clinics.

(g) Clinics often have no choice but to borrow funds to cover operations pending receipt of state funds and the resulting interest payments reduce the amount of funds available for direct services to the needy population.

(h) Therefore, it is the intent of the Legislature that preliminary advance payment authority be established for the department in order to alleviate clinics' cash-flow problems to the extent possible.

(i) It is the intent of the Legislature that a clinic revolving fund be established within the department to expedite the payment process and thereby alleviate the cash-flow problems of clinics.

124480. As used in this chapter, ''clinic'' means a primary care clinic as defined in Section 1200.

124485. (a) The department shall prepare and transmit to the Legislature a report of the department's activities relating to the utilization of clinics to provide comprehensive health services pursuant to the following programs:

(1) Health of seasonal agricultural and migratory workers and their families program.

(2) American Indian health services program.

(3) Rural health services program.

(4) Grants-in-aid to clinic program.

(5) California health services corps program.

(b) A report shall be transmitted to the Legislature by July 1, 1992, and by July 1 of every fourth year thereafter.

(c) The report shall also include any grant funds expended and the resources allocated to the programs by the department, including staff, travel, and support services.

(d) The report shall reflect activities, resources, and expenditures by fiscal year.

Article 2. The Clinic Revolving Fund

124500. The Clinic Revolving Fund of the department is hereby established for the purpose of expediting preliminary advance payments as authorized pursuant to Article 3 (commencing with Section 124525) and to reimburse clinics that are grantees or contractors for services rendered under grants or contracts issued pursuant to this part.

124505. (a) Notwithstanding Section 16400 of the Government Code or any other provision of law, the department may, to the extent local assistance appropriations are made by the Legislature for programs set forth in this part, without at the time furnishing vouchers or itemized statements, draw up to 50 percent of the funds appropriated for the purposes of the Clinic Revolving Fund, for purposes of preliminary advance payments pursuant to Article 3 (commencing with Section 124525).

(b) The purpose of the Clinic Revolving Fund does not include expenses related to departmental administrative expenses, departmental travel expenses, departmental travel expense advances, or other departmental administrative costs.

124510. In lieu of actually withdrawing revolving fund moneys from the State Treasury, the Controller, upon the request of the department, shall apply and credit the amount of the Clinic Revolving Fund, or any portion thereof, as repayment and return of any existing funds in the revolving fund to the appropriation for which it was drawn by the department.

124515. The department shall remain fully accountable for the Clinic Revolving Fund. All disbursements shall be substantiated by vouchers filed with the Controller. Disbursements may be reported, substantiated by vouchers, from time to time to the Controller in connection with claims for reimbursements of the revolving fund. At any time, upon the demand of the Department of Finance or the Controller, the revolving fund shall be accounted for and substantiated by vouchers and itemized statements submitted to the Controller.

Article 3. Preliminary Advance Payments

124525. Notwithstanding any provision of law to the contrary, the department may, to the extent funds are available, provide for advance payments for services to be performed under pending grant

agreements or contracts with clinics pursuant to the Primary Care Services Act (Section 27), at the time that the notice of award is issued if all of the following conditions are met:

(a) The request for application or the request for proposals contains the terms and conditions under which advance payment may be received pursuant to this section.

(b) That the total amount of the advance shall not exceed 25 percent of the amount of the proposed award, including any advance payments provided under authority of any other provision of law.

(c) That the terms and conditions of the request for application or the request for proposal, specifies that the grantee shall repay the full amount of the advance if the grant or the contract is not finally approved.

(d) That the department has evaluated the financial stability of the clinic and found it to be reasonably financially sound.

(e) That advance payments be made only to those nonprofit agencies that request an advance in writing.

(f) That the application or proposal contains the terms and conditions set forth in the request for application or the request for proposal.

(g) That the application or proposal is signed by an authorized person representing the clinic.

CHAPTER 3. HEALTH OF SEASONAL AGRICULTURAL AND MIGRATORY WORKERS

124550. The department shall maintain a program for seasonal agricultural and migratory workers and their families, consisting of all of the following:

(a) Studies of the health and health services for seasonal agricultural and migratory workers and their families throughout the state.

(b) Technical and financial assistance to local agencies concerned with the health of seasonal agricultural and migratory workers and their families.

(c) Coordination with similar programs of the federal government, other states, and voluntary agencies.

124555. The department shall contract and cooperate with local governmental agencies and voluntary nonprofit organizations in connection with the development of local health programs for seasonal agricultural and migratory workers and their families.

CHAPTER 4. AMERICAN INDIAN HEALTH SERVICES

124575. The department shall maintain a program for American Indians and their families, consisting of all of the following:

(a) Studies of the health and health services available to American Indians and their families throughout the state.

(b) Technical and financial assistance to local agencies concerned with the health of American Indians and their families.

(c) Coordination with similar programs of the federal government, other states, and voluntary agencies.

124580. The department shall cooperate with local governmental agencies and contract with voluntary nonprofit organizations in connection with the development of local health programs for American Indians and their families.

124585. (a) All moneys appropriated to the department for the purposes of this chapter shall be used to provide financial, training, and technical assistance to urban and rural American Indian health programs and to assist these programs in planning, implementing, and upgrading programs to attain a comprehensive health services delivery system for American Indians in urban and rural areas.

(b) The department shall provide technical assistance and shall promote the provision of services for preventive health care, health education, and environmental health.

(c) The department may expend funds, appropriated to it to carry out the purposes of this chapter, by contract or grant, or any combination thereof, to assist any urban or rural American Indian health program.

(d) The department shall adopt regulations establishing criteria for reimbursement for direct services under this chapter, that shall include, but not be limited to, a definition of direct services that are reimbursable and a formula for allocation of funds appropriated to the department.

(e) The department shall provide assistance to American Indian health services programs in maximizing utilization of third party payment systems and in developing programs in health education, nutrition, and family planning, if the assistance is not being provided by agencies of the federal government.

(f) Funds appropriated to carry out the purposes of this chapter shall be supplemental to those available from the federal government and shall not duplicate, and they shall not replace, any commitments made by the federal government to provide health services to American Indians and their families in this state who receive health services pursuant to an urban or rural American Indian health program.

(g) It is the intent of the Legislature that the program established by this chapter shall, commencing with the 1984–85 fiscal year, be funded according to customary budget procedures.

124590. The Legislature finds and declares that the health status of many American Indians in California is not adequate.

It is, therefore, the intent of the Legislature to insure that in addition to funding provided pursuant to the American Indian

Health Service program, sufficient funding is provided to American Indians from other programs in order to substantially improve their access to health services. These programs include, but are not limited to, the following:

(a) Rural health services.
(b) Mental health services.
(c) Developmental disability programs.
(d) Maternal and child health programs.
(e) Alcoholism programs.
(f) Programs for the aging.
(g) Environmental health programs.

The department shall report to the Legislature by July 1, 1984, and every two years thereafter, with respect to the extent to that funding for these programs is allocated to grantees receiving funding from the department pursuant to Section 124585.

124595. (a) The Indian Health Policy Panel, established by the director pursuant to Section 1520 of Title 17 of the California Administrative Code, is continued in existence and shall be renamed the American Indian Health Policy Panel. The policy panel shall advise the department on the level of resources, priorities, criteria, and guidelines necessary to implement this chapter. The policy panel shall be composed of 10 members, appointed by the director. Four members shall be appointed from a list of persons submitted by the California Rural Indian Health Board, four members shall be appointed from a list of persons submitted by the California Urban Indian Health Council, and two members shall represent the public. The persons appointed by the director to represent the public may be consumers, consumer advocates, health service providers, representatives of state or county health agencies, health professionals, or private citizens. The terms of the members shall be established pursuant to bylaws adopted by the policy panel.

(b) The director may also seek advice from individuals and groups, other than the policy panel, on program issues.

(c) Those persons who are members of the policy panel on December 31, 1983, shall continue to be members for the remainder of their terms and, upon expiration of their terms, shall be eligible for reappointment by the director.

CHAPTER 5. RURAL HEALTH SERVICES DEVELOPMENT

Article 1. Legislative Intent and General Provisions

124600. The Legislature makes the following findings and declarations:

(a) There is a maldistribution of health services in California. Most rural areas of the state do not have adequate health services because

there are insufficient health personnel and facilities and inadequate transportation to such services.

(b) The lack of health services in rural areas has a negative impact on the health and safety of the public.

(c) Existing public programs to meet the problem of inadequate health services in rural areas are not sufficient in scope or properly coordinated to significantly improve the availability of health services.

(d) It is unlikely that the situation will improve without substantial state and local action.

It is, therefore, the intent of the Legislature in enacting this chapter to establish a program of rural health services in the department. The purpose of the program is to improve the coordination of rural health services and to increase the amount and availability of the services.

The Legislature intends that the program consist of all the following:

(1) The California Health Services Corps in which health personnel are assigned to health care delivery organizations.

(2) Health services development projects, in which new health care delivery organizations are established.

(3) An organizational unit within the department to coordinate rural health programs.

124605. The department shall implement a program to remedy deficiencies in health services in rural areas. The department shall have responsibility for the following elements:

(a) California Health Services Corps.

(b) California Rural Health Services Development Projects.

(c) Coordination of Rural Health Programs.

124610. The director shall administer this chapter and shall adopt any regulations and standards as are necessary to implement this chapter.

124615. No services provided under this chapter shall substitute for current services and obligations of a county including those required by state law.

124620. Funds expended pursuant to this chapter shall be supplemental to those made available by the federal government for the National Health Services Corps and shall not duplicate, or replace, but may supplement and complement, any commitments made by the federal government to provide health personnel as needed.

124625. (a) It is the intent of the Legislature that the Rural Health Services Development Program be funded annually through the budgetary process.

(b) Notwithstanding any other provision of law, the department may, to the extent funds are available, provide for advance payments for services to be performed under any contract entered into

pursuant to this chapter with any small community based public or private nonprofit agency with modest reserves and potential cash flow problems, where the department determines that such advance payments will further the purposes of this chapter. Advance payments shall not be made more than once a year.

Article 2. California Health Services Corps

124650. The director shall establish in the department, a California Health Services Corps. The purpose of the corps is to make available health personnel to rural areas that are presently receiving inadequate health services. The corps shall consist of physicians and surgeons, podiatrists, dentists, vision care providers, and other health professionals, such as nurse practitioners, physician assistants, nurses, dental hygienists, dental assistants, health educators, nutritionists, dietitians, health and nutrition aides, and other personnel as the director finds necessary to meet the purposes of the program.

124655. Members of the California Health Services Corps may be assigned to the following categories of health services programs:

(a) Any nonprofit primary care clinic or licensed health facility.

(b) Any health provider or group provider.

(c) Any county health program or facility.

(d) Any state health program or facility.

(e) Any federal health program.

Assignments may be made to a health provider or facility, to a health services development project established pursuant to Article 3 (commencing with Section 124700), or directly to an area in California where health services are inadequate.

124660. Assignments shall be made in accordance with the following:

(a) The authority of any person to supervise any member of the corps shall be subject to approval by the director.

(b) No member of the corps shall be placed in an assignment without the prior agreement of the person or governing board in charge of the health delivery program to which the corps member is assigned.

(c) Corps members directly assigned to rural areas or to state-operated projects shall be contract employees of the California Health Services Corps. Corps members assigned to projects with a nonstate provider or facility may be employees of the provider or facility if specified by contract between the state and the provider or facility. The state shall provide malpractice insurance coverage for all corps personnel.

(d) Local consumers shall be consulted in the placement of California Health Services Corps members.

(e) In making the assignment of a corps member, the director shall seek to match the characteristics and preferences of the

member with those of the area, population group, or medical facility where the member may be assigned to the maximum extent possible in order to increase the probability of the member remaining to serve the area, population group, or medical facility upon completion of his or her assignment period.

124665. The director shall, by regulation, specify the salary schedules, other terms and conditions of employment, and reimbursement policies with respect to the employment of corps members that shall be followed by institutions, providers, or programs where a member of the California Health Services Corps is assigned.

124670. Funds expended pursuant to this article may be used for any of the following purposes:

(a) Expenses of the department in administering the program.

(b) Salaries and employee benefits for members of the California Health Services Corps.

(c) Supplies, equipment, minor capital outlay, and minor renovations.

124675. Assignments shall be made by the department without regard to ability of residents in areas to pay.

Any provider or facility where a California Health Services Corps member is assigned, and any corps member, shall be required to seek third party reimbursements, including Medi-Cal and private insurance, for any person served by the corps member. Any such corps member, provider, or facility may be required to provide reports to the department concerning reimbursements and may be required to contribute all or part of the proceeds of reimbursements to the department for deposit in the State Treasury in accordance with regulations or contracts adopted by the department after regulations have been approved by the Director of Finance.

124680. No corps member may refuse needed service to any person because of inability to pay for such service, or refuse service to persons on account of their entitlement to medical benefits under Title XVIII or XIX of the United States Social Security Act.

124685. The director may, upon request, provide technical assistance to groups preparing applications for assignment of corps personnel.

Article 3. Health Services and Development Projects

124700. The department shall plan and put into operation a number of health services development projects. The purpose of the projects shall be to demonstrate effective ways of providing health care services in underserved rural health areas. The director shall make the final decision on approval of a project.

124705. Applications may be made for funds for health services development projects and the projects may be initiated and operated by any agency, including, but not limited to, the following:

(a) A community agency, including a National Health Services Corps site.

(b) An ongoing rural health program, including migrant health or American Indian health program.

(c) A family practice education program.

(d) A county health department.

(e) The department.

(f) Any health facility or licensed nonprofit primary care clinic.

124710. Projects may be in the form of grants or loans provided under contract between the department and the contracting nonprofit agency, or may be administered directly by the department.

124715. The department may assist community agencies to develop contract proposals.

124720. Project proposals shall be considered that address the health needs of rural populations, including, but not limited to, migratory and other agricultural workers, American Indians, and senior citizens, who have insufficient access to adequate levels of health care services due to geographical isolation or economic factors.

Projects that are approved shall accomplish one or more of the following:

(a) Provide primary health care, including preventive health services and diagnostic, treatment, referral, and followup services.

(b) Provide comprehensive health care, including specialized physician services, inpatient and outpatient facilities, laboratory and X-ray services, home health services, and other specialized services.

(c) Provide emergency medical services designed to meet the special problems of rural isolation.

(d) Provide transportation appropriate to achieving the goal of making health care services available to residents of rural areas.

(e) Provide electronic communication technology to improve health care delivery and emergency health services in the designated rural areas.

(f) Establish regional health systems, including linkage with both rural and urban health programs and facilities.

(g) Improve the quality of medical care and the administrative capabilities of agencies and management systems in rural areas.

(h) Provide health education programs in the designated rural areas, including health and nutrition education, and continuing education for health professionals.

(i) Promote nurse practitioner and physician assistants programs and other programs for training and placement of health

professionals in the designated areas to respond to rural manpower shortages.

124725. Project funding shall be for one year. Continuation of funding for a project shall depend on progress toward achieving the goals of the project. The director shall make the final decision to continue or discontinue a project. In evaluating the success of a project, the director shall take into account the number of additional persons who are receiving quality health care as a result of the operation of the project and the improvement in health status of the population served by the project.

124730. Each applicant shall form an advisory committee for the project. The advisory committee shall participate in all of the following:

(a) Planning the project.

(b) Reviewing the progress of the project.

(c) Proposing changes in the project.

(d) Planning for the continuation of the project after the grant period through self-sufficiency.

At least one-half of the members of the advisory committee shall be consumers, as defined by Public Law 93-641. The advisory committee shall include, where feasible, representatives of the health service agencies, the Seasonal Agricultural and Migratory Workers Advisory Committee, the American Indian Health Policy Panel, consumers selected from rural target populations, such as American Indians, senior citizens, Medi-Cal recipients, isolated rural residents, and agricultural and forestry workers, providers from rural areas, and persons with knowledge of rural areas from educational institutions, and state, county, and federal agencies.

124735. Each contract for a project shall require the contracting agency to seek third-party reimbursements, including Medi-Cal and private insurance, for any person served under the contract. Each contract shall require the contracting agency to provide reports to the department on reimbursements and may require the contracting agencies to contribute all or part of the proceeds of reimbursements to the department for deposit in the State Treasury in accordance with regulations to be adopted by the department after the regulations are approved by the Director of Finance.

124740. State-operated projects shall be established only in accordance with all of the following:

(a) The health of the population in a rural area would be substantially improved by the establishment of a project.

(b) There exists no local public or nonprofit agency willing and able to undertake the project.

(c) The project contains two or more of the elements specified in Section 124720.

A project may employ staff, and may purchase, rent, or lease supplies and equipment where required. A project may also rent or lease land and buildings where required.

Article 4. Coordination of Rural Health Programs

124750. The director shall ensure the coordination of state efforts in rural health in order to maximize effective use of scarce medical resources and to coordinate efforts to provide health services through the California Health Services Corps and health services development projects with existing program resources, including, but not limited to, migrant health programs, American Indian health programs, contract county health services programs, the National Health Service Corps, and other related programs administered by the department to ensure minimal duplication and maximum effectiveness.

124760. The Health Manpower Policy Commission shall establish a plan that integrates family practice residencies and other health sciences education programs established in rural areas pursuant to Article 8 (commencing with Section 31910) of Chapter 5 of Division 5 of Division 22 of the Education Code with the health services provided pursuant to Article 3 (commencing with Section 124700).

124765. The Health Manpower Policy Commission, in coordination with the Rural Health Section of the department, shall designate the geographical rural areas within California where unmet priority need for medical services exists.

124770. The director shall utilize the authority to establish health manpower pilot projects pursuant to Article 1 (commencing with Section 128125) of Chapter 3 of Part 3 of Division 107 to develop personnel with special health and medical skills that may effectively advance the objectives of the Primary Care Services Act (Section 27).

124775. Each proposal for health corps personnel or project application under Article 3 (commencing with Section 124700) shall be submitted to the appropriate county health officer or district health officer for review and recommendation. The review and recommendation shall be completed within 30 days of receipt. Any recommendations made shall be based upon the Health Systems Plan and Annual Implementation Plan as required for that area by Public Law 93-641.

124780. If the director decides to act contrary to the recommendation of a county or district health officer made pursuant to Section 124775, the director shall explain his or her action in writing to the appropriate board of supervisors.

124785. Nothing in the Primary Care Services Act (Section 27) shall affect the operation of local public health services contracted for by the department with other agencies pursuant to former Section 1157.

CHAPTER 6. SMALL AND RURAL HOSPITALS

124800. The Legislature finds and declares all of the following:

(a) Rural hospitals serve as the ''hub of health,'' and through that role attract and retain in their communities physicians, nurses, and other primary care providers. Because of economies of scale compounded by reimbursement reforms, many rural hospitals will close before the end of this decade. This will result in the departure of primary care providers and the loss of emergency medical services both to residents and persons traveling through the area. The smallest and most remote facilities are at highest risk.

(b) The rural hospital is often one of the largest employers in the community. The closure of such a hospital means the loss of a source of employment. This has an economic impact beyond the health sector. Further, economic development of a rural area is, in part, tied to the existence of a hospital. People, for example, tend not to retire to areas where there is not reasonable access to physician and hospital-based services.

(c) Rural hospitals, especially the smaller facilities, lack access to the sophisticated expertise necessary to deal with current reimbursement regulations and the associated bureaucracy.

(d) Most rural hospitals are unable to participate in programs that provide access to short- and long-term financing due to lender requirements for credit enhancement.

(e) Because of economies of scale compounded by regulations under Title 22 of the California Code of Regulations and other regulations, rural hospitals have high, fixed costs that, in the present reimbursement environment, cannot be offset by revenues generated from serving a relatively small population base. Further, in an economically depressed rural area, community contributions are not sufficient to offset deficits.

(f) Rural hospitals are an important link in the Medi-Cal program, and without special consideration that takes into account their unique circumstances, rural hospitals will be unable to continue providing services to Medi-Cal patients. This is especially true for outpatient services that are reimbursed at less than 60 percent of costs.

(g) While only a very small percentage of the Medi-Cal budget for inpatient and outpatient services is spent for services rendered by rural hospitals, their participation is essential to preserve the integrity of the entire Medi-Cal program.

124805. (a) The Legislature recognizes the need to strengthen, and in some cases salvage, rural hospitals to ensure that adequate access to services is provided to residents of rural areas as well as tourists and travelers who, at certain times, may outnumber the residents. Further, the Legislature recognizes that this will require a comprehensive approach. Therefore, the Legislature intends that:

(1) Expertise be provided to endangered rural hospitals to both of the following:

(A) Carry out a strategic assessment of potential business and diversification of service opportunities.

(B) Develop a specific plan of action when feasible.

(2) Access, when appropriate, be provided to special eligibility programs within the California Health Facilities Financing Authority.

(3) Short-term technical assistance be available on fiscal and program matters.

(4) The department continue to provide regulatory relief through program flexibility.

(5) Inpatient reimbursement limitations be modified so as not to single out rural hospitals for application.

(6) Reimbursement rates for outpatient services be set at a level that will provide incentives for rural hospitals to focus on the provision of outpatient services and that will reduce the financial losses incurred by the facilities in providing those services.

(b) The Legislature recognizes that for certain rural settings, an acute care hospital as defined in subdivision (a) of Section 1250 may no longer be cost-effective. Therefore, a rural alternative model that preserves the primary and emergency care systems must be identified, studied through demonstration projects, and developed as a new category of health facility.

(c) The Legislature recognizes that a rural alternative facility may not conform to what is now depicted in state or federal regulation. Therefore, to identify a model, implement demonstration projects, and establish the rural alternative hospital as a license category of health facility, a cooperative effort will be required between the department, the federal Health Care Financing Administration, and the health care industry. To this end, the Legislature intends that the department inform the federal Health Care Financing Administration of its interest in establishing the rural alternative hospital program and subsequently seek any necessary waivers.

124810. Unless the context otherwise requires, the definitions contained in this article govern the construction of this chapter.

124815. ''Department'' means the State Department of Health Services.

124820. ''High-risk rural hospital,'' means a hospital as defined in subdivision (a) of Section 124840 that can demonstrate through audited and interim financial reports and projections that it is probable that it will need to cease operations within one year.

124825. The department shall, in consultation with an organization of interest, develop recommendations on the type and scope of technical assistance that needs to be available to small and rural hospitals from within the department. The recommendations

of an organization of interest shall be given consideration by the department in development of subsequent budgets.

124830. ''Director'' means the State Director of Health Services.

124835. ''Organizations of interest'' means nonprofit organizations that typically represent the interests of hospitals and health systems.

124840. ''Small and rural hospital'' means an acute care hospital that meets either of the following criteria:

(a) Meets the criteria for designation within peer group six or eight, as defined in the report entitled Hospital Peer Grouping for Efficiency Comparison, dated December 20, 1982.

(b) Meets the criteria for designation within peer group five or seven and has no more than 76 acute care beds and is located in an incorporated place or census designated place of 15,000 or less population according to the 1980 federal census.

124845. ''Strategically located'' means a hospital as defined in subdivision (a) of Section 124840 that, by virtue of its location, or the location of a major portion of the hospital's service area, can demonstrate that its existence is essential to provide health services including emergency services and stabilization to the service area and transient populations.

124850. The department shall provide expert technical assistance to strategically located, high-risk rural hospitals to assist the hospitals in carrying out an assessment of potential business and diversification of service opportunities. In providing the technical assistance on business opportunities, the department shall consult with the Department of Commerce and other appropriate agencies. The high-risk rural hospital, in cooperation with the department, may develop a short-term plan of action if, in its opinion, the results of the assessment so indicate. The department, in consultation with an organization of interest, shall do all of the following:

(a) Establish a process for identifying strategically located, high-risk rural hospitals and reviewing requests from the hospitals for assistance.

(b) Develop a standard format for the strategic assessment.

(c) Develop a model action plan.

(d) Establish criteria for review of action plans.

(e) Request input and assistance from organizations of interest.

(f) Make the strategic assessment format and model action plan available to all small and rural hospitals.

124855. Any small and rural hospital may apply to the California Health Facilities Financing Authority for consideration under special eligibility programs if the hospital has successfully completed the assessment and developed an action plan.

124860. (a) The department, after consultation with an organization of interest, shall select two strategically located, high-risk rural hospitals to plan and implement rural alternative

hospital demonstration projects. To the extent possible, the department shall choose two demonstration sites, with one site serving an isolated mountainous area where access may be impeded by adverse weather conditions, and one site located in a rural agricultural community. Hospitals shall be selected on the basis of their interest in becoming a demonstration site and on their suitability as model rural alternative hospitals. The demonstration projects shall include, but not be limited to, identification of the following:

(1) Appropriate mix and type of services to be provided locally and obtained on referral.

(2) Types and numbers of personnel required.

(3) Probability of, and the amount of, reimbursement under current regulations.

(4) Statutory and regulatory changes necessary to license the facility and maximize reimbursement.

(b) In administering the rural alternative hospital demonstration project, the department shall do all of the following:

(1) Establish two demonstration sites on or before January 1, 1990, and operate the projects for a period of up to 18 months.

(2) Grant exceptions to the licensure requirements for general acute care hospitals that are necessary to serve the purposes of this section when the granting of the exceptions do not jeopardize the health and welfare of patients.

(3) Convey to the Federal Health Care Financing Administration its intent to establish the rural alternative hospital demonstration project and seek any necessary appropriate waivers.

(4) Consider requests for grant funds made by demonstration site hospitals pursuant to subdivision (a) of Section 1188.86 as meeting criteria for priority funding.

(5) Monitor and evaluate demonstration site projects as to the applicability of these models for statewide application.

(c) The department, based on interim findings from the demonstration projects, shall do either of the following:

(1) Prepare and adopt regulations establishing the rural alternative hospital as a licensed health facility by January 1, 1992.

(2) Submit to the Legislature by that date a report detailing why a category of health facility should not be established.

124865. The department shall continue to provide regulatory relief when appropriate through program flexibility for such items as staffing, space, and physical plant requirements.

124870. (a) The department shall adopt regulations that will provide for an increase in reimbursement rates for outpatient services rendered to Medi-Cal patients by small and rural hospitals, as defined in Section 124840, over and above those reimbursement rates specified in Section 51509 of the California Code of Regulations. The amount of this increase shall be governed by the funding

allocated for this specific purpose in the Budget Act, or in another specific appropriation measure.

(b) The rate adjustment authorized by subdivision (a) shall be allocated to eligible hospitals as follows:

(1) A separate percentage increase shall be calculated for minimum floor and nonminimum floor hospitals based on the ratio of each small and rural hospitals' Medi-Cal outpatient payments to the total of all small and rural hospitals' Medi-Cal outpatient payments during the preceding calendar year, as determined by the department. The percentage rate increase for minimum floor hospitals shall be 125 percent of the rate increase percentage calculated for nonminimum floor hospitals. The combined rate increases for minimum floor and nonminimum floor hospitals shall not exceed the funds appropriated for this purpose.

(2) For purposes of this section, ''minimum floor hospital'' means a hospital (A) where Medi-Cal payments for outpatient services during the preceding calendar year were less than $^1/_2$ percent of the total of Medi-Cal payments for outpatient services rendered by all small and rural hospitals during that period and (B) where the total gross patient revenue from all sources during that period was less than two million five hundred thousand dollars ($2,500,000).

(3) For purposes of this section, ''nonminimum floor hospital'' means a hospital (A) where Medi-Cal payments for outpatient services during the preceding calendar year equaled or exceeded $^1/_2$ percent or of the total of Medi-Cal payments for outpatient services rendered by all small and rural hospitals during that period or (B) where the total gross patient revenue from all sources during that period was two million five hundred thousand dollars ($2,500,000) or more.

(c) For the purpose of calculating the percentage increase, if any eligible hospital had less than a full year of operation upon which to determine the ratio of Medi-Cal expenditures as defined in paragraph (1) of subdivision (b), the department shall extrapolate the Medi-Cal paid claims expenditures for that hospital to estimate a full year's Medi-Cal claims expenditure.

(d) Payment under this section shall be contingent upon submission of approved claims for Medi-Cal outpatient services rendered after January 1, 1989.

(e) The Director of Health Services shall adopt emergency regulations pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code to implement the rate adjustments required under this section. The adoption of these regulations shall be deemed an emergency and necessary for the immediate preservation of the public peace, health, or safety. Notwithstanding any provision of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, emergency regulations adopted by the

department to implement the rate adjustments required under this section shall not be subject to any review, approval, or disapproval by the Office of Administrative Law at any stage of the rulemaking process. These regulations shall become effective immediately upon their filing with the Secretary of State.

(f) Notwithstanding any other provision of law, reimbursement rates adopted pursuant to this section shall not exceed the hospital's usual and customary charges for services rendered.

(g) The department shall maximize federal financial participation in implementing this section.

(h) This section shall become operative July 1, 1989.

CHAPTER 7. GRANTS IN AID FOR CLINICS

Article 1. Clinics

124875. The Legislature finds and declares that:

(a) In California there are approximately 300 community clinics and free clinics that provide primary health care at low cost for a significant portion of the medically underserved population.

(b) These clinics account for more than 3,000,000 patient visits annually.

(c) Increasingly large caseloads, the debilitating effects of inflation on purchased goods and services, and a lack of financial resources are forcing many community and free clinics to curtail services needed in their communities.

(d) Recognizing the contribution of community and free clinics to the health care of Californians and the contribution of the clinics to lowering the costs of health care, it is in the interest of the people of this state to ensure continuation of clinic programs by providing necessary funding.

124880. The department shall conduct a program of grants-in-aid for the following purposes:

(a) To assist in stabilizing the health care operations of community clinics and free clinics that provide a wide range of primary health care services.

(b) To fund innovative and creative programs of such clinics designed to provide a high quality of health services at minimum cost.

Eligibility for grants shall be limited to community clinics, free clinics, clinics exempt from licensure under subdivision (c) of Section 1206, and any nonprofit corporation that is comprised of not less than three such clinics having a combined service area covering an entire county or more. Grants authorized pursuant to this article shall be limited in purpose to defraying operating expenses of the recipient clinic, including personnel costs, and for technical assistance provided to the recipient. Grants shall not be made or used for purchase of equipment, facility renovations, or purchase of land or

buildings. As a condition to making a grant pursuant to this chapter, the director shall require the applicant to match not less than 20 or more than 40 percent of the amount granted. The required matching funds shall be determined by the director, based upon the ability of the applicant to provide matching funds. The required match may be in cash or in-kind contributions, or a combination of both. In-kind contributions may include, but shall not be limited to, staff and volunteer services. The director may waive all or a portion of the grantee match in individual cases of demonstrated hardship if the director determines that making the grant would effectively serve the purposes of this chapter. The director shall adopt criteria to be applied in determining whether to grant requests for waivers.

124885. The department shall annually receive and process grant applications submitted by eligible applicants, and shall allocate grant moneys in accordance with the policies and priorities adopted pursuant to this article. Individual grants shall be limited to a maximum of sixty thousand dollars ($60,000), including grants to nonprofit corporations comprised of more than one clinic. However, grants may be renewed on an annual basis, subject to the submission and review of an annual renewal application, that shall be considered with, and subject to the same priorities as, new applications. No applicant shall receive more than one grant in any year.

Each grant shall be subject to a contract between the department and the grantee prescribing the services to be provided by the grantee thereunder and other conditions of the grant. A contract may provide for periodic advance payments for services to be performed, but in no event shall advance payments exceed 25 percent of the grant.

124890. In developing policies and priorities pertaining to the allocation of grant funds, the department shall give primary consideration to the following factors:

(a) The applicant’s need for funds to continue its current level of operation.

(b) The applicant’s long-term prospects for financial stability.

(c) The quality of services provided.

(d) The high-risk or underserved population groups currently being served by the applicant.

All of the above factors being present, clinics primarily serving population groups determined by the director to be medically underserved shall be entitled to first consideration in the allocation of grant funds.

The department shall adopt guidelines for establishment of grant-supported activities, including criteria for evaluation of each activity and monitoring to assure compliance with grant conditions and applicable regulations of the department. The guidelines shall be developed in consultation with the Primary Care Clinics Advisory

Committee and other advisory committees and persons as the department determines are appropriate.

Article 2. Primary Care

124900. (a) The State Department of Health Services shall select primary care clinics that are licensed under paragraph (1) or (2) of subdivision (a) of Section 1204, or are exempt from licensure under subdivision (c) of Section 1206, to be reimbursed for delivering medical services, including preventative health care, and smoking prevention and cessation health education, to program beneficiaries. In selecting primary care clinics for reimbursement, the department shall give priority to clinics that provide services in a medically underserved area or to a medically underserved population as determined by the department.

(b) As a part of the award process for funding pursuant to this article, the department shall take into account the availability of primary care services in the various geographic areas of the state. The department shall determine which areas within the state have populations which have clear and compelling difficulty in obtaining access to primary care. The department shall consider proposals from new and existing eligible providers to extend clinic services to these populations. The department shall give equal consideration to all applicants, regardless of whether or not they have previously been funded for this program by the department.

(c) Each primary care clinic applying for funds pursuant to this article shall demonstrate that the funds shall be used to expand medical services, including preventative health care, and smoking prevention and cessation health education, for program beneficiaries based on the primary care clinic's projected increase in outpatient visits as compared to the outpatient visits provided in the 1988 calendar year.

(d) (1) For purposes of this article, an outpatient visit shall include, diagnosis and medical treatment services, including the associated pharmacy, X-ray, and laboratory services, and prevention health and case management services that are needed as a result of the outpatient visit. For a new patient, an outpatient visit shall also include a health assessment encompassing an assessment of smoking behavior and the patient's need for appropriate health education specific to related tobacco use and exposure.

(2) ''Case management'' includes, for this purpose, the management of all physician services, both primary and specialty, and arrangements for hospitalization, postdischarge care, and followup care.

(e) (1) Payment shall be on a per visit basis at a rate that is determined by the department to be appropriate for an outpatient

visit as defined in this section, not to exceed sixty-five dollars ($65) per outpatient visit.

In developing a statewide uniform rate for an outpatient visit as defined in this article, the department shall consider existing rates of payments for comparable outpatient visits. The department shall review the outpatient visit rate on an annual basis.

(2) The department may also pay for case management services, and may establish a separate, uniform statewide rate for these services which shall be paid in addition to the outpatient visit rate. The rate for case management shall not exceed 5 percent of the rate for an outpatient visit. If, upon establishment of the outpatient visit rate, the department determines that the rate of payment for case management is not adequate to cover the cost of the service, the department may increase the rate for case management, but the rate shall not exceed 10 percent of the outpatient visit rate.

In developing the separate, uniform statewide rate for case management, the department shall take into account rates paid to providers for case management services under any other program funded in whole or in part by the state or federal government. The rates shall be published in accordance with subdivision (e). The department shall review the case management rate on an annual basis.

(3) A primary care clinic may, at its option, and with department approval, provide and be paid for both outpatient visits and case management services.

(f) Not later than January 15 of each year, the department shall adopt and provide each clinic with a schedule for programs under this article, including the date for notification of availability of funds, the deadline for the submission of a completed application, and an anticipated contract award date for successful applicants.

(g) In administering the program created pursuant to this article, the department shall utilize the Medi-Cal program statutes and regulations pertaining to program participation standards, medical and administrative recordkeeping, the ability of the department to monitor and audit clinic records pertaining to program services rendered to program beneficiaries and take recoupments or recovery actions consistent with monitoring and audit findings, and the provider’s appeal rights. Each primary care clinic applying for program participation shall certify that it will abide by these statutes and regulations and other program requirements set forth in this article.

124905. For purposes of this article, a ‘‘program beneficiary’’ is any person whose income level is at or below 200 percent of the federal poverty level. Program beneficiaries shall not be required to provide any copayment for services that are funded pursuant to this article. The department shall annually adjust this income standard to reflect any changes in the federal poverty level. Payment pursuant

to this article shall be made only for services for which payment will not be made through any private or public third-party reimbursement.

124910. (a) Each eligible entity applying for funds under this article, as specified in subdivision (a) of Section 124900, shall demonstrate in its application that it is providing primary care services, to a medically underserved area or population. Any applicant who has applied for and received a federal or state designation for serving a medically underserved area or population shall be deemed to meet the requirements of subdivision (a) of Section 124900.

(b) Each applicant shall also demonstrate to the satisfaction of the department that the proposed services supplement, and do not supplant, those primary care services to program beneficiaries that are funded by any county, state, or federal program.

(c) Each applicant shall demonstrate that it is an active Medi-Cal provider by having a Medi-Cal provider number and diligently billing the Medi-Cal program for services rendered to Medi-Cal eligible patients during the past three months. This subdivision shall not apply to clinics that are not currently Medi-Cal providers, and were funded participants pursuant to this article during the 1993–94 fiscal year.

(d) Each application shall be evaluated by the state department prior to funding to determine all of the following:

(1) The number of program beneficiaries who are in the service area of the applicant, and the number of visits, the scope of primary care services, and the proposed total budget for outpatient visits provided to beneficiaries under this article. The applicant shall provide its most recently audited financial statement to verify budget information.

(2) The applicant's ability to deliver basic primary care to program beneficiaries.

(3) A description of the applicant's operational quality assurance program.

(4) The applicant's use of protocols for the most common diseases in the population served under this article.

124915. Services funded pursuant to this article shall be limited to the extent that funds are appropriated for this purpose.

124920. (a) The department shall utilize existing contractual claims processing services in order to promote efficiency and to maximize use of funds.

(b) The department shall certify which primary care clinics are selected to participate in the program for each specific fiscal year, and how much in program funds each selected primary care clinic will be allocated each fiscal year.

(c) The department shall make an advance payment for funds appropriated for services provided under this article to the selected

primary care clinics in an amount not to exceed 25 percent of a clinic's allocation for visits provided to program beneficiaries. These advance payments may only be made during the 1994–95 fiscal year.

(d) In the event the department's contractual claims processing service is not ready to accept and timely adjudicate program claims by August 15, 1994, the department shall reimburse clinic billings in excess of the advance payment until such time as the contractual claims processing mechanism is viable.

(e) The department shall pay claims from selected primary care clinics up to each clinic's annual allocation, adjusted for advance payments made under subdivision (c) and claims reimbursement made under subdivision (d). Once a clinic has exhausted its annual allocation, the state shall stop paying its program claims.

(f) The department may adjust any selected primary care clinic's allocation to take into account:

(1) An increase in program funds appropriated for the fiscal year.

(2) A decrease in program funds appropriated for the fiscal year.

(3) A clinic's projected inability to fully spend its allocation within the fiscal year.

(4) Surplus funds reallocated from other selected primary care clinics.

(g) The department shall notify all affected primary care clinics in writing prior to adjusting selected primary care clinics' allocations.

(h) Cessation of program payments under subdivision (e) or adjustment of selected primary care clinic's allocations under subdivision (f) shall not be subject to the Medi-Cal appeals process referenced in subdivision (g) of Section 124900.

124925. The department shall submit a report on its activities under this article to the Legislature no later than January 1, 1991, and annually thereafter.

124927. Final payment adjustments reflecting advance payments pursuant to this article shall be made pursuant to a plan of financial adjustment that is approved by the state department and submitted to the Controller.

124930. (a) For any condition detected as part of a child health and disability prevention screen for any child eligible for services under Section 140395, if the child was screened by the clinic or upon referral by a child health and disability prevention program provider, unless the child is eligible to receive care with no share of cost under the Medi-Cal program, is covered under another publicly funded program, or the services are payable under private coverage, a clinic shall, as a condition of receiving funds under this article, do all of the following:

(1) Insofar as the clinic directly provides these services for other patients, provide medically necessary followup treatment, including prescription drugs.

(2) Insofar as the clinic does not provide treatment for the condition, arrange for the treatment to be provided.

(b) (1) If any child requires treatment the clinic does not provide, the clinic shall arrange for the treatment to be provided, and the name of that provider shall be noted in the patient's medical record.

(2) The clinic shall contact the provider or the patient or his or her guardian, or both, within 30 days after the arrangement for the provision of treatment is made, and shall determine if the provider has provided appropriate care, and shall note the results in the patient's medical record.

(3) If the clinic is not able to determine, within 30 days after the arrangement for the provision of treatment is made, whether the needed treatment was provided, the clinic shall provide written notice to the county child health and disability prevention program director, and shall also provide a copy to the state director of the program.

(c) (1) For the 1994–95 and 1995–96 fiscal years, inclusive, the state department may establish a reimbursement program for referral case management services required pursuant to subdivision (b), provided to a child pursuant to subdivision (a).

(2) The department may utilize funds appropriated for the purposes of this article for reimbursements under paragraph (1).

(3) (A) The department shall evaluate the effectiveness of the referral case management program, including the extent to which children actually receive appropriate treatment for conditions detected as part of the Child Health and Disability Prevention Program examination.

(B) The department shall report the evaluation required by subparagraph (A) to the health policy committee of each house of the Legislature no later than April 1 of each year.

124935. (a) For the 1990–91 to 1993–94 fiscal years, inclusive, the department shall establish and maintain a primary care clinic risk pool in which the department shall assume responsibility to pay for dental treatment of a child by the primary care clinic subsequent to the clinic's meeting the requirements of subdivision (b) of Section 124930.

(b) Payment under this section shall be available when the clinic has done either of the following:

(1) Detected the condition as part of a child health and disability prevention screen pursuant to Section 124930 and has directly provided the treatment.

(2) Provided the treatment upon referral from another child health and disability prevention provider.

124940. The use of funds granted pursuant to this article for use by school-based clinics shall be limited to those school-based clinics that were licensed and in operation before January 1, 1990.

124945. Any entity or provider that receives funds pursuant to this article shall expend those funds in accordance with the requirements of Article 2 (commencing with Section 30121) of Chapter 2 of Part 13 of Division 2 of the Revenue and Taxation Code.

124950. This article shall remain operative only until July 1, 1996, and shall remain in effect only until January 1, 1997, and as of that date is repealed, unless a later enacted statute, which is effective on or before January 1, 1997, deletes or extends that date.

PART 5. HEREDITARY DISEASES/CONGENITAL DEFECTS

CHAPTER 1. GENETIC PREVENTION SERVICES

Article 1. Hereditary Disorders Act

124975. The Legislature hereby finds and declares that:

(a) Each person in the State of California is entitled to health care commensurate with his or her health care needs, and to protection from inadequate health services not in the person's best interests.

(b) Hereditary disorders, such as sickle cell anemia, cystic fibrosis, and hemophilia, are often costly, tragic, and sometimes deadly burdens to the health and well-being of the citizens of this state.

(c) Detection through screening of hereditary disorders can lead to the alleviation of the disability of some hereditary disorders and contribute to the further understanding and accumulation of medical knowledge about hereditary disorders that may lead to their eventual alleviation or cure.

(d) There are different severities of hereditary disorders, that some hereditary disorders have little effect on the normal functioning of individuals, and that some hereditary disorders may be wholly or partially alleviated through medical intervention and treatment.

(e) All or most persons are carriers of some deleterious recessive genes that may be transmitted through the hereditary process, and that the health of carriers of hereditary disorders is substantially unaffected by that fact.

(f) Carriers of most deleterious genes should not be stigmatized and should not be discriminated against by any person within the State of California.

(g) Specific legislation designed to alleviate the problems associated with specific hereditary disorders may tend to be inflexible in the face of rapidly expanding medical knowledge, underscoring the need for flexible approaches to coping with genetic problems.

(h) State policy regarding hereditary disorders should be made with full public knowledge, in light of expert opinion and should be constantly reviewed to consider changing medical knowledge and ensure full public protection.

(i) The extremely personal decision to bear children should remain the free choice and responsibility of the individual, and should not be restricted by the state.

(j) Participation of persons in hereditary disorders programs in the State of California should be wholly voluntary, except for initial screening for phenylketonuria (PKU) and other genetic disorders treatable through the California newborn screening program. All information obtained from persons involved in hereditary disorders programs in the state should be held strictly confidential.

(k) In order to minimize the possibility for the reoccurrence of abuse of genetic intervention in hereditary disorders programs, all programs offering screening programs for heredity disorders shall comply with the principles established in the Hereditary Disorders Act (Section 27). The Legislature finds it necessary to establish a uniform statewide policy for the screening for heredity disorder in the State of California.

124980. The director shall establish any regulations and standards for hereditary disorders programs as the director deems necessary to promote and protect the public health and safety, in accordance with the principles established pursuant to this section. These principles shall include, but not be limited to, the following:

(a) The public, especially communities and groups particularly affected by programs on hereditary disorders, should be consulted before any regulations and standards are adopted by the department.

(b) The incidence, severity and treatment costs of each hereditary disorder and its perceived burden by the affected community should be considered; and that where appropriate, state and national experts in the medical, psychological, ethical, social, and economic effects or programs for the detection and management of hereditary disorders be consulted by the department.

(c) Information on the operation of all programs on hereditary disorders within the state, except for confidential information obtained from participants in the programs, be open and freely available to the public.

(d) Clinical testing procedures established for use in programs, facilities, and projects be accurate, provide maximum information, and that the testing procedures selected produce results that are subject to minimum misinterpretation.

(e) No test or tests shall be performed on any minor over the objection of the minor’s parents or guardian, nor may any tests be performed unless the parent or guardian is fully informed of the purposes of testing for hereditary disorders, and is given reasonable opportunity to object to the testing.

(f) No testing, except initial screening for PKU and other diseases that may be added to the newborn screening program, shall require mandatory participation, and no testing programs shall require restriction of childbearing, and participation in a testing program

shall not be a prerequisite to eligibility for, or receipt of, any other service or assistance from, or to participate in, any other program, except where necessary to determine eligibility for further programs of diagnoses of or therapy for hereditary conditions.

(g) Counseling services for hereditary disorders be available through the program or a referral source for all persons determined to be or who believe themselves to be at risk for a hereditary disorder as a result of screening programs; the counseling is nondirective, emphasizes informing the client, and not require restriction of childbearing.

(h) All participants in programs on hereditary disorders be protected from undue physical and mental harm, and except for initial screening for PKU and other diseases that may be added to newborn screening programs, be informed of the nature of risks involved in participation in the programs, and those determined to be affected with genetic disease be informed of the nature, and where possible, the cost of available therapies or maintenance programs, and be informed of the possible benefits and risks associated with such therapies and programs.

(i) All testing results and personal information generated from hereditary disorders programs be made available to an individual over 18 years of age, or to the individual's parent or guardian. If the individual is a minor or incompetent, all testing results that have positively determined the individual to either have, or be a carrier of, a heredity disorder shall be given through a physician or other source of health care.

(j) All testing results and personal information from hereditary disorders programs obtained from any individual, or from specimens from any individual, be held confidential and be considered a confidential medical record except for such information as the individual, parent, or guardian consents to be released; provided that the individual is first fully informed of the scope of the information requested to be released, of all of the risks, benefits, and purposes for the release, and of the identity of those to whom the information will be released or made available, except for statistical data compiled without reference to the identity of any individual, and except for research purposes, provided that pursuant to 45 Code of Federal Regulations Section 46.101 et seq. entitled ''Protection of Human Subjects,'' the research has first been reviewed and approved by an institutional review board that certifies the approval to the custodian of the information and further certifies that in its judgment the information is of such potentially substantial public health value that modification of the requirement for legally effective prior informed consent of the individual is ethically justifiable.

(k) An individual whose confidentiality has been breached as a result of any violation of the provisions of the Hereditary Disorders Act (Section 27) may recover compensatory damages, and in

addition, may recover civil damages not to exceed ten thousand dollars ($10,000), reasonable attorney's fees, and the costs of litigation.

124985. A violation of any of the provisions of the Hereditary Disorders Act (Section 27) or any of the regulations adopted pursuant to that act shall be punishable as a misdemeanor.

124990. For the purposes of the Hereditary Disorders Act (Section 27), hereditary disorders programs shall include, but not be limited to, all antenatal, neonatal, childhood, and adult screening programs, and all adjunct genetic counseling services.

124995. The following programs shall comply with the regulations established pursuant to the Hereditary Disorders Act (Section 27):

(a) The California Children's Services Program under Article 5 (commencing with Section 123800) of Chapter 3 of Part 2.

(b) Prenatal testing programs for newborns under Sections 125050 to 125065, inclusive.

(c) Medical testing programs for newborns under the Maternal and Child Health Program Act (Section 27).

(d) Programs of the genetic disease unit under Section 125000.

(e) Child health disability prevention programs under Article 6 (commencing with Section 124025) of Chapter 3 of Part 2 and Section 120475.

(f) Genetically handicapped person's programs under Article 1 (commencing with Section 125125) of Chapter 2.

(g) Medi-Cal Benefits Program under Article 4 (commencing with Section 14131) of Chapter 7 of Part 3 of Division 9 of the Welfare and Institutions Code.

Article 2. Newborn Screening

125000. (a) It is the policy of the State of California to make every effort to detect, as early as possible, phenylketonuria and other preventable heritable or congenital disorders leading to mental retardation or physical defects.

The department shall establish a genetic disease unit, that shall coordinate all programs of the department in the area of genetic disease. The unit shall promote a statewide program of information, testing, and counseling services and shall have the responsibility of designating tests and regulations to be used in executing this program.

The information, tests, and counseling for children shall be in accordance with accepted medical practices and shall be administered to each child born in California once the department has established appropriate regulations and testing methods. The information, tests, and counseling for pregnant women shall be in accordance with accepted medical practices and shall be offered to

each pregnant woman in California once the department has established appropriate regulations and testing methods. These regulations shall follow the standards and principles specified in Section 124980. The department may provide laboratory testing facilities or contract with any laboratory that it deems qualified to conduct tests required under this section. However, notwithstanding Section 125005, provision of laboratory testing facilities by the department shall be contingent upon the provision of funding therefor by specific appropriation to the Genetic Disease Testing Fund enacted by the Legislature. If moneys appropriated for purposes of this section are not authorized for expenditure to provide laboratory facilities, the department may nevertheless contract to provide laboratory testing services pursuant to this section and shall perform laboratory services, including, but not limited to, quality control, confirmatory, and emergency testing, necessary to ensure the objectives of this program.

(b) The department shall charge a fee for any tests performed pursuant to this section. The amount of the fee shall be established and periodically adjusted by the director in order to meet the costs of this section.

(c) The department shall inform all hospitals or physicians and surgeons, or both, of required regulations and tests and may alter or withdraw any of these requirements whenever sound medical practice so indicates.

(d) This section shall not apply if a parent or guardian of the newborn child objects to a test on the ground that the test conflicts with his or her religious beliefs or practices.

(e) The genetic disease unit is authorized to make grants or contracts or payments to vendors approved by the department for all of the following:

(1) Testing and counseling services.

(2) Demonstration projects to determine the desirability and feasibility of additional tests or new genetic services.

(3) To initiate the development of genetic services in areas of need.

(4) To purchase or provide genetic services from any sums as are appropriated for this purpose.

(f) The genetic disease unit shall evaluate and prepare recommendations on the implementation of tests for the detection of hereditary and congenital diseases, including, but not limited to, cystic fibrosis and congenital adrenal hyperplasia. The genetic disease unit shall also evaluate and prepare recommendations on the availability and effectiveness of preventative followup interventions, including the use of specialized medically necessary dietary products.

It is the intent of the Legislature that funds for the support of the evaluations and recommendations required pursuant to this

subdivision, and for the activities authorized pursuant to subdivision (e), shall be provided in the annual Budget Act appropriation from the Genetic Disease Testing Fund.

(g) Health care providers that contract with a prepaid group practice health care service plan that annually has at least 20,000 births among its membership, may provide, without contracting with the department, any or all of the testing and counseling services required to be provided under this section or the regulations adopted pursuant thereto, if the services meet the quality standards and adhere to the regulations established by the department and the plan pays that portion of a fee established under this section that is directly attributable to the department's cost of administering the testing or counseling service and to any required testing or counseling services provided by the state for plan members. The payment by the plan, as provided in this subdivision, shall be deemed to fulfill any obligation the provider or the provider's patient may have to the department to pay a fee in connection with the testing or counseling service.

(h) The adoption of regulations pursuant to this section shall be deemed to be an emergency, and necessary for the immediate preservation of the public peace, health, safety, and general welfare. Notwithstanding subdivision (h) of Section 11346.1 and Section 11349.6 of the Government Code, the director shall transmit regulations adopted pursuant to this section directly to the Secretary of State for filing. The regulations shall be filed by the Secretary of State as emergency regulations and shall become effective immediately.

(i) The department may appoint experts in the area of genetic screening, including, but not limited to, cytogenetics, molecular biology, prenatal, specimen collection, and ultrasound to provide expert advice and opinion on the interpretation and enforcement of regulations adopted pursuant to this section. These experts shall be designated agents of the state with respect to their assignments. These experts shall receive no salary, but shall be reimbursed for expenses associated with the purposes of this section. All expenses of the experts for the purposes of this section shall be paid from the Genetic Disease Testing Fund.

(j) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the department pursuant to this section shall not be repealed by the Office of Administrative Law and shall remain in effect until revised or repealed by the department.

125005. The Genetic Disease Testing Fund is continued in existence as a special fund in the State Treasury. All moneys collected by the department under Section 125000 shall be deposited in the Genetic Disease Testing Fund, that is continuously appropriated to the department to carry out the purposes of Section 125000.

It is the intent of the Legislature that the program carried out pursuant to Section 125000 be fully supported from fees collected for such testing.

Article 3. Sickle Cell Anemia

125025. It is the policy of the State of California to make every effort to detect, as early as possible, sickle cell anemia, a heritable disorder that leads to physical defects.

The department shall have the responsibility of designating tests and regulations to be used in executing this policy. These tests shall be in accordance with accepted medical practices.

Testing for sickle cell anemia may be conducted at the following times:

(a) Upon first enrollment of a child at an elementary school in this state, the child may be tested.

(b) For any child not tested pursuant to subdivision (a), upon first enrollment at a junior high school or senior high school in this state, as the case may be, the child may be tested.

(c) Upon application of any person for a license to marry, the parties seeking to be married may be tested.

(d) At any other times that the department may designate.

This section shall not apply if a parent or guardian of a minor child sought to be tested or any adult sought to be tested objects to the test on the ground that the test conflicts with his or her religious beliefs or practices.

125030. The department may require that a test be given for sickle cell anemia pursuant to Section 125025 to any identifiable segment of the population that the department determines is susceptible to sickle cell anemia at a disproportionately higher ratio than is the balance of the population.

125035. The department is authorized to make grants or contracts for demonstration projects to determine the feasibility of alternate methods of testing for sickle cell anemia, to provide counseling services, to evaluate the social consequences of the identification of sickle cell trait carriers, to provide training in genetic counseling, and to conduct research on the prevention of sickle cell anemia.

Article 4. Prenatal Testing

125050. The department shall administer a statewide program for the prenatal testing for genetic disorders and birth defects, including, but not limited to, ultrasound, amniocentesis, chorionic villus sampling, and blood testing for genetic disorders and birth defects.

125055. The department shall:

(a) Establish criteria for eligibility for the prenatal testing program. Eligibility shall include definition of conditions and

circumstances that result in a high risk of a detectable genetic disorder or birth defect.

(b) Develop an education program designed to educate physicians and surgeons and the public concerning the uses of prenatal testing and the availability of the program.

(c) Ensure that genetic counseling be given in conjunction with prenatal testing at the approved prenatal diagnosis centers.

(d) Designate sufficient prenatal diagnosis centers to meet the need for these services. Prenatal diagnosis centers shall have equipment and staff trained and capable of providing genetic counseling and performing prenatal diagnostic procedures and tests, including the interpretation of the results of the procedures and tests.

(e) Administer a program of subsidy grants for approved nonprofit prenatal diagnosis centers. The subsidy grants shall be awarded based on the reported number of low-income women referred to the center, the number of prenatal diagnoses performed in the previous year at that center, and the estimated size of unmet need for prenatal diagnostic procedures and tests in its service area. This subsidy shall be in addition to fees collected under other state programs.

(f) Establish any rules, regulations, and standards for prenatal diagnostic testing and the allocation of subsidies as the director deems necessary to promote and protect the public health and safety and to implement the Hereditary Disorders Act (Section 27).

125060. The participation by any individual in the prenatal testing program shall be wholly voluntary and shall not be a prerequisite to eligibility for, or receipt of, any other service or assistance from, or to participation in, any other program.

125065. All prenatal diagnosis centers shall meet standards developed by the department and shall agree to accept patients from state funded or administered programs, including, but not limited to, Medi-Cal, Regional Centers, Maternal and Child Health, California Children's Services, Genetically Handicapped Persons Program, and Family Planning. Only prenatal diagnosis centers meeting standards developed by the department shall be eligible for reimbursement under these state programs.

125070. (a) Laboratories licensed by the Department of Health Services shall not offer the maternal serum-alpha fetoprotein screening test for prenatal detection of neural tube defects of the fetus until the department has developed regulations, under the authorization granted by Section 124980. However, laboratories providing this testing, as of July 21, 1983, may continue to provide this testing until these regulations become operative. The department shall adopt regulations pursuant to this section.

(b) The adoption of regulations pursuant to this section shall be deemed to be an emergency, and necessary for the immediate preservation of the public peace, health, safety, and general welfare.

Notwithstanding subdivision (h) of Section 11346.1 and Section 11349.6 of the Government Code, the director shall transmit regulations adopted pursuant to this section directly to the Secretary of State for filing. The regulations shall be filed by the Secretary of State as emergency regulations and shall become effective immediately.

(c) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, any emergency regulations adopted by the department pursuant to this section shall not be repealed by the Office of Administrative Law and shall remain in effect until revised or repealed by the department.

125075. Every licensed physician and surgeon or other person attending a newborn infant diagnosed as having had rhesus (Rh) isoimmunization hemolytic disease shall report the condition to the department on report forms prescribed by the department.

125080. A licensed physician and surgeon or other person engaged in the prenatal care of a pregnant woman or attending the woman at the time of delivery shall obtain or cause to be obtained a blood specimen of the woman. Prior to obtaining the blood specimen, the woman shall be notified of the fact that the blood specimen is going to be obtained. If the blood specimen is not obtained prior to delivery, it shall be obtained at the time of delivery.

125085. (a) A blood specimen obtained pursuant to Section 125080 shall be submitted to a clinical laboratory licensed by the department or to an approved public health laboratory for a determination of rhesus (Rh) blood type and the results shall be reported to both of the following:

(1) The physician and surgeon or other person engaged in the prenatal care of the woman or attending the woman at the time of delivery.

(2) The woman tested.

(b) In addition, a blood specimen obtained pursuant to Section 125080 shall be submitted to a clinical laboratory licensed by the department or to an approved public health laboratory for a test to determine the presence of hepatitis B surface antigen. In the event that other tests to determine hepatitis B infection become available, the department may approve additional tests.

125090. (a) Subdivision (a) of Section 125085 shall not be applicable if the licensed physician and surgeon or other person engaged in the prenatal care of a pregnant woman or attending the woman at the time of delivery has knowledge of the woman's blood type and accepts responsibility for the accuracy of the information.

(b) Subdivision (b) of Section 125085 shall not be applicable if the licensed physician and surgeon or other person engaged in the prenatal care of a pregnant woman or attending the woman at the time of delivery has knowledge that the woman has previously been

determined to be chronically infected with hepatitis (B) and accepts responsibility for the accuracy of the information.

125095. The department may adopt regulations as it determines are reasonably necessary for the implementation of the Maternal and Child Health Program Act (Section 27).

125100. (a) Clinical laboratories licensed by the department, approved public health laboratories, local health departments, physicians and surgeons, or other persons engaged in the prenatal care of a pregnant woman or in the care of an infant shall maintain and make available to the department information necessary to evaluate, for public health purposes, the effectiveness of testing and followup treatment for the prevention of perinatally transmitted hepatitis B infection.

(b) The department shall make available, to the extent state funds are appropriated therefor in the annual Budget Act or federal funds are available for that purpose, money to each county requesting funds for testing and followup treatment for the prevention of perinatally transmitted hepatitis B infection or for any functions performed pursuant to subdivision (a). The money shall be allocated by the department on the basis of the incidence of perinatally transmitted hepatitis B infection and the need for necessary followup treatment and evaluation in the requesting county.

125105. (a) The blood specimen and test results pursuant to subdivision (b) of Section 125085 shall be confidential and shall not be disclosed, except as otherwise provided by law.

(b) No person shall be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceeding to provide test results determined pursuant to Section 125080 and Section 125085.

125110. The Maternal and Child Health Program Act (Section 27) shall not apply if the pregnant woman objects to the test required by that act on the ground that the test conflicts with her religious beliefs or practices.

CHAPTER 2. GENETIC DISEASE SERVICES

Article 1. Genetically Handicapped Persons Program

125125. This article shall be known and may be cited as the Holden-Moscone-Garamendi Genetically Handicapped Person's Program.

125130. The Director of Health Services shall establish and administer a program for the medical care of persons with genetically handicapping conditions, including cystic fibrosis, hemophilia, sickle cell disease, Huntington's disease, Friedreich's Ataxia, Joseph's disease, Von Hippel-Landau syndrome, and the following hereditary metabolic disorders: phenylketonuria, homocystinuria, branched

chain amino acidurias, disorders of propionate and methylmalonate metabolism, urea cycle disorders, hereditary orotic aciduria, Wilson's Disease, galactosemia, disorders of lactate and pyruvate metabolism, tyrosinemia, hyperornithinemia, and other genetic organic acidemias that require specialized treatment or service available from only a limited number of program-approved sources.

The program shall also provide access to social support services, that may help ameliorate the physical, psychological, and economic problems attendant to genetically handicapping conditions, in order that the genetically handicapped person may function at an optimal level commensurate with the degree of impairment.

The medical and social support services may be obtained through physicians and surgeons, genetically handicapped person's program specialized centers, and other providers that qualify pursuant to the regulations of the department to provide the services. ''Medical care,'' as used in this section, is limited to noncustodial medical and support services.

The director, with the guidance of the Advisory Committee on Genetically Handicapped Person's Program, may, by regulation, expand the list of genetically handicapping conditions covered under this article. The director shall adopt regulations that are necessary for the implementation of this article. The director, with the approval of the advisory committee, shall establish priorities for the use of funds and provision of services under this article.

125135. As used in this article, ''genetically handicapping condition'' shall mean a disease that is accepted as being genetic in origin by the American Society of Human Genetics.

125140. The program established under this article shall include any or all of the following medical and social support services:

(a) Initial intake and diagnostic evaluation.

(b) The cost of blood transfusion and use of blood derivatives, or both.

(c) Rehabilitation services, including reconstructive surgery.

(d) Expert diagnosis.

(e) Medical treatment.

(f) Surgical treatment.

(g) Hospital care.

(h) Physical and speech therapy.

(i) Occupational therapy.

(j) Special treatment.

(k) Materials.

(*l*) Appliances and their upkeep, maintenance, and care.

(m) Maintenance, transportation, or care incidental to any other form of services.

(n) Respite care or other existing resources (e.g., sheltered workshops).

(o) Genetic and long-term psychological counseling.

(p) Appropriate administrative staff resources to carry out this article. The staff shall include, but not be limited to, at least one case manager per each 350 clients.

125145. The director shall appoint an 11-member Advisory Committee on Genetically Handicapped Person's Program composed of professional and consumer representatives who shall serve without compensation and at the discretion of the director. The director shall seek the advice of the advisory committee with respect to regulations to be adopted pursuant to this article.

125150. The director shall establish the rate structure for reimbursement of physicians and supportive services. The rates shall not be less than the amounts paid for provider services under the Medi-Cal Act (Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code).

125155. Reimbursement under this article shall not be made for any services that are available to the recipient under any other private, state, or federal programs or under other contractual or legal entitlements, except for those instances where the department determines that prolonged use of employer health insurance would jeopardize the recipient's employment. However, no provision in this article shall be construed as limiting in any way state participation in any federal governmental program for medical care of persons with genetically handicapping conditions.

125160. The department shall receive and expend all funds made available to it by the federal government, the state, its political subdivisions or from other sources for the purposes of this article. Payment for genetically handicapped person's program shall be made by the department.

125165. (a) The department shall determine and establish an enrollment fee for the services provided pursuant to this article.

(b) Beginning July 1, 1993, each client eligible for services shall pay an annual enrollment fee to the department, except as provided in subdivision (f).

(c) (1) The annual enrollment fee schedule shall be a sliding scale based upon family size and income and shall be identical to the fee schedule established under Section 123900. The department shall adjust the scale to reflect changes in the federal poverty level. Family size shall be based upon the number of persons living with the applicant who are dependent upon the family income. Family income shall include the total gross income of the applicant and other individuals living with the applicant.

(2) Until July 1, 1995, the annual enrollment fee for eligible participants who use the Genetically Handicapped Persons Program but receive only case management services provided by the program shall be determined by using 50 percent of the amount specified in the sliding scale. On or before July 1, 1995, the department shall evaluate the revenue enhancement resulting from the use of this

reduced enrollment fee schedule for persons who receive only case management services. After July 1, 1995, all eligible participants shall pay the enrollment fee established pursuant to paragraph (1).

(d) Notwithstanding any other subdivision, those persons whose family income exceeds forty thousand dollars ($40,000) per year and whose cost of care is 20 percent or less of the family's adjusted gross income shall pay either the enrollment fee or the cost of care, whichever is greater. Those persons whose family income exceeds forty thousand dollars ($40,000) per year and whose cost of care exceeds 20 percent of the family's adjusted gross income shall pay the enrollment fee.

(e) Payment of the enrollment fee is a condition of program participation and is independent of any other outstanding obligations to the program. The department may arrange for periodic payment during the year if it determines a lump-sum payment will be a hardship for the family. The director, on a case-by-case basis, may waive or reduce the amount of an enrollment fee if the director determines payment of the fee will result in undue hardship. Otherwise, failure to pay or arrange for payment of the enrollment fee within 60 days of the due date shall result in disenrollment and ineligibility for coverage of treatment services effective 60 days after the due date of the fee.

(f) The enrollment fee shall not be charged in the following cases:

(1) The client is eligible for the full scope of Medi-Cal benefits, without being required to pay a share of cost, at the time of enrollment fee determination.

(2) The family of the client otherwise eligible to receive services has a gross annual income of less than 200 percent of the federal poverty level.

(g) Upon determination of program eligibility, the department shall enter into an agreement with the applicant or client legally responsible for that applicant for payment of the enrollment fee.

(h) All enrollment fees shall be used in support of the program for services established under this article.

125170. The department shall maintain sufficient, appropriate staff to carry out this article.

125175. The health care benefits and services specified in this article, to the extent that the benefits and services are neither provided under any other federal or state law nor provided nor available under other contractual or legal entitlements of the person, shall be provided to any patient who is a resident of this state and is made eligible by this article. After the patient has utilized the contractual or legal entitlements, the payment liability under Section 125165 shall then be applied to the remaining cost of genetically handicapped person's services.

125180. The department shall require all applicants to the program who may be eligible for cash grant public assistance or for

Medi-Cal to apply for Medi-Cal eligibility prior to becoming eligible for funded services.

Article 2. Long-Term Care for Degenerative Genetic Disease

125200. The Legislature finds and declares that there are many persons in California who are victims of chronic and degenerative genetic conditions, who experience a wide range of degenerating conditions including mental and physical deterioration. For some of these conditions, there is no known prior detection or subsequent treatment.

The Legislature further finds and declares that appropriate supportive care services, both in and out of the home, are very often unavailable, due to the lack of resource identification and referral, and the lack of case management services.

125205. The department and the State Department of Social Services shall, after consultation with the Genetically Handicapped Persons Program of the department, from the Genetically Handicapped Persons Program Advisory Committee, and from consumer organizations representing persons with chronic and degenerative conditions, as defined in Section 125210, compile a list of long-term care resources that serve adults with chronic and degenerative conditions, as defined. The list of resources shall include those that have already been identified by the Genetically Handicapped Persons Program as serving persons with Huntington's disease, Joseph's disease, and Friedrich's ataxia, and shall include those that have already been identified by consumer organizations representing persons with chronic and degenerative conditions. The list of resources shall include, but not be limited to, the following:

(a) Public and private skilled nursing facilities and intermediate care facilities.

(b) Public and private community residential care facilities.

(c) Public and private out-of-home long-term care resources such as day activity programs, and in-home support service programs. Nothing in this section shall require the Department of Health Services to undertake a survey of long-term care facilities or programs in the state for the purposes of carrying out the requirements of this section.

The information shall be made available to the public, upon request, through the Genetically Handicapped Persons Program of the department.

125210. For the purposes of this article, chronic and degenerative diseases shall include those conditions that are neurological and neuromuscular in origin, including such disorders as Huntington's disease, Friedrich's ataxia, Joseph's disease, and other disorders that are determined by the department to be similar in origin and clinical manifestation to the named disorders, and that affect adults.

125215. The department and the State Department of Social Services shall review regulations that currently provide disincentives to providers of in-home and out-of-home long-term care resources, as defined in Section 125205, to accept and serve persons with chronic and degenerative disorders. The review shall be conducted with assistance and input from the Genetically Handicapped Persons Program of the department, and from the Genetically Handicapped Persons Program Advisory Committee. These departments shall provide a list of those regulations to the Legislature by September 1, 1982. The regulations subject to review shall be those regulations that do the following:

(a) Affect the admission of patients to state-licensed skilled nursing facilities, intermediate care facilities, and community residential care facilities.

(b) Affect the staffing ratios necessary to care for persons with chronic and degenerative conditions, as defined, within those facilities.

(c) Affect the likelihood of facilities, or of day care programs and in-home support service programs, to refuse the admission of persons with chronic and degenerative conditions, solely on the basis of anticipated jeopardy to their licensing, or on the basis of anticipated liability to the facilities arising from instances where a person's degenerative condition, by its own clinical merits, results in medical complications that are, in fact, entirely unrelated to the quality of care provided by the facility or program.

125220. The actions undertaken pursuant to this article shall not impose additional state obligations or expenditures for the care of persons with chronic and degenerative conditions, as defined by this article, unless the Legislature enacts a statute specifically appropriating money for the additional obligations or expenditures.

Article 3. Huntington's Disease Research and Workshop Grants

125225. The Legislature hereby finds and declares that:

(a) Huntington's disease is a chronic progressive inherited disorder of the central nervous system.

(b) The constellation of mental and physical symptoms, the insidious onset of the disorder, and the torment of those at-risk, waiting throughout their lives to learn if they have been spared, conspire to make ''Huntington's disease one of the most diabolical diseases known to man.'' Each child of a patient with Huntington's disease has a 50/50 chance of getting the disease.

(c) Males, females, and all ethnic groups may be affected and there is no effective treatment or cure. Because so little is known about the disease, many people are misdiagnosed and mistreated.

(d) The suicide rate among Huntington's disease patients is estimated to be seven times the national rate.

(e) The advancement of scientific knowledge about Huntington's disease, that, because of its extraordinary range of symptoms, serves as an excellent prototype for other major chronic genetic, neurologic, and psychiatric illnesses and diseases of aging, such as epilepsy, muscular dystrophy, and Parkinson's disease, will reveal fundamental scientific information that may lead to treatment, prevention, and ultimately a cure for an array of inherited disorders that affect millions.

125230. The director may establish any rules or criteria for grants under this article as the director deems necessary.

125235. There is hereby created a Scientific Advisory Review Committee. The membership of the committee shall be composed of 11 members who shall be representatives from each of the following:

(a) Two from the University of California.

(b) One from Stanford University.

(c) One from the California Institute of Technology.

(d) One from the Hereditary Disease Foundation.

(e) One from the City of Hope.

(f) One from the Health and Welfare Agency appointed by the Secretary of the Health and Welfare Agency.

(g) One appointed by the Speaker of the Assembly.

(h) One appointed by the President pro Tempore of the California Senate.

(i) One from the National Huntington's Disease Association.

(j) One from the Committee to Combat Huntington's Disease.

Except as otherwise provided in this section, members of the committee shall be appointed by the director, who shall make the appointments based upon recommendations from the entity or organization represented.

The members of the committee shall serve at the pleasure of the appointing power. The members of the committee shall serve without compensation, but shall be reimbursed for necessary and travel expenses incurred in the performance of the duties on the committee.

The Scientific Advisory Review Committee is hereby abolished one year after the grants under this article have been made by the director.

125240. Pursuant to the rules or criteria as the director may deem necessary, the Scientific Advisory Review Committee shall review and recommend approval of grant applications and monitor programs receiving grants under this article.

125245. The director may make grants as follows:

(a) Individual research grants to scientists and facilities residing in this state that have research experience with basic and clinical investigations on Huntington's disease and related disorders. Individual research grants shall not exceed twenty thousand dollars ($20,000).

(b) Interdisciplinary workshop grants to scientists and facilities for the purposes of facilitating interchange among an interdisciplinary group of investigators regarding problems in the treatment and care of patients as well as basic research, all of which may be applicable to a variety of genetic or neuro-degenerative disorders in addition to Huntington's disease. Individual workshop grants shall not exceed twelve thousand five hundred dollars ($12,500).

125250. Not more than 10 percent of any money appropriated for purposes of this article shall be utilized for the administration of this article.

Article 4. Alzheimer's Disease

125275. (a) The Legislature finds that Alzheimer's disease, a devastating disease that destroys certain vital cells of the brain, affects more than 1,500,000 Americans. The Legislature also finds that Alzheimer's disease and related disorders are responsible for 50 percent of all nursing home admissions and Alzheimer's disease is the fourth leading cause of death in adults. The Legislature recognizes that the disease has serious emotional, financial, and social consequences for its victims and their families.

(b) The Legislature recognizes that the cause of Alzheimer's disease is presently unknown, and there is no established treatment that can cure, reverse, or stop the progression of Alzheimer's disease. The Legislature also recognizes that research is the only hope for victims and families. The Legislature finds that existing diagnostic and treatment centers have improved the quality of care available to the victims of Alzheimer's disease and increased knowledge with respect to Alzheimer's disease and related disorders. These centers provide clinical opportunities for research and facilitate the collection of essential data regarding Alzheimer's disease and related disorders, while at the same time providing valuable services such as information and referral, counseling, and training to victims and their families. It is the intent of the Legislature, in enacting this article, to encourage the establishment of geographically dispersed diagnostic and treatment centers for Alzheimer's disease within every postsecondary higher educational institution with a medical center, and to encourage research to discover the cause of, and a cure for, Alzheimer's disease.

(c) The functions of the diagnostic and treatment centers shall be designed to serve all of the following purposes:

(1) To provide diagnostic and treatment services and improve the quality of care to victims of Alzheimer's disease.

(2) To increase research by faculty and students in discovering the cause of, and a cure for, Alzheimer's disease.

(3) To provide training, monitoring, consultation, and continuing education to the families of those who are affected by Alzheimer's disease.

(4) To increase the training of health care professionals with respect to Alzheimer's disease.

125280. (a) Any postsecondary higher educational institution with a medical center may establish diagnostic and treatment centers for Alzheimer's disease subject to the department's grants review process.

(b) The department shall administer grants to postsecondary higher educational institutions that establish diagnostic and treatment centers pursuant to subdivision (a).

(c) Funds appropriated for the purposes of this article by the Statutes of 1987 shall first be used to maintain and enhance, as determined by the department, existing centers and to prevent program cutbacks under subdivision (b).

(d) Alzheimer's disease grants for the purpose of establishing a diagnostic and treatment center shall be used only for the purposes of this article, including, but not limited to, all of the following:

(1) Salary and benefits for faculty, residents, fellows, and staff of the diagnostic and treatment center.

(2) Costs of supplies and equipment.

(3) Research grants for faculty research to discover the cause of, and a cure for, Alzheimer's disease.

(4) Research grants for students, residents, and fellows.

(5) General administrative costs of up to 8 percent of the total grant.

(e) The department shall establish criteria for requests for Alzheimer's disease diagnostic and treatment center grants and Alzheimer's disease research grants, and for program evaluation.

(f) No grant awarded pursuant to this article shall be approved for any amount that exceeds 25 percent of the total amount of funds appropriated for this purpose in the 1987–88 Regular Session of the Legislature.

(g) The department shall administer a grant program for the purpose of research into the causes, treatment, cure, strategies for coping with, prevention, incidence, and prevalence of Alzheimer's disease and related disorders. Priority shall be given to grant applications for feasibility studies, startup grants, and matching funds for federal and privately funded research grants. Consideration shall be given to proposals that link service delivery and collect data relative to patient care and the delivery of social services. This research may include, but is not limited to, examinations and recommendations for the improvement of the family, community-based and health care support systems available to Alzheimer's disease victims, and their caregivers.

(h) Upon request, the department shall make available to the Legislature information regarding the progress of the grant programs established pursuant to this article.

(i) The department shall reduce any grant pursuant to this article by the amount of any federal funds available for the same purposes to the same grantee.

PART 6. HOSPITALS (Reserved)

PART 7. CHRONIC DISEASE SERVICES

CHAPTER 1. KIDNEY DISEASES-CHRONIC UREMIA

125500. (a) Up to four regional dialysis centers with up to two in the northern and up to two in the southern part of the state, shall be established for the treatment of persons suffering from chronic uremia. Each center shall be located in a metropolitan area and shall have an affiliation with a large hospital or medical school, but shall not be necessarily a physical part of the institution. These institutions, however, shall be able to provide a full range of medical, surgical and rehabilitation services. The department shall only act as a granting agency for state funds that are appropriated for the establishment and the continuation of the four centers. The department, upon the advice of the review committee that is provided for by Section 125515, may contract with any hospital or medical care institution for the administration and operation of one of the regional dialysis centers. It is not the intent of this section that any new hospital or medical school be established.

(b) Any moneys appropriated by Chapter 1416 of the Statutes of 1972 may be used either in existing dialysis and kidney transplantation programs for children or to establish new programs for such purposes. Any new or existing dialysis center funded pursuant to this subdivision shall provide for children the same center dialysis, home dialysis, and outpatient clinic services as are provided under Section 125530. Any new center funded pursuant to this subdivision shall be designated as a pediatric renal failure center. Funds granted for aid to children under this subdivision shall be based upon need as determined by the Renal Dialysis Review Committee established pursuant to Section 125515 and an evaluation by the department of a county’s ability to fund their one-fourth share of a child’s care under the Crippled Children’s Services Program. The funds shall only cover costs not recoverable from direct or third party payments. A pediatric renal failure center may use funds provided under this subdivision for payment of costs for kidney transplantation services at any hospital that is authorized to perform these services by the department. For purposes of this subdivision, a child is any person 18 years of age or under.

125505. The dialysis centers shall be designed primarily to provide lifesaving dialysis services to approximately 30 patients in each center. Funds shall be provided for developing home dialysis treatment services for approximately 20 patients in each center and the necessary specialized personnel and equipment to operate each center. Funds for construction of the centers shall also be provided. The centers shall develop and utilize newer methods of dialysis designed to make the process more efficient and economical and shall take into account other applications of the procedure such as home dialysis. Centers may seek the active participation and consultation from industry in order to streamline equipment and procedures for greater efficiency.

125510. The dialysis centers shall also serve to provide training for medical and nursing personnel who will carry out dialysis services in other communities in the state. The dialysis centers may also work in close cooperation with other medical specialists who are seeking ways to develop successful means of kidney transplantation. Dialysis services are necessary as an adjunct to this type of medical investigation.

125515. The director shall appoint a review committee, upon nomination of the represented party, not to exceed nine members, at least four of whom shall be physicians, including at least one physician specializing in kidney transplantation and at least two physicians specializing in pediatric nephrology, one member to represent the University of California, one to represent a private organization or organizations concerned with kidney disease in California, one to represent the department, and two members to represent the lay public. The chairman of the committee shall be appointed by the Governor. This committee shall establish standards for the expenditure of state funds that are provided for the establishment and support of regional dialysis and transplantation centers to assure the availability of specialized personnel, resources, and equipment necessary to enable the centers to function and care for patients with severe uremia. The director shall choose from a list provided by the review committee the institutions that qualify under the standards established to receive grants of state funds to establish and continue a regional dialysis center. The review committee shall also examine periodically the performance of established regional dialysis centers and recommend continuation grants to the director. The members of the review committee shall serve for a two-year period and may be reappointed. Not more than half the membership of the committee shall be changed during any one year. The committee shall serve without compensation, but shall receive their necessary travel expenses.

125520. The dialysis centers may also receive and make use of any outside source of funds that may become available from federal,

voluntary, philanthropic, or other sources in order to augment state funds.

125525. No resident of this state shall be denied treatment in any of the regional dialysis centers because of his or her place of residence, so long as he or she is able to transport himself to the center.

125530. The funds that are provided by the state shall only be expended for the construction and equipment of the regional dialysis centers; equipment for and development of, home dialysis services; training of personnel and other expenses incident to the activation of the regional centers; services of dialysis and directly associated procedures; and treatment of complications that may result from dialysis. These funds shall not be utilized to pay for general medical care services that should come from private, local, other state or federal sources.

125535. The department succeeds to and is vested with the duties, purposes, responsibilities, and jurisdiction heretofore exercised by the Department of Benefit Payments with respect to the payment of grants to and audit responsibility for regional dialysis centers under this chapter and for home dialysis training centers under Chapter 2 (commencing with Section 125550).

125540. The department shall have possession and control of all records, papers, equipment, and supplies held for the benefit or use of the Director of Benefit Payments in the performance of his or her duties, powers, purposes, responsibilities, and jurisdiction that are vested in the department by Section 125535.

125545. All officers and employees of the Director of Benefit Payments who, on July 1, 1978, are serving in the state civil service, other than as temporary employees, and engaged in the performance of a function vested in the department by Section 125535 shall be transferred to the department. The status, positions, and rights of those persons shall not be affected by the transfer and shall be retained by them as officers and employees of the department pursuant to the State Civil Service Act, except as to positions exempt from civil service.

CHAPTER 2. HOME DIALYSIS TRAINING CENTER

125550. Up to three home dialysis training centers shall be established for the purpose of training persons suffering from chronic uremia for home dialysis. Each center shall have an affiliation with a large hospital or medical school, but shall utilize the most economical facilities for treatment. These institutions, however, shall be able to provide a full range of home dialysis training services. The department and the review committee established pursuant to Section 125515 shall exercise over the home dialysis training centers

the same powers they exercise, pursuant to Chapter 1 (commencing with Section 125500), over regional dialysis centers.

125555. Each center shall contain approximately four dialysis bed units. The department shall grant to each center fifty thousand dollars ($50,000) during the first year, twenty-five thousand dollars ($25,000) during the second year, and twelve thousand five hundred dollars ($12,500) during the third year. The department shall grant to each center not to exceed five thousand dollars ($5,000) in the first year for the purchasing or leasing of equipment and not to exceed two thousand five hundred dollars ($2,500) in the first year for construction or remodeling of the physical facility.

PART 8. ADULT HEALTH (Reserved)

PART 9. OTHER (Reserved)

SEC. 9. Division 107 (commencing with Section 127000) is added to the Health and Safety Code, to read:

DIVISION 107. STATEWIDE HEALTH PLANNING AND DEVELOPMENT

PART 1. OFFICE OF STATEWIDE HEALTH PLANNING AND DEVELOPMENT

CHAPTER 1. GENERAL PROVISIONS

127000. There is in the state government, in the Health and Welfare Agency, an Office of Statewide Health Planning and Development.

127005. The office is under the control of an executive officer known as the Director of Statewide Health Planning and Development, who shall be appointed by the Governor, subject to confirmation by the Senate, and hold office at the pleasure of the Governor. He or she shall receive the annual salary provided by Article 1 (commencing with Section 11550) of Chapter 6 of Part 1 of Division 3 of Title 2 of the Government Code.

127010. The director of the office shall have the powers of a head of the department pursuant to Chapter 2 (commencing with Section 11150) of Part 1 of Division 3 of Title 2 of the Government Code.

127015. The office succeeds to and is vested with all the duties, powers, purposes, responsibilities, and jurisdiction of the State Department of Health relating to health planning and research development. The office shall assume the functions and responsibilities of the Facilities Construction Unit of the former State Department of Health, including, but not limited to, those functions

and responsibilities performed pursuant to the following provisions of law:

Chapter 1 (commencing with Section 127125) of Part 2, Article 1 (commencing with Section 127750) of Chapter 1, Article 3 (commencing with Section 127975) of Chapter 2, and Article 1 (commencing with Section 128125) of Chapter 3 of Part 3, Part 6 (commencing with Section 129000) and Part 7 (commencing with Section 129675) of this division, Sections 104650, 104655, and Section 127050; Chapter 10 (commencing with Section 1770) of Division 2; and Section 13113.

127020. All regulations heretofore adopted by the State Department of Health that relate to functions vested in the office and that are in effect immediately preceding the operative date of this section, shall remain in effect and shall be fully enforceable unless and until readopted, amended, or repealed by the office.

127025. The office may use the unexpended balance of funds available for use in connection with the performance of the functions of the State Department of Health transferred to the office pursuant to Section 127015.

127030. All officers and employees of the State Department of Health, who, on July 1, 1978, are serving in the state civil service, other than as temporary employees, and engaged in the performance of a function vested in the Office of Statewide Planning and Development by Section 127015 shall be transferred to the office. The status, positions, and rights of these persons shall not be affected by the transfer and shall be retained by them as officers and employees of the office, pursuant to the State Civil Service Act except as to positions exempted from civil service.

127035. The office shall have possession and control of all records, papers, offices, equipment, supplies, moneys, funds, appropriations, land or other property, real or personal, held for the benefit or use of the State Department of Health for the performance of functions transferred to the office by Section 127015.

127040. All officers or employees of the office employed after the operative date of this section shall be appointed by the director of the office.

127045. The office may enter into agreements and contracts with any person, department, agency, corporation, or legal entity that are necessary to carry out the functions vested in the office by this article, Article 1 (commencing with Section 127875), Article 2 (commencing with Section 127900), Article 5 (commencing with Section 128050) of Chapter 2, Article 2 (commencing with Section 128375), and Article 3 (commencing with Section 128425) of Chapter 5 of Part 3.

127050. (a) As used in this section, ‘‘nonprofit hospital’’ means a general acute care hospital or an acute psychiatric hospital owned and operated by a fund, foundation, or corporation, no part of the net

earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(b) A nonprofit hospital may exercise the right of eminent domain to acquire property necessary for the establishment, operation, or expansion of the nonprofit hospital if both of the following requirements are satisfied:

(1) The property to be acquired by eminent domain is adjacent to other property used or to be used for the establishment, operation, or expansion of the nonprofit hospital.

(2) The director of the office has certified, after the public hearing required by subdivision (c), all of the following:

(A) The acquisition of the property sought to be condemned is necessary for the establishment, operation, or expansion of the nonprofit hospital.

(B) The public interest and necessity require the proposed project.

(C) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(c) The director of the office shall adopt reasonable regulations that will provide for a public hearing to be conducted by a hearing officer in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code in the area where the hospital is located to determine the necessity of the proposed project and of any acquisition of property for the project. Written notice of the hearing shall be given to the voluntary area health planning agency, if one exists, in the area where the hospital is located. The voluntary area health planning agency so notified shall make its recommendations to the hearing officer within 90 days from the receipt of notice. No hearing shall be held prior to the expiration of the 90-day period unless the hearing officer has received the recommendations of the voluntary area health planning agency. At the public hearing, the hearing officer shall ensure that the hearing, in part at least, considers the impact of the proposed project upon the delivery of health care services in the community and upon the environment, as gathered from an environmental impact report. The applicant and all interested parties to the acquisition, including the voluntary area health planning agency, have the right to representation by counsel, the right to present oral and written evidence, and the right to confront and cross-examine opposing witnesses. A transcript of the public hearing shall be filed with the director of the office as a public record.

PART 2. HEALTH POLICY AND PLANNING

CHAPTER 1. HEALTH PLANNING

127125. As used in this chapter, ''office'' means the Office of Statewide Health Planning and Development and ''office director'' means the director of the office.

Any reference in this chapter to the State Department of Health, the department, the state department, or the Director of Health shall be deemed a reference to the office in the Health and Welfare Agency.

127130. For the purposes of this chapter:

(a) ''Health maintenance organization'' or ''HMO'' means a public or private organization, organized under the laws of this state, that:

(1) Provides or otherwise makes available to enrolled participants health care services, including at least the following basic health care services: usual physician services, hospitalization, laboratory, X-ray, emergency and preventive services, and out-of-area coverage.

(2) Is compensated (except for copayments) for the provision of basic health care services listed in paragraph (1) to enrolled participants on a predetermined periodic rate basis.

(3) Provides physician services primarily (i) directly through physicians who are either employees or partners of the organization, or (ii) through arrangements with individual physicians or one or more groups of physicians (organized on a group practice or individual practice basis).

(4) Is not a corporation organized or operating pursuant to Section 10810 of the Corporations Code.

(b) ''Health maintenance organization for which assistance may be provided under Title XIII'' means an HMO that is qualified under Section 1310(d) of Title XIII of the federal Public Health Service Act, or an HMO that the Secretary of Health, Education and Welfare determines, upon the basis of an application and the submission of any information and assurance that he or she finds necessary, may be eligible for assistance under Title XIII of the act.

127135. Any reference in any code to the Health Planning Council, the Health Review and Program Council, or the State Board of Public Health, with respect to functions thereof that are advisory, shall be deemed a reference to the Advisory Health Council.

127140. (a) In order to effectively implement this chapter, the Legislature finds that it is indispensable that providers of health care be free to engage in voluntary, cooperative efforts with consumers, government, or other providers of health care to fulfill the purposes of the health planning laws.

(b) Approved plans and projects undertaken in compliance with those plans, as provided in Sections 437.20, 437.21, 437.22, and 437.23

are exempt from Chapter 1 (commencing with Section 16600), Chapter 2 (commencing with Section 16700), Chapter 3 (commencing with Section 16900), and Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code.

(c) In the case of a project that, on or before January 1, 1987, is included in the Tulare County countywide long-range capital investment plan, that is contained in the ''April 1983 Multi-Hospital Capital Investment and Master Plan,'' as amended by the April 1986 update, the exemptions set forth in subdivision (b) shall apply even though the project is not undertaken until after January 1, 1987.

127145. (a) The Advisory Health Council, with the recommendation of the department, shall approve the statewide health facility and services plan adopted pursuant to subdivision (b) of Section 127155.

(b) The Advisory Health Council shall advise the department in the conduct of its health planning activities and in the setting of priorities in accordance with the statewide health facility and services plan adopted pursuant to subdivision (b) of Section 127155.

(c) Public agencies shall furnish to the Advisory Health Council, upon request, data on health programs pertinent to effective planning and coordination.

(d) The Advisory Health Council shall act as the appeals body pursuant to Section 127250 regarding applications for a certificate of need filed pursuant to this chapter.

127150. (a) The office director shall adopt regulations for the implementation of this chapter.

(b) Notwithstanding any other provision of this chapter to the contrary, the office director may suspend the operation of any or all of the following provisions or requirements of this chapter:

(1) The administrative appeals process for certificate-of-need applications established by Sections 127250 to 127270, inclusive. Nothing in this section shall be construed, however, to limit the availability of judicial review of a decision of the office director or of the Advisory Health Council as provided in Section 127275.

(2) The notification of intent required by Section 127225.

(c) It is the intent of the Legislature that the office and the area health planning agencies shall not implement the requirements of subdivisions (g) and (h) of Section 1513 of the Public Health Service Act. To the extent required by federal law, the office and area health planning agencies shall request from the Secretary of the United States Department of Health and Human Services a waiver from those requirements.

(d) The Governor shall not execute an agreement with the Secretary of the United States Department of Health and Human Services pursuant to Section 1122 of Public Law 92-603 as the section existed on January 1, 1981.

127155. The Advisory Health Council shall evaluate and shall designate annually no more than one area health planning agency for any area of the state designated by the council. An area health planning agency shall be incorporated as a nonprofit corporation and controlled by a board of directors consisting of a majority representing the public and local government as consumers of health services with the balance being broadly representative of the providers of health services and the health professions, or alternatively be a health systems agency established pursuant to Public Law 93-641. The functions of area health planning agencies are all of the following:

(a) To review information on utilization of hospitals and related health facilities.

(b) To develop area plans to be used for the determination of community need and desirability of projects specified in Section 127170, consistent with the regulations adopted by the office pursuant to Section 127160. Each plan shall become effective upon a determination by the council that the plan is in conformance with regulations adopted pursuant to Section 127160. The council shall integrate all area plans into a single Statewide Health Facilities and Services Plan that shall become effective upon formal adoption by the council.

(c) To conduct public meetings where providers of health care and consumers will be encouraged to participate.

(d) Area health planning agencies shall comply with all of the following requirements:

(1) The governing body of the agency shall, to the extent feasible, be composed of individuals representative of the major social, economic, linguistic, and racial populations, and geographic areas, within the area served by the agency.

(2) The agency shall hold public meetings and hearings only after reasonable public notice. This notice shall, to the extent feasible, be publicized directly to those who, as determined by the director, are medically underserved and are in other ways denied equal access to good medical care.

(3) The agency shall file with the Advisory Health Council an affirmative action employment plan approved by the office.

Area health planning agencies may divide their areas into local areas for purposes of more effective health facility planning, with the approval of the Advisory Health Council. These local areas shall be of a geographic size and contain adequate population to ensure a broad base for planning decisions. Each local area shall contain a local health planning agency that shall meet the requirements of this section.

An organization that meets the requirements of this section may make application to its area health planning agency for designation as a local health planning agency for a designated area. Within 45 days

after a complete application for designation has been received, the area agency shall reach a decision concerning the application.

Each area health planning agency existing on the operative date of amendments to this section enacted during the 1976 portion of the 1975–76 Regular Session of the Legislature shall continue to function as an area planning agency pursuant to this chapter, until one or more designated health systems agencies are fully operational, as determined by the Advisory Health Council in the area served, or formerly served, by the respective area health planning agency.

If the Advisory Health Council determines that an area health planning agency approved under this section is dissolved or unable to carry out the functions required by this chapter, the office shall fulfill the responsibilities of an area health planning agency pursuant to this chapter in the area until another area health planning agency is designated by the Advisory Health Council for the area and becomes fully operational.

Adoption of regulations setting forth administrative procedures for area and local area health planning agencies shall be made by the office pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

127160. The office shall adopt regulations setting forth statewide policies for area health planning agencies in the performance of their responsibilities under Section 127155.

In adopting the regulations, the office shall, with the advice of the Advisory Health Council, consider the following factors, and may consider other factors not inconsistent with the following:

(a) The need for health care services in the area and the requirements of the population to be served, including evaluation of current utilization patterns.

(b) The availability and adequacy of health care services in the area's existing facilities that currently conform to federal and state standards.

(c) The availability and adequacy of services in the area such as preadmission, ambulatory or home care services that may serve as alternatives or substitutes for care in health facilities.

(d) The possible economies and improvement in service that may be derived from the following:

(1) Operation of joint, cooperative, or shared health care resources.

(2) Maximum utilization of health facilities consistent with the appropriate levels of care, including, but not limited to, intensive care, acute general care, and skilled nursing care.

(3) Development of medical group practices, especially those providing services appropriately coordinated or integrated with institutional health service, and development of health maintenance organizations.

(e) The development of comprehensive services for the community to be served. These services may be either direct or indirect through formal affiliation with other health programs in the area, and include preventive, diagnostic, treatment and rehabilitation services. Preference shall be given to health facilities that will provide the most comprehensive health services and include outpatient and other integrated services useful and convenient to the operation of the facility and the community.

(f) The needs or reasonably anticipated needs of special populations, including members of a comprehensive group practice prepayment health care service plan, members of a religious body or denomination who desire to receive care and treatment in accordance with their religious conviction, or persons otherwise contracted or enrolled under extended health care arrangements, including life-care agreements pursuant to Chapter 10 (commencing with Section 1770), Division 2 of the Health and Safety Code.

(g) The special needs and circumstances of those entities that provide a substantial portion of their services or resources, or both, to individuals not residing in the health service areas where the entities are located. These entities may include medical and other health professional schools, multidisciplinary clinics, and specialty centers.

With respect to the determination of unmet need in the community or the adverse effect of new or expanded surgical clinics on the utilization of operating rooms in hospitals, it is not the intent of the Legislature to limit the expansion of surgical clinics when the hospitals have not made efforts to fully utilize their ambulatory operating capacity and to provide ambulatory surgical services at a reasonable cost to the community.

127165. (a) The basis for decisions by the office on applications for certificates of need filed pursuant to this chapter shall be:

(1) The Statewide Health Facilities and Services Plan specified in subdivision (b) of Section 127155.

(2) The statewide policies developed pursuant to Section 127160.

(b) The office shall annually update the statistical information used in the determination of resource requirements in the Statewide Health Facilities and Services Plan and shall update this statistical information more frequently when new data is available. These data updates shall include, but not be limited to, population estimates, utilization data, changes in the inventory, and other statistical information used in the determination of resource requirements. This data shall be incorporated into the Statewide Health Facilities and Services Plan by operation of law and without the necessity of following the procedures set forth in Chapter 3.5 (commencing with Section 11340) of Title 2 of Division 3 of the Government Code.

127170. Except as otherwise exempted by any other provision of law, projects requiring a certificate of need issued by the office are the following:

(a) Construction of a new health facility, relocation of a health facility or specialty clinic on a site that is not the same site or adjacent thereto, the increase of bed capacity in an existing health facility, the conversion of an entire existing health facility from one license category to another, or the conversion of a health facility's existing beds from any bed classification set forth in Section 1250.1 to skilled nursing beds, psychiatric beds, or intermediate care beds, and the conversion of skilled nursing beds, psychiatric beds, or intermediate care beds to any other bed classification set forth in Section 1250.1, except for skilled nursing beds or intermediate care beds licensed as of March 1, 1983, as part of a general acute care hospital. The conversion may not exceed during any three-year period 5 percent of the existing beds of the bed classification to which the conversion is made.

A health facility may use beds in one bed classification that, pursuant to the facility's license, have been designated in another bed classification, if all of these bed classification changes do not at any time exceed 5 percent of the total number of the facility's beds as set forth by the facility's license and if this use meets the requirements of Chapter 2 (commencing with Section 1250) of Division 2. In addition, a facility may use an additional 5 percent of its beds in this manner if the director finds that seasonal fluctuations justify it.

For purposes of this subdivision, ''adjacent,'' means real property within a 400-yard radius of the site where a health facility or specialty clinic currently exists.

(b) Establishment of a new specialty clinic, as defined in paragraphs (1) and (3) of subdivision (b) of Section 1204, a project by a health facility for expanded outpatient surgical capacity, the conversion of an existing primary care clinic to a specialty clinic, or the conversion of an existing specialty clinic to a different category of specialty-clinic licensure. It does not constitute a project and no certificate of need is required for the establishment of a primary care clinic, as defined in subdivision (a) of Section 1204, the conversion of an existing specialty clinic to a primary care clinic, or the conversion of an existing primary care clinic to a different category of primary-care-clinic licensure. Any capital expenditure involved in the establishment of a primary care clinic also does not constitute a project, except as provided in subdivision (d).

(c) The establishment of a new special service delineated in subdivision (a), (b), (c), (e), (f), (g), or (h) of Section 1255, or the establishment by a specialty clinic, as defined in paragraphs (1) and (3) of subdivision (b) of Section 1204, of a new special service identified by or pursuant to Section 1203.

(d) The initial purchase or lease by a clinic subject to licensure under Chapter 1 (commencing with Section 1200) of Division 2, of diagnostic or therapeutic equipment with a value in excess of one million dollars ($1,000,000) in a single fiscal year, or where the cumulative cost exceeds this amount in more than one fiscal year. For purposes of this subdivision, the purchase or lease of one or more articles of functionally related diagnostic or therapeutic equipment, as determined by the office, shall be considered together.

(e) (1) Any project requiring a capital expenditure for a specialty clinic, as defined in paragraphs (1) and (3) of subdivision (b) of Section 1204, or for the services, equipment or modernization of a specialty clinic in excess of one million dollars ($1,000,000) in the current fiscal year or cumulation to an expenditure of one million dollars ($1,000,000) in the same fiscal year or subsequent fiscal years for a single project.

(2) The threshold exemptions from certificate-of-need requirements provided for in this subdivision do not apply to projects for expanded outpatient surgical capacity.

(3) For the purposes of this subdivision, ''capital expenditure'' means any of the following:

(A) An expenditure, including an expenditure for a construction project undertaken by the specialty clinic as its own contractor, that under generally accepted accounting principles is not properly chargeable as an expense of operation and maintenance and that exceeds one million dollars ($1,000,000). The cost of studies, surveys, legal fees, land, offsite improvements, designs, plans, working drawings, specifications, and other activities essential to the acquisition, improvement, expansion, or replacement of the physical plant and equipment for which the expenditure is made shall be included in determining whether the cost exceeds one million dollars ($1,000,000). Where the estimated cost of a proposed project, including cost escalation factors appropriate to the area where the project is located, is, within 60 days of the date that the obligation for the expenditure is incurred, certified by a licensed architect or engineer to be one million dollars ($1,000,000) or less, that expenditure shall be deemed not to exceed one million dollars ($1,000,000) regardless of the actual cost of the project. However, in any case where the actual cost of the project exceeds one million dollars ($1,000,000) the specialty clinic on whose behalf the expenditure is made shall provide written notification of the cost to the office not more than 30 days after the date that the expenditure is incurred. The notification shall include a copy of the certified estimate.

(B) The acquisition, under lease or comparable arrangement, or through donation, of equipment for a specialty clinic, the expenditure for which would have been considered a capital

expenditure if the person had acquired it by purchase. For the purposes of this paragraph, ''donation'' does not include a bequest.

(C) Any change in a proposed capital expenditure that meets the criteria set forth in this subdivision.

(4) ''Capital expenditure'' includes the total cost of the proposed project as certified by a licensed architect or engineer based on preliminary plans or specifications and concurred in by the state department.

(5) For the purposes of this subdivision, ''project'' does not include the purchase of real property for future use or the transfer of ownership, in whole or part, of an existing specialty clinic or the acquisition of all or substantially all of the assets or stock thereof, or the construction, modernization, purchase, lease, or other acquisition of parking lots or parking structures, telephone systems, and nonclinical data-processing systems.

(6) For the purposes of this subdivision, ''modernization'' means the alteration, expansion, repair, remodeling, replacement, or renovation of existing buildings, including initial equipment thereof, and the replacement of equipment of existing buildings.

(f) Except as provided in subdivision (g), only those projects where 25 percent or less of the patients are covered by prepaid health care.

(g) Projects otherwise subject to review under subdivision (a) that are for the addition of new licensed skilled nursing beds by construction or conversion, regardless of the percentage of patients served who are covered by prepaid health care.

(h) (1) Except as provided in paragraph (2), the office shall annually adjust the dollar thresholds set forth in subdivisions (d) and (e) to reflect changes in the cost of living, as determined by the Department of Finance, using 1981 as the base year.

(2) Notwithstanding the amount of the dollar thresholds specified in paragraph (1), in the event Congress increases or repeals the amount or amounts of the thresholds, the dollar thresholds set forth in subdivisions (d) and (e) shall be the highest amount or amounts permitted by Public Law 93-641, as amended, or one million dollars ($1,000,000), whichever is less, on the date congressional action is effective.

(i) This section is not applicable to an intermediate care facility/developmentally disabled habilitative or an intermediate care facility/developmentally disabled—nursing.

127175. (a) The office shall exempt from Sections 127210 to 127275, inclusive, and shall issue a certificate of exemption for those projects that were not previously subject to review under Section 127155 prior to the effective date of this section where the applicant has shown and the office director has found all of the following:

(1) The applicant has, prior to the effective date of this section, committed or incurred a financial obligation, including any

obligation payable by force account, that is certified by a licensed architect or engineer to be 10 percent of the cost of the total project, or seventy-five thousand dollars ($75,000), whichever is less.

(2) The project cannot be terminated without substantial economic loss to the applicant.

(3) Except with respect to projects set forth in subdivision (d) of Section 127170, the project was commenced prior to the effective date of this section and is being diligently pursued to completion.

(4) The applicant has filed a notice of the project with the office on forms supplied by the office within 60 days of the effective date of this section.

For the purposes of this subdivision, ''project'' shall mean any project set forth in Section 127170, and the term ''financial obligation'' shall include cost factors set forth in the definition of ''capital expenditure'' in Section 127170.

Within 120 days of the effective date of this section, the office shall determine in public hearing the applications that are entitled to an exemption under this subdivision.

(b) In addition, the office shall exempt from Sections 127210 to 127275, inclusive, and shall issue a certificate of need for those projects where the applicant has shown and the office director has found one of the following:

(1) The project is necessary solely to replace health care services that are no longer available at the facility because of a disaster or other emergency.

(2) The project is solely for the purpose of complying with requirements of law or regulations.

(3) The project was the subject of an application submitted to an area health planning agency prior to the effective date of this section. These applications shall be processed and decided in the manner prescribed by this chapter as it existed immediately prior to the operative date of this section, except that any petition for appeal of a decision or lack of decision the area health planning agency rendered after the effective date of this section shall be made directly to the Advisory Health Council.

(4) The project is to add not more than 10 percent of licensed bed capacity or 10 beds, whichever is less, to an existing general acute care hospital, an existing acute psychiatric hospital, an existing special hospital, an existing general acute care/rehabilitating hospital, or an existing chemical dependency recovery hospital, where the applicant has shown and the office director has found that:

(A) The applicant hospital has not been granted a certificate of exemption pursuant to this provision or pursuant to Section 437.112, as Section 437.112 existed on January 1, 1982, within the last preceding 24 months.

(B) The applicant hospital has had an occupancy rate for the classification of beds to be added, and for the facility as a whole, for the preceding 12-month period, of not less than 85 percent.

(C) The facility is accessible to persons for whom the cost of care is reimbursed under Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code. In the case of an acute psychiatric hospital, the showing required by this subparagraph shall be limited to those categories of patients for whom acute psychiatric hospitals are eligible to receive reimbursement under Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code.

(5) The project is to add not more than five beds to an existing skilled nursing facility that is operated as a distinct part of a primary health service hospital, as defined in Section 1339.9 that participates in Medi-Cal programs, provided that all of the following conditions exist:

(A) At the time of the application, the Statewide Health Facility and Services Plan indicates a need for the proposed number of beds, taking into account the number of approved beds in the health facilities planning area where the project is located including beds approved pursuant to this subdivision.

(B) The applicant skilled nursing facility has had at least a 95 percent occupancy rate for existing beds for the 12 months preceding the submission of an application.

(C) The applicant facility has not been issued within the 12 months preceding application a citation for a class A violation or more than one class B violation, as defined in Section 1424, that is one of the following:

(i) Uncontested.

(ii) Contested, but not adjudicated.

(iii) Contested, but sustained upon adjudication.

In determining the current number of approved beds in the health facilities planning area where the project is located, the office shall count the number of beds for which applications for a certificate of need have been deemed complete pursuant to Section 127220, before the effective date of the amendments to this section enacted by the Statutes of 1983.

The project shall not require a capital expenditure that exceeds ten thousand dollars ($10,000), and only one project may be approved for a facility in a 12-month period. However, no facility shall receive approval pursuant to this section for more than two projects. The office shall annually adjust this capital expenditure threshold to reflect changes in the cost of living as determined by the Department of Finance, using 1981 as the base year.

Any certificate issued for projects shall expire if the applicant does not complete the project within 12 months after issuance unless the office, for good cause shown, extends the certificate.

(c) A certificate of exemption issued pursuant to this section or Section 1268 shall, for all purposes, have the same effect as a certificate of need issued pursuant to this chapter.

127180. (a) In addition to the exemption required by Section 127175, the office director shall exempt Sections 127210 to 127275, inclusive, and shall issue a certificate of exemption for those projects where the applicant has shown, and the office director has found, all of the following:

(1) The conversion of a freestanding skilled nursing facility to a chemical dependency recovery hospital, as defined in Section 1250.3, where the project was commenced on or before September 15, 1981, and provided that the person or entity proposing the project was, prior to June 1, 1981, operating in this state a health facility, or distinct part thereof, that provided 24 hours' chemical dependency recovery hospital in-patient services as enumerated in Section 1250.3 under a direction of a medical director, and that the person or entity was the owner or lessee of the facility to be converted prior to June 1, 1981. As used in this paragraph, ''person'' or ''entity'' shall include collectively a corporation and any wholly owned subsidiaries thereof. ''Commencement'' means the submission of drawings for the project to the local government having jurisdiction containing substantially sufficient detail for the issuance of a building permit or permits as required and submission of a written declaration of intent for the project to the department on or before September 15, 1981.

(2) The project does not meet the construction standards established by law or regulation for general acute care hospitals.

(3) The applicant has filed a notice of the project with the office director on or before September 15, 1981.

(4) The applicant has filed a notice of the project with the office director on forms supplied by the office director within 90 days of the effective date of this section. The office director shall inform the applicant in writing of his or her determination as to eligibility of the application for a certificate of exemption under this section within 60 days of receipt of a complete application.

(b) A certificate of exemption issued pursuant to this section shall for all purposes have the same effect as a certificate of need issued pursuant to this chapter.

127185. (a) In addition to the exemption required by Section 127175, the office director shall exempt from Sections 127210 to 127275, inclusive, and shall issue a certificate of need for those projects where the applicant has shown and the office director has found all of the following:

(1) The project is for either of the following:

(A) The conversion of a skilled nursing or community care facility, or acute psychiatric hospital or a county funded institution-based alcoholism program, certified by the Department of Alcohol and Drug Programs pursuant to Section 11831 as a residential treatment

program, to a chemical dependency recovery hospital as defined in subdivision (a) of Section 1250.3, and provided that the facility to be converted has, prior to June 1, 1981, and continuously thereafter, been used exclusively to provide 24-hour residential chemical dependency recovery services, including the basic services enumerated in Section 1250.3 under the direction of a medical director.

(B) The construction and licensure of a chemical dependency recovery hospital where the project was commenced prior to June 1, 1981, and is being diligently pursued to completion, and provided that the person or entity proposing the facility was, prior to June 1, 1981, operating in this state a skilled nursing or community care facility used exclusively for 24-hour residential chemical dependency recovery services, including the basic services enumerated in Section 1250.3, under the direction of a medical director. As used in this paragraph, ''commencement of the project'' means acquisition of the site where the facility is to be located and submission of drawings for the project to the local government having jurisdiction containing substantially sufficient detail for the issuance of a building permit or permits.

(2) The project could not meet the construction standards established by law or regulation for general acute care hospitals.

(3) The applicant has filed a notice of the project with the office director on forms supplied by the office director within 90 days of the effective date of this section.

The office director shall inform the applicant in writing of his or her determination as to eligibility of the application for a certificate of need under this subdivision within 60 days of receipt of a complete application.

(b) In addition to the exemption required by Section 127175, the office director shall exempt from Sections 127210 to 127275, inclusive, and shall issue a certificate of need for a project for the conversion of a portion of the authorized bed capacity of a general acute care hospital in the classifications listed in Section 1250.1 to chemical dependency recovery beds as provided in subdivision (h) of Section 1250.1, or for the conversion of a skilled nursing facility to a chemical dependency recovery hospital as defined in subdivision (a) of Section 1250.3, where the applicant has shown and the office director has found all of the following:

(1) Commencement of the project began prior to August 10, 1981, and is being diligently pursued to completion.

(2) The facility proposing a conversion was, prior to June 1, 1981, operating an alcoholism treatment program, including all the basic services enumerated in Section 1250.3, under the direction of a medical director, or the facility had obtained, prior to June 1, 1981, the services of a medical director and contracted with program professionals for the conversion of the facility.

As used in this subdivision, ''commencement of the project'' means a written declaration by the governing body or administration of a hospital of the intention to convert beds of other licensed categories to usage as chemical dependency beds pursuant to subdivision (f) of Section 1250.3 as it existed on August 10, 1981, or a written declaration by the governing body or administration of a skilled nursing facility of the intention to convert to a chemical dependency recovery hospital. The written declaration shall be transmitted to the director by August 17, 1981.

(c) Construction or remodeling necessary to enable a facility exempted under this section to comply with applicable licensing regulations shall be deemed to be eligible for exemption under paragraph (2) of subdivision (b) of Section 127175.

(d) A certificate of exemption issued pursuant to this section shall, for all purposes, have the same effect as a certificate of need issued pursuant to this chapter.

127190. Notwithstanding any other provision of this chapter, the office shall exempt from Sections 127210 to 127275, inclusive, and shall issue a certificate of need for, any health care project of a health facility that agrees to provide free health care services to indigents over a period of at least five years at a dollar value equal to the dollar value of the exempted project at completion. The annual dollar value of the free care shall be at a level equal to at least 10 percent of the project value as determined in the agreement. The free health care services shall be furnished in the form of direct service or by reimbursement of costs incurred by other facilities if an insufficient number of patients, as determined in the agreement, are referred or present themselves for treatment to account for the minimum 10 percent requirement.

The provision of free care pursuant to this section shall be in accordance with an agreement executed between the health facility granted an exemption and the office. If the health facility does not meet the terms of the agreement, the department shall suspend the license or special permit associated with the exempted project until compliance with the terms is obtained. The obligations imposed by the agreement shall not be discharged by virtue of transfer of ownership, but shall be assumed by a new owner as a condition of transfer.

''Free care,'' as used in this section, does not include either of the following:

(a) Bad debt unless the debtor makes specific application for relief as an indigent.

(b) Contractual allowances.

127195. Projects for freestanding outpatient surgery units that only perform cataract surgery under the Medi-Cal program or a program that provides over 25 percent of its services to patients

covered by prepaid health care are exempt from the certificate-of-need requirement of this chapter.

As used in this section and in paragraphs (f) and (g) of Section 127170, patients are covered by prepaid health care if they are members of federally qualified health maintenance organizations.

127200. Taking into consideration the basis for decision set forth in Section 127165:

(a) The office may, in individual cases, grant certificates of need for projects when it determines that one of the following is applicable:

(1) The applicant has provided evidence that the project will meet the needs or reasonably anticipated needs of a special population including members of a religious body or denomination who desire to receive care and treatment in accordance with their religious convictions.

(2) The applicant has provided evidence that the project is or will be necessary to meet the health needs or reasonably anticipated health needs of adult residents of a nonprofit community care facility, as defined by subdivision (a) of Section 1502, that is owned by the applicant.

(3) The applicant has provided evidence that, as a health facility, it has developed community support for its services as indicated by its current utilization patterns, and has provided health care services for at least five years.

(4) The applicant has provided evidence, when the project is for a new health facility or an increase in bed capacity, that there will be an equal or greater reduction in bed capacity in other health facilities in the area.

(5) The applicant has provided evidence that it will deliver the service proposed to be offered as a result of the project in an innovative and more competitive manner, or at a lower cost than the service is provided by other facilities in the area, and has provided evidence that the quality of care offered will be comparable to that offered by other facilities in the area; or that as a health facility, it serves a disproportionate volume of publicly funded patients, or patients for whom the cost of health care is uncompensated. The office director shall, as he or she deems appropriate, ensure fulfillment of the requirements of this subdivision through conditions mutually agreed upon by the applicant and the office. This paragraph does not apply to projects for the addition of licensed skilled nursing beds by construction or conversion.

If an applicant is requesting the exercise of discretion by the office director pursuant to this paragraph, prior to granting a certificate of need, the office director shall receive an evaluation from the department assessing the potential negative financial impact upon any county owned or operated general acute care hospital. If there

is a significant negative potential financial impact, a certificate of need shall not be granted.

Nothing in this subdivision requires the office to grant certificates of need as authorized by this section in any of the above categories.

(b) In the case of a project for a service to be provided by or through a health maintenance organization for which assistance may be provided under Title XIII, the office shall grant a certificate of need for the project unless the office director finds that the project is not needed by the enrolled or reasonably anticipated new members of the HMO or proposed HMO or the beds or services to be provided are available from non-HMO providers or other HMO's in a reasonable and cost-effective manner that is consistent with the basic method of operation of the HMO.

For the purposes of subdivision (b), beds or services shall not be considered available if they are any of the following:

(1) Dispersed in more than one facility when the HMO's basic method of operation is to provide services through medical centers that consist of a hospital and medical offices at the same site.

(2) Not available under a contract of at least five years' duration, with an option to extend the contract for an additional time period as is reasonably necessary for the HMO to obtain a certificate of need and to construct and equip and begin operating alternative beds or service, in the event the non-HMO provider or other HMO gives notice that it intends to terminate the contract.

(3) Not available under circumstances that would grant full and equal staff privileges to an adequate number of physicians associated with the HMO in appropriate specialties, or otherwise not conveniently accessible through physicians and other health care professionals associated with the HMO.

(4) Not available in a manner that is administratively feasible to the HMO.

(5) More costly than if the services were provided by the HMO.

In order to qualify under this section, a project that is proposed to be provided by or through a health maintenance organization for which assistance may be provided under Title XIII, and that consists of or includes the construction, development, or establishment of a new inpatient health care facility, shall be a facility that the office determines will be utilized by members of the health maintenance organization for at least 75 percent of the projected annual inpatient days, as determined in accordance with the recommended occupancy levels under the applicable health systems plan.

(c) In the case of a project for a service to be provided by or through an HMO, the office shall not deny a certificate of need with respect to the service (or otherwise make a finding that the service is not needed) in those cases (1) when the office has granted a certificate of need that authorized the development of the service, or expenditures in preparation for the offering or development (or

has otherwise made a finding that the development or expenditure is needed), and when the offering of this service will be consistent with the basic objectives, time schedules, and plans of the previously approved application. However, the office may impose a limitation on the duration of the certificate of need that shall expire at the end of this time unless the health service is offered prior thereto, or (2) solely because there is an HMO of the same type in the same area, or solely because the services are not discussed in the applicable health systems plan, annual implementation plan, state health plan, or state medical facilities plan.

(d) A project for a service to be provided by, or through, an HMO that is subject to review under this chapter shall remain subject to that review, unless the federal law states that an approved state program shall not require a certificate of need for the project.

The office shall establish uniform procedures and criteria for approving applications under this section.

127205. (a) It is the intent of the Legislature that projects for a general acute care hospital designated as a sole community provider and licensed for less than 100 beds, projects for the establishment or expansion of skilled nursing facilities or intermediate care facilities, and projects for skilled nursing beds or intermediate care beds in health facilities other than skilled nursing or intermediate care facilities be processed as expeditiously as possible, consistent with the purposes of this chapter.

(b) In reviewing an application for projects for a general acute care hospital designated as a sole community provider and licensed for less than 100 beds, a project for a skilled nursing facility, a project for an intermediate care facility, or a project for skilled nursing beds or intermediate care beds in health facilities, the office director shall consider only need, expected utilization and financial feasibility, compliance with applicable laws and regulations, and whether the proposed facility will enhance access to the population to be served.

(c) The following exceptions to the procedural provisions of this chapter shall apply to applications for projects for a general acute care hospital designated as a sole community provider and licensed for less than 100 beds, projects for the establishment or expansion of skilled nursing facilities or intermediate care facilities, or a project for skilled nursing beds or intermediate care beds in health facilities other than skilled nursing or intermediate care facilities:

(1) The notification of intent specified in Section 127225 shall not be required prior to the filing of an application.

(2) Upon a determination that an application is complete pursuant to Section 127220, the office shall promptly publish notice in a newspaper of general circulation in the geographical area to be served by the project. The notice shall describe the project and provide that any affected person may request, in writing, that the office hold a public hearing in the course of its review. The notice

shall state the address where the request shall be made and the time period when it shall be made. The written request shall be based upon the applicable review criteria and shall specify the review criteria.

(3) No hearing need be held by the office in the course of its review unless ordered by the office within 30 calendar days after the application is determined to be complete. In those cases when no hearing is required to be held, the office shall, within 30 calendar days after the application is determined to be complete, issue a decision approving the project in its entirety or with modifications or conditions as have been agreed to in writing by the office and the applicant.

(d) The office shall amend its regulations and application forms as may be necessary to effectuate the purposes of this section.

127210. Applicants for a certificate of need for a project specified in Section 127170 shall submit an application to the department on the official forms provided by the department, that may include, but need not be limited to, the following information:

(a) The site of the facility in the geographic area to be served.

(b) The population to be served, categorized by age, income, and sex, as well as projections of population growth, by age, income, and sex.

(c) The anticipated demand for the health care service or services to be provided.

(d) A description of the service or services to be provided.

(e) Utilization of existing programs within the area to be served offering the same or similar health care services.

(f) The benefit to the community that will result from the development of the project as well as the anticipated impact on other institutions offering the same or similar services in the area.

(g) A schedule for the commencement and completion of the project.

(h) Reasonable assurance that adequate financing is available for the completion of the project within the time period stated in the application.

127215. Each application for a certificate of need shall contain all of the information required by the office and, except as otherwise provided in this chapter, shall be accompanied by a fee. The fee shall be determined annually by regulation of the office director and shall be set forth in a schedule differentiating by type and cost of project, as determined by the office director. The office director shall establish fees so that in the aggregate they will defray costs of processing certificate of need applications that are not otherwise defrayed by the special fees charged pursuant to Section 127280. However, the application fee for a certificate of need shall not in any event exceed five thousand dollars ($5,000).

127220. (a) The office, within 15 days of its receipt of an application for a certificate of need submitted pursuant to Section 127210, shall make a determination as to whether the application is complete. If the office determines that the applicant has not submitted an application that adequately addresses the information requirements of the application form, it shall provide to the applicant a written notification of incompleteness specifying the additional information required to render the application complete. After receipt of this additional information, the office, within 15 days, shall make a determination as to whether the application is complete.

(b) If, after review of additional information pursuant to subdivision (a), the office determines that the application is still incomplete, it shall provide to the applicant a written notification of incompleteness, advising the applicant of the additional information needed and the options available to the applicant to render the application complete. Following receipt of notification, the applicant shall exercise one of the following options:

(1) Submit the additional information required by the office.

(2) Request in writing, with or without submitting the additional information, that the review commence notwithstanding the determination of incompleteness.

Upon receipt of a written statement requesting that the review commence, the application shall be deemed complete on the fifth business day following receipt unless the office determines, and notifies the applicant in writing, by the fifth business day, that the lack of information is so material that it would render meaningful analysis of the application impossible and that the application is therefore incomplete. This determination shall be based solely on the failure to provide information specifically requested by the application form.

If the applicant submits the requested additional information and does not submit a written statement requesting the office to commence the review notwithstanding its determination of incompleteness, the office, within 15 days after receipt of the additional information, shall make a determination as to whether the application is complete.

Upon the receipt of any additional notifications of incompleteness, the applicant shall exercise one of the options enumerated in paragraphs (1) and (2). The office, in its second or subsequent completeness inquiry, shall not request information beyond the scope of the preceding request.

(c) If the office does not give the notification of incompleteness within the 15-day period required for review of completeness, the application shall be deemed complete on the 15th day following the receipt of the material submitted and the office shall then proceed with its review.

(d) The office shall publish notice of the commencement of the review promptly after the application review process commences pursuant to subdivision (b) or (c).

(e) A completed application may be amended or withdrawn by the applicant at any time without prejudice, but any amendment to an application, except as the office and the applicant may otherwise agree, shall cause the amended application to be treated as a new application for purposes of the time limits prescribed by this chapter and for the determination of the amount of the fee.

(f) A filed application shall be a public document and shall be available for inspection at the offices of the area health planning agency and the office. A copy of any filed application shall be furnished to any person upon request and payment of a reasonable fee, to be established by the office in an amount sufficient to defray the costs of reproduction.

(g) Applications filed by any state agency or the Board of Regents of the University of California shall be exempt from a filing fee.

127225. At least 20 calendar days prior to the filing of an application for a certificate of need under Section 127170, the applicant shall notify the office of its intent to apply for a certificate of need. The office may consult with the applicant on the proposed project.

The office may refuse to accept a certificate-of-need application where the applicant has failed to file a notification of intent to apply for a certificate of need pursuant to this section. However, if a certificate of need is issued, it shall not be invalidated on the sole basis of failure of the applicant to notify the office within the time required by this section.

127230. The office shall transmit a copy of each application for a certificate of need determined by it to be complete, or otherwise deemed complete pursuant to Section 127220, to the appropriate area health planning agency. The area health planning agency may, at its discretion, informally review the application and provide comment on it at the public hearing held pursuant to Section 127235, if a public hearing is held. If an area health planning agency intends to provide comment on an application at a public hearing, it shall provide notice to the applicant and to the state 20 days in advance of making a comment. The comment shall be deemed to have given the area health planning agency party status.

127235. (a) Within 45 calendar days of the receipt of the complete application, or an application otherwise deemed complete pursuant to Section 127220, the office shall do one of the following:

(1) Approve the application. The office may approve the application pursuant to this subdivision with modifications or conditions, provided that the applicant agrees in writing to the modifications or conditions.

(2) Order a hearing if the office determines that substantial questions exist as to the eligibility of the proposed project for certificate-of-need approval. Except as otherwise provided in this section, the hearing shall be held in the health service area served by the applicant.

(b) The office shall order a hearing by the service of a copy of the order on the applicant and the Office of Administrative Hearings. The order shall include the intended position of the Division of Certificate of Need of the office. Upon receipt of the order, the Office of Administrative Hearings shall promptly consult with the parties to the hearing in order to determine the time and place of hearing. Except as otherwise agreed by the parties and the Office of Administrative Hearings, the hearing shall commence within 15 days of the date of the order. Upon the scheduling of the hearing, the Office of Administrative Hearings shall promptly serve notice of the date, location, and time of the hearing upon the parties to the hearing. The Office of Administrative Hearings shall also publish a notice of the date, location, and time of the hearing in at least one newspaper of general circulation in the health service area served by the applicant. The notice shall also include the name and address of the applicant, the nature of the proposed project, and other information, deemed relevant by the Office of Administrative Hearings.

(c) The hearing shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except as otherwise provided in this chapter. The hearing shall be conducted by a hearing officer assigned by the Office of Administrative Hearings who shall rule on the admission and exclusion of evidence and may exercise all other powers relating to the conduct of the hearing. With the concurrence of the parties to the hearing, law and motion matters pertaining to the hearing may be heard by the hearing officer in a location other than the geographic location of the hearing.

(d) The hearing shall conclude within 45 calendar days after commencement of the hearing unless one of the following occurs:

(1) The applicant agrees to extend the time for conclusion of the hearing.

(2) The hearing is ongoing and continuing during consecutive business days, in which case it shall be concluded as soon as reasonably practicable thereafter.

(e) Within seven days after the conclusion of the hearing, the hearing officer shall render a proposed decision supported by findings of fact, based solely upon the record of the hearing, and conclusions of law. The proposed decision, findings of fact, and conclusions of law shall be served upon the parties to the hearing.

(f) The director shall make a final decision on an application within seven calendar days after issuance of the proposed decision by

the hearing officer. The decision shall either approve the application, approve it with modifications, reject it, or approve it with conditions mutually agreed upon by the applicant and the office. The failure of any applicant to fulfill the conditions under which the certificate of need was granted shall constitute grounds for revocation of the certificate of need.

(g) Notice of the substance of the office's decision shall be published in a newspaper of general circulation within the health service area served by the applicant, within 10 calendar days following the decision.

127240. (a) Notwithstanding subdivision (b), (c), (d), (e), or (f) of Section 127235, if the office orders a hearing on an application, the applicant may request an informal hearing of the matter, described in this section, in lieu of, and in the alternative to, the formal procedures described in subdivisions (b), (c), (d), (e), and (f) of Section 127235.

(b) If an applicant requests an informal hearing and the office concurs with the request, the office shall proceed as follows:

(1) Within five calendar days after receipt of the request for an informal public hearing, the office shall order the informal public hearing by the service of a copy of the order on the applicant. The order shall include the staff report and recommendations prepared by staff of the office. Except as otherwise agreed by the applicant and the office, the informal public hearing shall commence within 20 days of the date of the order. Upon the scheduling of the hearing, the office shall promptly serve notice of the date, location, and time of the informal public hearing upon the applicant. The office shall also publish a notice of the date, location, and time of the informal public hearing in at least one newspaper of general circulation in the health service area served by the applicant. The notice shall also include the name and address of the applicant, the nature of the proposed project, and other information, deemed relevant by the office.

(2) The informal public hearing shall not be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The informal public hearing shall be conducted by an employee of the office designated by the office director. The person conducting the informal public hearing may exercise all powers relating to the conduct of the hearing, including the power to reasonably limit the length of oral presentations by any person who has been allowed to make a statement.

The informal public hearing shall be conducted as follows:

(A) The applicant shall be given an opportunity to present the merits of the project and to address the issues raised by the staff report and recommendations.

(B) The office staff shall be given an opportunity to present their analysis of the project.

(C) Other interested persons shall be given an opportunity to present written or oral statements.

(D) The person conducting the informal public hearing may question any person making a written or oral statement and may give the applicant and office staff an opportunity to question any person who has made a written or oral statement.

(E) The applicant and staff shall be given an opportunity to make closing statements.

(F) The office shall make a tape recording of the hearing, and copies of the tape shall be made available at cost upon reasonable notice. However, the applicant shall have a right to bring a certified shorthand reporter to be used in place of the tape recording, provided that he or she provides the office with a copy of the transcript.

(c) The informal public hearing shall conclude within 10 calendar days after commencement of the hearing unless one of the following occurs:

(1) The applicant agrees to extend the time for conclusion of the hearing.

(2) The hearing is ongoing and continuing during consecutive business days, in which case it shall be concluded as soon as reasonably practicable thereafter.

(d) Within 10 days after the conclusion of the informal public hearing, the person conducting the hearing shall render a proposed decision supported by findings of fact, based solely upon the record of the hearing. The proposed decision shall be served upon the applicant and the office staff.

(e) The director shall make a final decision on an application within 10 calendar days after issuance of the proposed decision. The decisions shall either approve the application, approve it with modifications, reject it, or approve it with conditions mutually agreed upon by the applicant and the office. The failure of any applicant to fulfill the conditions under which the certificate of need was granted shall constitute grounds for revocation of the certificate of need.

(f) Notice of the substance of the office's decisions shall be published in a newspaper of general circulation within the health service area served by the applicant, within 10 calendar days following the decision.

(g) Whether or not an informal hearing is granted shall be at the discretion of the office.

127245. (a) The undertaking of a project that requires a certificate of need, as provided in this chapter, without having first obtained a certificate of need shall (1) constitute grounds for revocation or denial of licensure, and (2) shall be deemed a violation of Section 1253.

In addition, the state department may assess and collect a civil penalty from any person undertaking a project without a certificate

of need. For projects requiring a certificate of need pursuant to subdivision (a) of Section 127170, the civil penalty shall not be more than five thousand dollars ($5,000). For projects requiring a certificate of need pursuant to subdivisions (b), (c), (d), or (e) of Section 127170, the civil penalty shall be two thousand five hundred dollars ($2,500) or 20 percent of the cost of the project, whichever is less.

(b) A certificate of need shall expire 18 months from the date of issuance unless:

(1) The certificate holder has commenced the project covered by the certificate of need and is diligently pursuing the same to completion, as determined by the state department; or

(2) The duration of the certificate of need has been extended by the state department upon a showing of good cause. However, an extension shall not cumulatively exceed a period of 12 months beyond the original expiration date of the certificate of need.

127250. Any decision issued pursuant to Section 127235 shall take effect 30 calendar days following its issuance unless within that time the applicant files a petition for appeal with the Advisory Health Council. The Advisory Health Council shall render a decision on each appeal, and appeal shall be by right. The filing of a petition shall operate to suspend and stay the decision by the office pending the hearing and entry of a final decision.

A petition for appeal shall be filed with the council within 30 calendar days following the date a decision is issued by the office. The petition shall be filed in the form and manner as prescribed by the office. As soon as a petition is filed, the council shall be polled and respond in writing to determine within 30 calendar days whether it will take oral argument on the petition. The council shall order a hearing if at least seven of the members certify in writing that they agree to take oral argument. If the council orders a hearing, the hearing shall be held within 60 calendar days of the date of the council's order. If a hearing is denied, a statement of the reasons for denial shall be issued by the council that shall be sent to the applicant, the office, and persons requesting the statement.

The council shall cause to be published in a newspaper of general circulation in the area where the proposed project is to be located, at least 30 calendar days prior to the appeal hearing, a notice summarizing the application and the office's decision, with particulars as the council may deem necessary, including, but not limited to, the name and address of the applicant, the type of project, and the date, time and place of the appeal hearing. In addition, the council shall send copies of the notice to the applicant, the office, and any person requesting a notice.

Parties to the appeals proceedings may only be the applicant and the office. Any other person shall have the right to appear and be

heard at the appeal hearing, but shall not be a party to the proceedings.

The appeal hearing may be held by the council or by a hearing officer, as ordered by the council. If there is a hearing officer, he or she shall rule on the admission and exclusion of evidence. The council shall exercise all other powers relating to the conduct of the hearing, but may delegate any or all powers to the hearing officer. Except as otherwise provided in this chapter, appeal hearings shall conform to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, except that the office may use its own hearing officer.

127255. Grounds for appeal pursuant to Section 127250 shall be limited to the following:

(a) The office or the hearing officer violated the review procedures prescribed by this chapter.

(b) The decision of the office is not supported by substantial evidence.

(c) The office or hearing officer has otherwise acted in an arbitrary and capricious manner.

127260. The Advisory Health Council, upon review of a decision of the department, shall do one of the following:

(a) Enter an order affirming the decision of the department where it finds as to the respective basis of review that:

(1) The application was processed and the hearing conducted was consistent with this chapter, or that any inconsistency with respect thereto was immaterial to the decision of the department.

(2) There is substantial evidence in the record supporting the department's decision.

(3) The department has not acted in an arbitrary and capricious manner.

(b) Enter an order remanding the decision of the department where it finds as to the respective basis of review that:

(1) The application was not processed or the hearing conducted was not consistent with this chapter, and this inconsistency was material to the decision rendered by the department.

(2) There is no substantial evidence in the record supporting the decision.

(3) The department has acted in an arbitrary or capricious manner.

(c) Enter an order reversing the decision of the department where it finds as to the respective basis of review that:

(1) The application was not processed or the hearing conducted was not consistent with the provisions of this chapter, and this inconsistency was material to the decision rendered by the department.

(2) There is no substantial evidence in the record supporting the decision.

(3) The department has acted in an arbitrary or capricious manner.

Orders of the council authorized by this section shall be made only upon the affirmative vote of a majority of the council, with at least six of the affirmative votes cast by the following members:

(a) Representative of consumers of services for the mentally retarded appointed by the Governor.

(b) Representative of consumers of mental health services appointed by the Governor.

(c) Representative of local government appointed by the Governor.

(d) Representatives of the general consumer public appointed by the Governor, Senate Committee on Rules, or Speaker of the Assembly.

(e) Members of the Legislature appointed by the Senate Committee on Rules or Speaker of the Assembly.

127265. Where the order of the Advisory Health Council remands the decision of the department pursuant to subdivision (b) of Section 127260, the council may direct the department to reconsider the application pursuant to Section 11521 of the Government Code in the light of its order and to take further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department.

If the Advisory Health Council does not adopt a decision within 90 calendar days after the close of the hearing provided for by Section 127250, in the absence of reconsideration on the motion of the department, the decision of the department shall be final.

127270. An appellant, other than an agency of the state or the Board of Regents of the University of California, who petitions pursuant to Section 127250, shall be responsible for the actual cost to the state for the hearing officers and stenographic assistance, including reproduction of minutes and reports, connected with the appeal, as determined by the Department of General Services. However, when a decision of the department is remanded or reversed by the council, the appellant shall not be required to reimburse the costs.

127275. Judicial review of a decision of the Advisory Health Council affirming the decision of the department pursuant to subdivision (a) of Section 127260 may be had by any party to the proceedings, other than the department, as provided in Section 1094.5 of the Code of Civil Procedure. An appellant desiring to contest an adverse decision of the department need not pursue the appeal procedures prescribed by this chapter, but may elect to pursue direct judicial remedy pursuant to Section 1094.5 of the Code of Civil Procedure. The decision of the council or department shall be upheld against a claim that its findings are not supported by the

evidence unless the court determines that the findings are not supported by substantial evidence.

127280. (a) Every health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2, except a health facility owned and operated by the state, shall be charged a fee of not more than 0.035 percent of the health facility's gross operating cost for the provision of health care services for its last fiscal year ending prior to the effective date of this section. Thereafter the office shall set for, charge to, and collect from all health facilities, except health facilities owned and operated by the state, a special fee, that shall be due on July 1, and delinquent on July 31 of each year beginning with the year 1977, of not more than 0.035 percent of the health facility's gross operating cost for provision of health care services for its last fiscal year that ended on or before June 30 of the preceding calendar year. Each year the office shall establish the fee to produce revenues equal to the appropriation to pay for the functions required to be performed pursuant to this chapter or Chapter 1 (commencing with Section 128675) of Part 5 by the office, the area and local health planning agencies, and the Advisory Health Council.

Health facilities that pay fees shall not be required to pay, directly or indirectly, the share of the costs of those health facilities for which fees are waived.

(b) There is hereby established the California Health Data and Planning Fund within the office for the purpose of receiving and expending fee revenues collected pursuant to this chapter.

(c) Any amounts raised by the collection of the special fees provided for by subdivision (a) of this section that are not required to meet appropriations in the Budget Act for the current fiscal year shall remain in the California Health Data and Planning Fund and shall be available to the office and the council in succeeding years when appropriated by the Legislature, for expenditure under the provisions of this chapter, and Chapter 1 (commencing with Section 128675) of Part 5 and shall reduce the amount of the special fees that the office is authorized to establish and charge.

(d) No health facility liable for the payment of fees required by this section shall be issued a license or have an existing license renewed unless the fees are paid. New, previously unlicensed health facilities shall be charged a pro rata fee to be established by the office during the first year of operation.

The license of any health facility, against which the fees required by this section are charged, shall be revoked, after notice and hearing, if it is determined by the office that the fees required were not paid within the time prescribed by subdivision (a).

127285. (a) Health facilities and clinics, except for chronic dialysis clinics as defined in subdivision (b) of Section 1204, shall annually report to the office all of the following information on forms supplied by the office:

(1) A current inventory of beds and services.

(2) Utilization data by bed type and service.

(3) Acquisitions of diagnostic or therapeutic equipment during the reporting period with a value in excess of five hundred thousand dollars ($500,000).

(4) Commencement of projects during the reporting period that require a capital expenditure for the facility or clinic in excess of one million dollars ($1,000,000).

(b) With respect to chronic dialysis clinics, the office may annually obtain this information to the extent it is available from the Federal End Stage Renal Disease Network.

127290. (a) The department shall contract with agencies approved pursuant to Section 127155 for the purpose of providing agencies with funds to assist them to perform the duties required of them by this chapter. The Advisory Health Council shall review and make recommendations to the department upon all contracts to be entered into under this section. The department shall prepare contracts upon information submitted by agencies in the form required by the department.

(b) Pending final approval by the department of the contracts, the department may advance funds to those area health planning agencies that the director determines require emergency assistance to carry out their functions under this chapter. This emergency funding authority shall expire July 1, 1977. After determining the emergency funding available to each area health planning agency, the department shall immediately notify the administrative body of each area health planning agency of the amount and the conditions governing its availability.

127295. The Legislature finds that funds available to the office, the health systems agencies, and the area health planning agencies for the implementation of this chapter may prevent the office, the health systems agencies and the area health planning agencies from fully complying with their statutorily mandated functions.

In the event that the health systems agencies lose all, or substantially all, federal funding that is not replaced by other funding at a level that allows them to fulfill their major responsibilities under this chapter and in order to ensure continuity of the certificate-of-need process, the Governor is hereby authorized to request that the Secretary for Health and Human Services eliminate federal designation and funding of some or all health systems agencies located within the state and to terminate some or all duties assigned to area health system planning agencies and to assign the office to conduct some or all functions heretofore designated to the health systems agencies and area health planning agencies.

127300. (a) Notwithstanding any other provision of law, on and after January 1, 1987, the requirement that health facilities and

specialty clinics apply for, and obtain, certificates of need or certificates of exemption is indefinitely suspended.

(b) Notwithstanding any other provision of law, the requirements of Section 15438.1 of the Government Code shall be suspended for the period of time specified for the suspension in subdivision (a).

CHAPTER 2. HEALTH POLICY RESEARCH AND EVALUATION

Article 1. Health Outcomes Reports (Reserved)

CHAPTER 3. UNIFORM BILLING FORMAT

127575. For purposes of this chapter, the following definitions shall apply:

(a) ''Carrier'' means any of the following:

(1) Any insurer, including, but not limited to, disability insurers, nonprofit hospital service plans, fraternal benefit societies, and firemen's, policemen's, or peace officers' benefit and relief associations.

(2) A health care service plan other than a specialized health care service plan.

(3) A self-funded employer sponsored plan, multiple employer trust, or Taft-Hartley Trust as defined by federal law, authorized to pay for health care services in this state.

(4) The State Compensation Insurance Fund.

(5) The health insurance offered to certain employees of this state by the Public Employees' Retirement System known as ''PERS'' Care.

(b) ''Department'' means the State Department of Health Services.

(c) ''Office'' means the Office of Statewide Health Planning and Development.

(d) ''Professional health care services'' means any diagnostic or treatment services provided in California directly to a patient by a person licensed or practicing pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code who is eligible to directly bill for their services. ''Professional health care services'' does not include services provided by a person licensed pursuant to a chapter of Division 2 that the director of the office has determined, pursuant to Section 127590, should be exempted.

(e) ''Institutional provider services'' means any services, equipment, and supplies, other than professional health care services that are provided by an institution, site, or facility through that professional health care services are provided. ''Institutional provider services'' includes any component of an episode of health care for which there will be charges, other than professional health care services. ''Institutional provider services'' does not include

diagnostic or treatment services that would be considered ‘‘professional health care services’’ but for the fact that the provider is licensed under a chapter of Division 2 of the Business and Professions Code that the director of the office has exempted pursuant to Section 127590.

(f) ‘‘California uniform billing form for professional health care services’’ and ‘‘California uniform billing form for institutional provider services’’ means billing forms in the formats developed by the office pursuant to Section 127580.

127580. The office, after consultation with the Insurance Commissioner, the Commissioner of Corporations, the director, and the Director of Industrial Relations, shall adopt a California uniform billing form format for professional health care services and a California uniform billing form format for institutional provider services. The format for professional health care services shall be the format developed by the National Uniform Claim Form Task Force. The format for institutional provider services shall be the format developed by the National Uniform Billing Committee. The formats shall be acceptable for billing in federal Medicare and medicaid programs. The office shall specify a single uniform system for coding diagnoses, treatments, and procedures to be used as part of the uniform billing form formats. The system shall be acceptable for billing in federal Medicare and medicaid programs.

127585. (a) Carriers shall accept, and providers shall use, a completed California uniform billing form, or the electronic equivalent, for each instance when a carrier provides coverage for professional health care services and for each instance when a carrier provides coverage for institutional provider services.

(b) Carriers that are health care service plans licensed under the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code), and providers of professional health care services or institutional provider services covered by those plans shall be exempt from the requirement of subdivision (a) except in instances when the provider of the professional health care services bills the plan for the specific services provided and in instances when the provider of the institutional provider services bills the plan for the specific services provided.

(c) Nothing in the forms shall be construed to prohibit a carrier from requiring that its insured or enrollee, or a person acting on behalf of the insured or enrollee, submit other information to the carrier as necessary to determine that the professional health care services or institutional provider services are covered under the terms of the carrier’s health benefits plan.

127590. The Director of the Office of Statewide Health Planning and Development may determine that the definition of ‘‘professional health care services’’ in subdivision (d) of Section 127575 does not

include services provided by persons licensed under certain chapters of Division 2 of the Business and Professions Code and shall have the authority to determine the chapters that shall be exempt.

127595. The department shall adopt the California uniform billing form formats for use in all health care payment programs it administers, including, but not limited to, Medi-Cal, county health services programs, and other health care payment programs, for each instance when a program provides coverage for professional health care services and for each instance when a program provides coverage for institutional provider services. The department may adapt the billing format for institutional provider services only to the extent necessary for the forms to be optically scanned and automatically microfilmed. The department shall provide exemptions from this requirement as necessary and appropriate to the efficient operation of health care service plans that do not reimburse providers on a fee-for-service basis, except that the plans shall use the formats in instances when the professional or institutional provider bills a plan for the specific services provided. The department shall implement this requirement in any Medi-Cal contract for fiscal intermediary services entered into on or after January 1, 1993.

127600. (a) The department, in consultation with the office and the California Health Policy and Data Advisory Commission, may develop a uniform core dataset for public health programs to do all of the following:

(1) Reduce administrative complexity.

(2) Eliminate unnecessary duplication in the collection and reporting of data.

(3) Facilitate integration, consistency, and transfer of data among public health and health services programs.

(4) Promote monitoring of health status, planning, policy development and service coordination, quality assurance, and program evaluation for all public health programs.

(b) The department, in consultation with the office and the California Health Policy and Data Advisory Commission, shall develop proposed policies and procedures to ensure privacy and confidentiality of data and appropriate use and access to data.

(c) This section shall not be construed to require any physician and surgeon or other health care provider to provide any additional items of information to these public health care programs.

PART 3. HEALTH PROFESSIONS DEVELOPMENT

CHAPTER 1. HEALTH PROFESSIONS PLANNING

Article 1. Health Personnel Planning

127750. The office shall prepare a Health Manpower Plan for California. The plan shall consist of at least the following elements:

(a) The establishment of appropriate standards for determining the adequacy of supply in California of at least each of the following categories of health personnel: physicians, midlevel medical practitioners (physician's assistants and nurse practitioners); nurses; dentists; midlevel dental practitioners (dental nurses and dental hygienists); optometrists; optometry assistants; pharmacists; and pharmacy technicians.

(b) A determination of appropriate standards for the adequacy of supply of the categories in subdivision (a) shall be made by taking into account all of the following: current levels of demand for health services in California; the capacity of each category of personnel in subdivision (a) to provide health services; the extent to which midlevel practitioners and assistants can substitute their services for those of other personnel; the likely impact of the implementation of a national health insurance program on the demand for health services in California; professionally developed standards for the adequacy of the supply of health personnel; and assumptions concerning the future organization of health care services in California.

(c) A determination of the adequacy of the current and future supply of health personnel by category in subdivision (a) taking into account the sources of supply for such personnel in California, the magnitude of immigration of personnel to California, and the likelihood of the immigration continuing.

(d) A determination of the adequacy of the supply of specialties within each category of health personnel in subdivision (a). The determination shall be made, based upon standards of appropriate supply to speciality developed, in accordance with subdivision (b).

(e) Recommendations concerning changes in health manpower policies, licensing statutes, and programs needed to meet the state's need for health personnel.

127755. The office shall consult with the Health Manpower Policy Commission, health systems agencies, and other appropriate organizations in the preparation of this plan.

127760. The Legislature finds and declares that:

(a) Planning for appropriate supplies and distribution of health care personnel is essential to assure the continued health and well-being of the people of the state and also to contain excess costs

that may result from unnecessary training and under utilization of health care personnel.

(b) The information on physicians and surgeons collected by the Medical Board of California, in cooperation with the office, and under the authority of Sections 921 and 923 of the Business and Professions Code, has proven to be valuable for health manpower planning purposes. It is the intent of the Legislature, through this article and Article 2 (commencing with Section 104650) of Chapter 2 of Part 3 of Division 103, to provide for the efficient collection and analysis of similar information on other major categories of healing arts licentiates, in order to facilitate the development of the biennial health manpower plan and other reports and program activities of the office.

(c) It is the intent of the Legislature that the data transmitted to the office by the various boards be processed by the boards so that licentiates are not identified by name or license number.

127765. The office is authorized and directed to receive, with the cooperation of the respective healing arts licensing boards and licentiates, basic data on each licentiate in the following categories of health personnel: registered nurses, licensed vocational nurses, pharmacists, dentists, and optometrists. The office shall develop a suggested format for data collection to be utilized by the various boards. However, the methods utilized to collect and tabulate this information, including the format and content of questionnaires and other survey instruments, shall be determined by each respective healing arts licensing board after consultation with the director of the office.

127770. The basic data to be collected on each licentiate in accordance with Section 127765 shall include at least all of the following: principal and other practice locations, practice specialty or specialties for appropriate categories, time spent in direct patient-care/patient-contact and other professional activities, race or ethnicity, age, sex, and educational background.

127775. Notwithstanding Sections 922 and 925 of the Business and Professions Code, the office may receive, and the Medical Board of California may provide, information respecting individual licentiates collected pursuant to Sections 921 and 923 of the Business and Professions Code.

Information provided to the office pursuant to this section shall be transmitted in a form so that the name or license number of an individual licensee is not identifiable. However, an encoding procedure shall be used to assign a unique identifying number to the other information provided upon the questionnaire so as to allow the office to track the geographical movements of physicians for planning purposes.

127780. The office shall maintain the confidentiality of the information it receives respecting individual licentiates under this

article and Article 2 (commencing with Section 104650) of Chapter 2 of Part 3 of Division 103 and shall only release information in a form that cannot be used to identify individuals.

127785. The California Postsecondary Education Commission shall furnish to the office, at least biennially, all information that the commission has compiled pursuant to Section 66903.2 of the Education Code, that constitutes basic data as to enrollees in public and private educational institutions and programs preparing or training health personnel. The office may request additional data from licensing boards and agencies to supplement the data received from the commission, as necessary to carry out the health personnel planning and development activities of the office.

127790. The basic data to be provided to the office pursuant to Section 127785 shall include all of the following, by training year or class: numbers enrolled, numbers in the various discipline or specialty categories, and numbers in age, sex, and race or ethnic categories.

127795. The office shall implement the authority granted to the office by Sections 127765, 127775, and 127785, on a phased basis, consistent with respective relicensure intervals and with the availability of resources for the effective utilization of the data and information obtained under that authority.

127800. The respective licensing boards for registered nurses, licensed vocational nurses, pharmacists, optometrists, and dentists may adopt regulations that require licentiates to provide the information included in Section 127770 as a condition of relicensure. In order to facilitate the collection and analysis of this information, any of these boards may use information from a scientifically selected random sample of the licentiates. These licensing boards may collaborate with the office in the collection or analysis of this information.

CHAPTER 2. PERSONNEL RECRUITMENT AND EDUCATION

Article 1. Health Professions Careers Opportunity Program

127875. The Legislature finds and declares that California has an insufficient number of minority health professionals to meet the health care needs in the state. Greater numbers of minority health professionals are required to meet the special needs of population groups who face cultural and linguistic barriers to adequate health care, and to meet the state's needs for a more equitable geographic distribution of professional health personnel resources.

127880. It is the intent of the Legislature to maintain a Health Professions Career Opportunity Program designed to:

(a) Increase the number of ethnic minorities in health professional training.

(b) Increase the number of minority health professionals practicing in health manpower shortage areas in this area.

127885. The office shall maintain a Health Professions Career Opportunity Program that shall include, but not be limited to, all of the following:

(a) Producing and disseminating a series of publications aimed at informing and motivating minority and disadvantaged students to pursue health professional careers.

(b) Conducting a conference series aimed at informing those students of opportunities in health professional training and mechanisms of successfully preparing to enter the training.

(c) Providing support and technical assistance to health professional schools and colleges as well as student and community organizations active in minority health professional development.

(d) Conducting relevant manpower information and data analysis in the field of minority and disadvantaged health professional development.

(e) Providing necessary consultation, recruitment, and counseling through other means.

(f) Supporting and encouraging minority health professionals in training to practice in health professional shortage areas of California.

Article 2. Health Promotion Education Programs for Allied Health Professionals

127900. (a) The Legislature finds and declares that evidence exists to support the development of health promotion and health-risk reduction programs as an effective method of constraining the annual inflation rate for expenditures in the health industry. It is, therefore, the intent of the Legislature that a health manpower education program be developed to demonstrate the health promotion and health-risk reduction concept at educational institutions, with special emphasis on health manpower development in urban areas having a disproportionate share of disadvantaged and indigent persons.

(b) The office shall establish a contract program for funding allied health manpower training projects related to health promotion and health-risk reduction. The contract program shall provide funds to eligible institutions, as determined by the office, for all of the following purposes:

(1) Teaching existing and future primary care providers about health-risk reduction through the institutions' basic curricula.

(2) Recruiting, remediating, and retaining minority allied health professionals, including, but not limited to, physician assistants, nurse practitioners, nurse midwives, public health nurses, health educators, dieticians, and nutritionists, especially those who provide in-home patient care.

(3) Increasing the supply of medical care in underserved urban areas and demonstrating methods which reduce cost through the use of allied health personnel.

(c) These funds shall be available to institutions which currently operate programs for training family practice physicians, other primary care physicians, and those health professionals identified in paragraph (2) of subdivision (b).

(d) The recipients of the funds shall provide, but shall not be limited to providing, orientation and training of primary care providers in teaching methods related to patient health education and health promotion, such as educating allied health professionals in the principles of self-care management as it relates to specific health problems in medically underserved communities.

(e) The office shall consult with organizations and experts in the field regarding the establishment of this program, and beginning with the 1986–87 fiscal year, this program shall be implemented to the extent funds are provided in the Budget Act. This program shall be designed to accommodate an appropriation request in the range of forty thousand dollars ($40,000) to eighty thousand dollars ($80,000) per year.

(f) The director of the office may waive any of the requirements of subdivisions (b) and (c) if a potential contractor demonstrates an ability to meet the goals and objectives of the program.

Article 3. Nursing Education Scholarships

127975. Recognizing that there is a shortage in supply of registered nurses, and that if the number of nursing students is to be materially increased to meet the demand there must first be an increase in the number of persons qualified for teaching or supervising in clinical areas, and further recognizing that the cost of education deters nurses from obtaining the education necessary to qualify them for teaching or supervision in clinical areas, there are hereby created state scholarships that shall be maintained by the state and awarded and administered pursuant to this article.

127980. There shall be available at least 10 scholarships per year. The scholarships shall be available to any registered nurse who is enrolled in one of the following accredited nursing programs in a college or university in California that is accredited by the Western Association of Schools and Colleges:

(a) The junior or senior year in a bachelor’s degree program in nursing.

(b) A program supplementary to a bachelor’s degree program in nursing required for admission to master’s level studies, in nursing.

(c) A master’s degree or a post-master’s program in teaching or supervision in a clinical nursing area.

127985. No person shall be awarded a scholarship under subdivision (a) or (b) of Section 127980 unless:

(a) He or she is a resident of California.

(b) He or she is licensed as a registered nurse by this state.

(c) He or she has complied with all the regulations adopted pursuant to this article.

(d) He or she has agreed that he or she will continue his or her education to completion of the bachelor's degree or a program supplemental to a bachelor's degree required for admission to master level studies in nursing, and that after completion of the requirements of subdivision (a) or (b) of Section 127980 and within a period of time to be determined by the office, will enroll in an accredited master's degree program in teaching or supervision in a clinical nursing area.

(e) He or she agrees that immediately upon completion of his or her graduate study, either master's degree or post-master's program, he or she will assume an employment obligation in California in teaching or supervision in a clinical nursing area, for not less than one year.

127990. No person shall be awarded a scholarship under subdivision (c) of Section 127980 unless he or she satisfies the requirements prescribed by subdivisions (a), (b), (c), and (e) of Section 127985.

127995. The office shall administer the program of nursing education scholarships and shall for this purpose, adopt regulations as it determines are necessary to carry out this article.

128000. Applications for scholarships shall be made to the office, upon forms provided by it, at the times and in the manner prescribed by the regulations adopted by the office.

128005. The office shall award the scholarships to the applicants that it determines are best fitted to undertake the educational program for which the scholarships are awarded and will be the best qualified to teach or supervise. In awarding the scholarships the office may give a preference to applicants who are willing to be available, upon the completion of their educational program, for a position in any part of the state. The office shall not, however, award any scholarship to an applicant if it determines that the applicant has adequate financial resources to pay the cost of the education necessary to qualify him or her for teaching or supervision in a clinical area.

128010. Scholarships shall be awarded without regard to race, religion, creed, or sex.

128015. Each scholarship under this article is for the period of no more than one academic year, and the award shall be:

(a) For a person qualifying under subdivision (a) or (b) of Section 127980, the sum of two hundred dollars ($200) per month for 12 months, plus school fees.

(b) For a person qualifying under subdivision (c) of Section 127980, the sum of two hundred fifty dollars ($250) per month for 12 months, plus school fees.

128020. A scholarship shall remain in effect only during the period, as determined by the office, that the person receiving the award achieves satisfactory progress and is regularly enrolled, within the terms of this article, as a full-time student.

Article 4. Health Professions Planning Grants

128025. For the purpose of this article, ''innovative programs of education in the health professions'' means programs for the development of physicians and surgeons, podiatrists, dentists, pharmacists, nurses, optometrists, and occupations in the allied health professions, that emphasize all of the following:

(a) The practice in the community on the part of graduates of the program.

(b) The utilization of existing teaching resources and clinical care facilities within the community where the program is located.

(c) The development of curricular mechanisms that allow for movement from one occupational category to the next, up to and including the doctor of medicine level.

(d) The training of persons possessing previously acquired health care skills, for positions of greater responsibility, with an emphasis upon corpsmen honorably discharged from the military.

(e) The training of persons with little or no formal education but with a willingness and aptitude to acquire health care skills.

(f) The development of coordination with community health care facilities to insure quality education and satisfactory employment opportunities for graduates of the program.

128030. The office, in cooperation with the California Postsecondary Education Commission, shall administer the program established pursuant to this chapter and shall for this purpose, adopt regulations as it determines are reasonably necessary to carry out this chapter.

128035. The office is authorized to make grants, from funds appropriated by the Legislature for this purpose, to assist organizations in meeting the cost of special projects to plan, develop, or establish innovative programs of education in the health professions, or for research in the various fields related to education in the health professions, or to develop training for new types of health professions personnel, or to meet the costs of planning experimental teaching facilities.

In determining priority of project applications, the office shall give the highest priority to:

(1) Applicants able to obtain commitments for matching planning funds from other governmental and private sources.

(2) Applicants who develop a preliminary plan that conforms to the criteria stated hereinabove for innovative programs of education in the health sciences.

(3) Applicants that in its judgment are most able to translate a plan into a feasible program.

CHAPTER 3. PROFESSIONAL PRACTICE DEVELOPMENT

Article 1. Health Manpower Pilot Projects

128125. The Legislature finds that there is a need to improve the effectiveness of health care delivery systems. One way of accomplishing that objective is to utilize health care personnel in new roles and to reallocate health tasks to better meet the health needs of the citizenry.

The Legislature finds that experimentation with new kinds and combinations of health care delivery systems is desirable, and that, for purposes of this experimentation, a select number of publicly evaluated health manpower pilot projects should be exempt from the healing arts practices acts. The Legislature also finds that large sums of public and private funds are being spent to finance health manpower innovation projects, and that the activities of some of these projects exceed the limitations of state law. These projects may jeopardize the public safety and the careers of persons who are trained in them. It is the intent of the Legislature to establish the accountability of health manpower innovation projects to the requirements of the public health, safety, and welfare, and the career viability of persons trained in these programs. Further, it is the intent of this legislation that existing healing arts licensure laws incorporate innovations developed in approved projects that are likely to improve the effectiveness of health care delivery systems.

128130. For the purposes of this article:

(a) ''Office'' means the Office of Statewide Health Planning and Development.

(b) ''Approved project'' means an educational or training program approved by the office that does any of the following on a pilot program basis:

(1) Teaches new skills to existing categories of health care personnel.

(2) Develops new categories of health care personnel.

(3) Accelerates the training of existing categories of health care personnel.

(4) Teaches new health care roles to previously untrained persons, and that has been so designated by the office.

(c) ''Trainee'' means a person to be taught health care skills.

(d) ''Supervisor'' means a person designated by the project sponsor who already possesses the skills to be taught the trainees and

is certified or licensed in California to perform the health care tasks involving the skills.

(e) ''Health care services'' means the practice of medicine, dentistry, nursing, including, but not limited to, specialty areas of nursing such as midwifery, pharmacy, optometry, podiatry, and psychology.

128135. The office may designate experimental health manpower projects as approved projects where the projects are sponsored by community hospitals or clinics, nonprofit educational institutions, or government agencies engaged in health or education activities. Nothing in this section shall preclude approved projects from utilizing the offices of physicians, dentists, pharmacists, and other clinical settings as training sites.

128140. Notwithstanding any other provision of law, a trainee in an approved project may perform health care services under the supervision of a supervisor where the general scope of the services has been approved by the office.

128145. A trainee and his or her supervisor shall be held to the standard of care of, and shall be afforded the same immunities as, an individual otherwise legally qualified to perform the health care service or services performed by the trainee or supervisor.

128150. Any patient being seen or treated by a trainee shall be apprised of that fact and shall be given the opportunity to refuse treatment. Consent to the treatment shall not constitute assumption of the risk.

128155. The office, after one or more public hearings thereon, shall establish minimum standards, guidelines, and instructions for pilot projects. Advance notice of the hearing shall be sent to all interested parties and shall include a copy of the proposed minimum standards, guidelines, and instructions.

Organizations requesting designation as approved projects shall complete and submit to the office an application, that shall include a description of the project indicating the category of person to be trained, the tasks to be taught, the numbers of trainees and supervisors, a description of the health care agency to be used for training students, and a description of the types of patients likely to be seen or treated. Additionally, the application shall contain a description of all of the following:

(a) The evaluation process to be used.

(b) The baseline data and information to be collected.

(c) The nature of program data that will be collected and the methods for collecting and analyzing the data.

(d) Provision for protecting the safety of patients seen or treated in the project.

(e) A statement of previous experience in providing related health care services.

128160. (a) Pilot projects may be approved in the following fields:

(1) Expanded role medical auxiliaries.

(2) Expanded role nursing.

(3) Expanded role dental auxiliaries.

(4) Maternal child care personnel.

(5) Pharmacy personnel.

(6) Mental health personnel.

(7) Other health care personnel including, but not limited to, veterinary personnel, chiropractic personnel, podiatric personnel, geriatric care personnel, therapy personnel, and health care technicians.

(b) Projects that operate in rural and central city areas shall be given priority.

128165. The office shall carry out periodic onsite visitations of each approved project and shall evaluate each project to determine the following:

(a) The new health skills taught or extent that existing skills have been reallocated.

(b) Implication of the project for existing licensure laws with suggestions for changes in the law where appropriate.

(c) Implications of the project for health services curricula and for the health care delivery systems.

(d) Teaching methods used in the project.

(e) The quality of care and patient acceptance in the project.

(f) The extent that persons with the new skills could find employment in the health care system, assuming laws were changed to incorporate their skill.

(g) The cost of care provided in the project, the likely cost of this care if performed by the trainees subsequent to the project, and the cost for provision of this care by current providers thereof.

All data collected by the office and by projects approved pursuant to this article shall become public information, with due regard for the confidentiality of individual patient information. The raw data on which projects' reports are based and the data on which the office's evaluation is based shall be available on request for review by interested parties. The office shall provide a reasonable opportunity for interested parties to submit dissenting views or challenges to reports to the Legislature and professional licensing boards required by this section. The office shall publish those comments, subject only to nonsubstantive editing, as part of its annual, or any special, reports.

128170. The office shall approve a sufficient number of projects to provide a basis for testing the validity of the experiment.

128175. The office shall seek the advice of appropriate professional societies and appropriate healing arts licensing boards prior to designating approved projects. In the case of projects

sponsored by a state agency, the following additional procedures shall apply:

(a) A hearing shall be conducted by a disinterested state government official selected by the director of the office from a state agency other than the office or the proponent of the project. The cost of the services of the disinterested state governmental official shall be paid by the office pursuant to an interagency agreement with the state agency represented by the state governmental official.

(b) A notice of hearing shall be sent by the office to interested parties, as designated by the director of the office, by registered mail no less than 30 days preceding the date of the hearing. The notice shall include, but not be limited to, the date, time, location, and subject matter of the hearing, and shall include a copy of the application for a pilot project that is the subject of the hearing.

(c) A verbatim transcript of the hearing shall be prepared and distributed to interested parties upon request.

(d) Within 60 days of the release of the transcript, the office shall submit a recommendation on the proposal to the director of the office and shall send copies to the interested parties.

(e) The director of the office shall accept comments on the recommendations, and, on or after 30 days after transmittal of the recommendations, the director of the office shall approve or disapprove the proposed project.

128180. The office shall not approve a project for a period lasting more than two training cycles plus a preceptorship of more than 24 months, unless the office determines that the project is likely to contribute substantially to the availability of high-quality health services in the state or a region thereof.

CHAPTER 4. FAMILY PRACTICE PHYSICIAN PROGRAMS (Reserved)

Article 1. Family Physician Training Program (Reserved)

Article 2. Additional Duties of the Health Manpower Policy Commission (HMPC) (Reserved)

CHAPTER 5. MINORITY HEALTH PROFESSIONS EDUCATION FOUNDATION PROGRAMS

Article 1. Minority Health Professions Education Foundation (Reserved)

Article 2. California Registered Nurse Education Program

128375. (a) The Legislature hereby finds and declares that an adequate supply of professional nurses is critical to assuring the health and well-being of the citizens of California.

(b) The Legislature further finds that changes in the health care system of this state have increased the need for more highly skilled nurses. These changes include advances in medical technology and pharmacology, that necessitate the use of more highly skilled nurses in acute care facilities. Further, the containment of health care costs has led to increased reliance on home health care and outpatient services and to a higher proportion of more acutely ill patients in acute care facilities. Long-term care facilities also need more highly educated nursing personnel. Both shifts require a larger number of skilled nursing personnel.

(c) The Legislature further finds and declares that in nursing, as in other professions, certain populations are underrepresented. The Legislature also finds and declares that it is especially important that nursing care be provided in a way that is sensitive to the sociocultural variables that affect a person's health. The Legislature recognizes that the financial burden of obtaining a baccalaureate degree is considerable and that persons from families lacking adequate financial resources may need financial assistance to complete a baccalaureate degree.

(d) The Legislature further finds and declares that approximately 20 percent of all Californians live in rural and urban areas that have been designated health manpower shortage areas. The shortage of professional nurses in these areas makes it more difficult for those citizens to obtain health care and more difficult to attract and retain other health care professionals to those areas.

(e) The Legislature further finds and declares that applications for enrollment in programs that grant baccalaureate of science of nursing degrees have declined at the same time that demand for professional nurses has increased.

128380. It is the intent of the Legislature to accomplish the following:

(a) Assure an adequate supply of appropriately trained professional nurses.

(b) Encourage persons from populations that are currently underrepresented in the nursing profession to enter that profession.

(c) Encourage professional nurses to work in medically underserved areas.

128385. (a) There is hereby created the Registered Nurse Education Program within the Minority Health Professions Education Foundation. Persons participating in this program shall be either persons from demographically underrepresented groups or persons who agree in writing prior to graduation to serve in an eligible county health facility or a health manpower shortage area, as designated by the director of the office. Persons from demographically underrepresented groups may apply for awards for persons agreeing to serve in eligible county health facilities or health manpower shortage areas. The Registered Nurse Education Program

shall be administered in accordance with Article 14 (commencing with Section 69795) of Chapter 2 of Part 42 of the Education Code, except that all funds in the Registered Nurse Education Fund shall be used only for the purpose of promoting the education of registered nurses and related administrative costs, and except that persons who apply for awards that require them to serve in an eligible county health facility or a health manpower shortage area may be, but are not required to be, persons from demographically underrepresented groups or persons from ''underrepresented minority groups'' as defined in subdivision (g) of Section 69795 of the Education Code. The Minority Health Professions Education Foundation shall make recommendations to the director of the office concerning both the following:

(1) A standard contractual agreement to be signed by the director and any student who has received an award to work in an eligible county health facility or in a health manpower shortage area that would require a period of obligated professional service in the areas of California designated by the Health Manpower Policy Commission as deficient in primary care services. The obligated professional service shall be in direct patient care. The agreement shall include a clause entitling the state to recover the funds awarded plus the maximum allowable interest for failure to begin or complete the service obligation.

(2) Maximum allowable amounts for scholarships, educational loans, and loan repayment programs in order to assure the most effective use of these funds.

(b) Applicants may be persons licensed as registered nurses or graduates of associate degree nursing programs prior to entering a program granting a baccalaureate of science of nursing. Priority shall be given to applicants who hold associate degrees in nursing.

(c) Not more than 5 percent of the funds available under the Registered Nurse Education Program shall be available for a pilot project designed to test whether it is possible to encourage articulation from associate degree nursing programs to baccalaureate of science of nursing programs. Persons who otherwise meet the standards of subdivision (a) shall be eligible for educational loans when they are enrolled in associate degree nursing programs. If these persons complete a baccalaureate of science of nursing program in California within five years of obtaining an associate degree in nursing and meet the standards of this article, these loans shall be completely forgiven.

(d) As used in this section, ''eligible county health facility'' means a county health facility that has been determined by the office to have a nursing vacancy rate greater than noncounty health facilities located in the same health facility planning area.

128390. The funds made available pursuant to this article shall be used as specified in Article 14 (commencing with Section 69795) of

Chapter 2 of Part 42 of the Education Code, except that the funds shall be used only for the purpose of assisting students in completing nursing programs meeting the standards specified in subdivision (j) of Section 69799 of the Education Code.

128395. In developing this program, the Minority Health Professions Education Foundation shall solicit the advice of representatives of the Board of Registered Nurses, the California Nurses Association, the Chancellor of the California Community Colleges, the Chancellor of the California State University, and the California Association of Hospitals and Health Systems.

128400. There is hereby established in the State Treasury the Registered Nurse Education Fund. All money in the fund shall be used for the purposes specified in the California Registered Nurse Education Program established pursuant to this article. This fund shall receive money collected pursuant to subdivision (c) of Section 2815 of the Business and Professions Code. These funds shall be appropriated annually in the Budget Act.

128405. This article shall remain in effect only until January 1, 2000, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2000, deletes or extends that date.

Article 3. Geriatric Nurse Practitioner and Clinical Nurse Specialist Scholarship Program

128425. The Legislature hereby finds and declares that more and better qualified medical care is needed for residents of health care facilities. The Legislature further finds that the shortage of physicians available to work in skilled nursing facilities and other facilities providing care primarily to geriatric patients is expected to continue.

Therefore, it is the intent of the Legislature to promote more and better-qualified medical care for geriatric patients by increasing training opportunities for geriatric nurse practitioners and geriatric clinical nurse specialists and by providing an incentive for nurse practitioners and clinical nurse specialists to practice in skilled nursing facilities or other facilities providing care primarily to geriatric patients. It is not the intent of the Legislature in enacting this article to change the existing scope of practice of nurse practitioners or clinical nurse specialists.

128430. For purposes of this article:

(a) A ‘‘geriatric clinical nurse specialist’’ is a registered nurse, licensed by the Board of Registered Nursing, who has completed a master’s program in nursing with an emphasis on care of elders.

(b) A ‘‘geriatric nurse practitioner’’ is a registered nurse, licensed by the Board of Registered Nursing as a nurse practitioner, who has completed an educational program in gerontological nursing, or family or adult nursing with an emphasis on care of elders.

128435. (a) There is hereby created the Geriatric Nurse Practitioner and Clinical Nurse Specialist Scholarship Program within the Minority Health Professions Education Foundation. Persons participating in this program shall be persons enrolled in nurse practitioner or clinical nurse specialist programs in this state who agree in writing prior to graduation to practice for a period of time, to be determined in accordance with paragraph (1) of subdivision (b), as geriatric nurse practitioners or geriatric clinical nurse specialists either in skilled nursing facilities licensed pursuant to Section 1250 or in other settings where care is provided primarily to geriatric patients. This program shall be administered in accordance with Article 2 (commencing with Section 128375), and with Article 14 (commencing with Section 69795) of the Education Code, except that all funds shall be used only for geriatric nurse practitioners and geriatric clinical nurse specialists and except that the programs shall be available only to those geriatric nurse practitioners and geriatric clinical nurse specialists who agree to practice in skilled nursing facilities or other settings caring for geriatric patients.

(b) The Minority Health Professions Education Foundation shall make recommendations to the director of the office concerning both of the following:

(1) A standard contractual agreement to be signed by the director and any student who has received an award to practice in a skilled nursing facility or other setting caring for geriatric patients that would require a period of obligated professional service. The obligated professional service shall be in direct patient care. The obligated professional service may be performed by a geriatric nurse practitioner or geriatric clinical nurse specialist either as an employee or independent contractor of a skilled nursing facility or other setting caring for geriatric patients, or as an employee or independent contractor of a physician providing care for geriatric patients in a skilled nursing facility or other setting. The agreement shall include a clause entitling the state to recover the funds awarded plus the maximum allowable interest for failure to begin or complete the service obligation.

(2) Maximum allowable amounts for scholarships and other financial assistance in order to assure the most effective use of these funds.

(c) To the extent feasible and appropriate, the Minority Health Professions Education Foundation shall assure that the standard contractual agreement and other aspects of the Geriatric Nurse Practitioner and Clinical Nurse Specialist Scholarship Program are substantially similar to those developed for the Registered Nurse Education Program.

128525. The Legislature finds and declares that:

(a) A pilot program was established by the Office of Statewide Health Planning and Development to test the feasibility of performing high quality, safe diagnostic cardiac catheterization procedures in a freestanding cardiac catheterization laboratory.

(b) Evaluation of this pilot program by the office demonstrated that it is feasible to conduct these procedures in nonhospital settings and that these laboratories maintain the quality of the diagnostic procedures while also reducing the cost of care.

(c) Based on this evaluation, it is the intent of the Legislature that those freestanding cardiac catheterization laboratories that are in active status in the pilot program be licensed.

128530. (a) Notwithstanding any other provision of law, a freestanding cardiac catheterization laboratory that as of December 31, 1993, was in active status in the Health Care Pilot Project established pursuant to former Part 1.85 (commencing with Section 444) of Division 1, and that meets the requirements specified in this section, may be licensed by the State Department of Health Services as a freestanding cardiac catheterization laboratory. The license shall be subject to suspension or revocation, or both, in accordance with Article 5 (commencing with Section 1240) of Chapter 1 of Division 2. An application for licensure or annual renewal shall be accompanied by a fee of one thousand dollars ($1,000).

(b) A laboratory granted a license pursuant to this section shall be subject to the department's regulations that govern cardiac catheterization laboratories operating in hospitals without facilities for cardiac surgery, any similar regulations that may be developed by the department specifically to govern freestanding cardiac catheterization laboratories, and to the following regulations: subdivisions (a) and (d) of Section 70129 of; paragraphs (1), (2), (3), and (4) of subdivision (a) of, and subdivision (i) of Section 70433 of; paragraphs (1), (3), (4), and (5) of subdivision (a) of Section 70435 of; subparagraphs (A), (B), and (D) of paragraph (1) of, and paragraphs (5) and (7) of, subdivision (b) of Section 70437 of; subdivision (a) of Section 70439 of; Sections 70841, 75021, and 75022 of; subdivision (a) of Section 75023 of; Sections 75024, 75025, and 75026 of; subdivisions (a), (b), and (c) of Section 75027 of; subdivision (b) of Section 75029 of; Section 75030 of; subdivision (b) of Section 75031 of; Sections 75034, 75035, 75037, 75039, 75045, and 75046 of; subdivision (a) of Section 75047 of; and Sections 75050, 75051, 75052, 75053, 75054, 75055, 75057, 75059, 75060, 75061, 75062, 75063, 75064, 75065, 75066, 75071, and 75072 of; Title 22 of the California Code of Regulations.

(c) A laboratory granted a license pursuant to this section shall have a system for the ongoing evaluation of its operations and the services it provides. This system shall include a written plan for evaluating the efficiency and effectiveness of the health care services provided that describes the following:

(1) The scope of the services provided.

(2) Measurement indicators regarding the processes and outcomes of the services provided.

(3) The assignment of responsibility when the data from the measurement indicators demonstrates the need for action.

(4) A mechanism to ensure followup evaluation of the effectiveness of the actions taken.

(5) An annual evaluation of the plan.

(d) A laboratory granted a license pursuant to this section is authorized to perform only the following diagnostic procedures:

(1) Right heart catheterization or angiography, or both.

(2) Left heart catheterization or angiography, or both.

(3) Coronary catheterization and angiography.

(4) Electrophysiology studies.

(e) A laboratory granted a license pursuant to this section shall only perform its procedures on adults, on an outpatient basis. Each laboratory shall define patient characteristics that are appropriate for safe performance of procedures in the laboratory, and include evaluation of these criteria in its quality assurance process.

(f) Notwithstanding the requirements already set forth in this chapter, freestanding cardiac catheterization laboratories shall comply with all other applicable federal, state, and local laws.

(g) This section shall become operative upon the effective date of the bill adding this section, and does not require the department to adopt regulations.

CHAPTER 2. POSTSURGICAL CARE DEMONSTRATION PROJECT

128600. (a) The Office of Statewide Health Planning and Development shall conduct a demonstration project to evaluate the accommodation of postsurgical care patients for periods not exceeding two days, except that the attending physician and surgeon may require that the stay be extended to no more than three days.

(b) (1) The demonstration project shall operate for a period not to exceed six years, for no more than 12 project sites, one of which shall be located in Fresno County. However, the demonstration project shall be extended an additional three years, to September 30, 1997, only for those project sites that were approved by the office and operational prior to January 1, 1994.

(2) Any of the 12 project sites may be distinct parts of health facilities, or any of those sites may be physically freestanding from health facilities. None of the project sites that are designated as distinct parts of health facilities, shall be located in the service area of any one of the six freestanding project sites. None of the project sites that are designated as distinct parts of health facilities shall have a service area that overlaps with any one or more service areas of the

freestanding pilot sites. For the purposes of this section, service area shall be defined by the office.

(c) (1) The office shall establish standards for participation, commensurate with the needs of postsurgical care patients requiring temporary nursing services following outpatient surgical procedures.

(2) In preparing the standards for participation, the office may, as appropriate, consult with the state department and with a technical advisory committee which may be appointed by the Director of the Office of Statewide Health Planning and Development. The committee shall have no more than eight members, all of whom shall be experts in health care, as determined by the director of the office. One of the members of the committee shall, as determined by the director of the office, have specific expertise in the area of pediatric surgery and recovery care.

(3) If a technical advisory committee is established by the director of the office, members of the committee shall be reimbursed for any actual and necessary expenses incurred in connection with their duties as members of the committee.

(d) Not later than six months prior to the conclusion of the demonstration project, the office shall submit an evaluation of the demonstration project to the Legislature on the effectiveness and safety of the demonstration project in providing recovery services to patients receiving outpatient surgical services. The office, as part of the evaluation, shall include recommendations regarding the establishment of a new license category or amendment of existing licensing standards.

(e) The office shall establish and administer the demonstration project in facilities with no more than 20 beds which continuously meet the standards of skilled nursing facilities licensed under subdivision (c) of Section 1250, except that the office may, as appropriate and unless a danger to patients would be created, eliminate or modify the standards. This section shall not prohibit general acute care hospitals from participating in the demonstration project. The office may waive those building standards applicable to a project site which is a distinct part of a health facility which are inappropriate, as determined by the office, to the demonstration project. Notwithstanding health facility licensing regulations contained in Division 5 (commencing with Section 70001) of Title 22 of the California Code of Regulations, a project site which is a distinct part of a health facility shall comply with all standards for participation established by the office and with all regulations adopted by the office to implement this section. A project site which is a distinct part of a health facility shall not, for the duration of the pilot project, be subject to Division 5 (commencing with Section 70001) of Title 22 of the California Code of Regulations which conflict, as determined by the office, with the demonstration project standards or regulations.

(f) The department shall issue a facility identification number to each facility selected for participation in the demonstration project.

(g) Persons who wish to establish recovery care programs shall make application to the office for inclusion in the pilot program. Applications shall be made on forms provided by the office and shall contain sufficient information determined as necessary by the office.

(h) As a condition of participation in the pilot program, each applicant shall agree to provide statistical data and patient information that the office deems necessary for effective evaluation. It is the intent of the Legislature that the office shall develop procedures to assure the confidentiality of patient information and shall only disclose patient information, including name identification, as is necessary pursuant to this section or any other law.

(i) Any authorized officer, employee, or agent of the office or the state department may, upon presentation of proper identification, enter and inspect any building or premises and any records, including patient records, of a pilot project participant at any reasonable time to review compliance with, or to prevent any violation of, this section or the regulations and standards adopted thereunder.

(j) The office may suspend or withdraw approval of any or all pilot projects with notice, but without hearing if it determines that patient safety is being jeopardized.

(k) The office may charge applicants and participants in the program a reasonable fee to cover its actual cost of administering the pilot program and the cost of any committee created under this section.

(*l*) The office may contract with a medical consultant or other advisers as necessary, as determined by the office. Due to the necessity to expedite the demonstration project and its extremely specialized nature, the contracts shall be exempt from Section 10373 of the Public Contract Code, and shall be considered sole-source contracts.

(m) The office may adopt emergency regulations to implement this section in accordance with Section 11346.1 of the Government Code, except that the regulations shall be exempt from the requirements of subdivisions (e), (f), and (g) of that section. The regulations shall be deemed an emergency for the purposes of Section 11346.1 of the Government Code.

Applications to establish any of the four project sites authorized by the amendments made to this section during the 1987–88 Regular Session of the California Legislature shall be considered by the office from among the applications submitted to it in response to its initial request for proposal process.

(n) Any administrative opinion, decision, waiver, permit, or finding issued by the office prior to July 1, 1990, with respect to any of the demonstration projects approved by the office prior to July 1,

1990, shall automatically be extended by the office to remain fully effective as long as the demonstration projects are required to operate pursuant to this section.

(o) The office shall not grant approval to a postsurgical recovery care facility, as defined in Section 97500.111 of Title 22 of the California Code of Regulations, which is freestanding, as defined in Section 97500.49 of Title 22 of the California Code of Regulations, to begin operation as a participating demonstration project if it is located in the County of Solano.

128605. (a) In addition to the 12 postsurgical care demonstration project sites authorized in Section 128600, the office may approve one additional freestanding demonstration project, in accordance with the requirements of Section 128600, in a site that is in a rural area. For the purposes of this section, ''rural area'' means any area of the state that is not in a metropolitan statistical area as described in the publication ''State and Metropolitan Area Data Book,'' 1986, published by the United States Department of Commerce.

(b) In order to receive applications for this one additional rural project site, the office shall accept additional applications until October 31, 1988.

PART 5. HEALTH DATA

CHAPTER 1. HEALTH FACILITY DATA

128675. This chapter shall be known as the Health Data and Advisory Council Consolidation Act.

128680. The Legislature hereby finds and declares that:

(a) Significant changes have taken place in recent years in the health care marketplace and in the manner of reimbursement to health facilities by government and private third-party payers for the services they provide.

(b) These changes have permitted the state to reevaluate the need for, and the manner of data collection from health facilities by the various state agencies and commissions.

(c) It is the intent of the Legislature that as a result of this reevaluation that the data collection function be consolidated in a single state agency. It is the further intent of the Legislature that the single state agency only collect that data from health facilities that are essential. The data should be collected, to the extent practical on consolidated, multipurpose report forms for use by all state agencies.

(d) It is the further intent of the Legislature to eliminate the California Health Facilities Commission and the State Advisory Health Council, and to create a single advisory commission to assume consolidated data collection and planning functions.

(e) It is the Legislature's further intent that the review of the data that the state collects be an ongoing function. The office, with the

advice of the advisory commission, shall annually review this data for need and shall revise, add, or delete items as necessary. The commission and the office shall consult with affected state agencies and the affected industry when adding or eliminating data items. However, the office shall neither add nor delete data items to the Hospital Discharge Abstract Data Record or the quarterly reports without prior authorizing legislation, unless specifically required by federal law or judicial decision.

(f) The Legislature recognizes that the authority for the California Health Facilities Commission is scheduled to expire January 1, 1986. It is the intent of the Legislature, by the enactment of this chapter, to continue the uniform system of accounting and reporting established by the commission and required for use by health facilities. It is also the intent of the Legislature to continue an appropriate, cost-disclosure program.

128685. Intermediate care facilities/developmentally disabled-habilitative, as defined in subdivision (e) of Section 1250, are not subject to this chapter.

128690. Intermediate care facilities/developmentally disabled—nursing, as defined in subdivision (h) of Section 1250, are not subject to this chapter.

128695. There is hereby created the California Health Policy and Data Advisory Commission to be composed of 11 members.

The Governor shall appoint seven members, one of whom shall be a hospital chief executive officer, one of whom shall be a long-term care facility chief executive officer, one of whom shall be a representative of the health insurance industry involved in establishing premiums or underwriting, one of whom shall be a representative of a group prepayment health care service plan, one of whom shall be a representative of a business coalition concerned with health, and two of whom shall be general members. The Speaker of the Assembly shall appoint two members, one of whom shall be a physician and surgeon and one of whom shall be a general member. The Senate Rules Committee shall appoint two members, one of whom shall be a representative of a labor coalition concerned with health, and one of whom shall be a general member.

The chairperson shall be designated by the Governor. The Governor shall designate four original appointments that will be for four-year terms. The Governor shall designate three original appointments that shall be for two-year terms. The Speaker of the Assembly shall designate one original appointment that will be for two years and one original appointment that will be for four years. The Senate Rules Committee shall designate one original appointment that will be for two years and one original appointment that will be four years. Thereafter, all appointments shall be for four-year terms.

In addition to the 11 original appointees to the commission, the chairperson of the Advisory Health Council on December 31, 1985, and the chairperson of the California Health Facilities Commission on December 31, 1985, shall also serve four-year terms. During their terms when the commission shall have 13 members, they shall be full voting representatives.

128700. As used in this chapter, the following terms mean:

(a) ''Commission'' means the California Health Policy and Data Advisory Commission.

(b) ''Health facility'' or ''health facilities'' means all health facilities required to be licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.

(c) ''Hospital'' means all health facilities except skilled nursing, intermediate care, and congregate living health facilities.

(d) ''Office'' means the Office of Statewide Health Planning and Development.

(e) ''Risk-adjusted outcomes'' means the clinical outcomes of patients grouped by diagnoses or procedures that have been adjusted for demographic and clinical factors.

128705. On and after January 1, 1986, any reference in this code to the Advisory Health Council shall be deemed a reference to the California Health Policy and Data Advisory Commission.

128710. The California Health Policy and Data Advisory Commission shall meet at least once every two months, or more often if necessary to fulfill its duties.

128715. The members of the commission shall receive per diem of one hundred dollars ($100) for each day actually spent in the discharge of official duties and shall be reimbursed for any actual and necessary expenses incurred in connection with their duties as members of the commission.

128720. The commission may appoint an executive secretary subject to approval by the Secretary of Health and Welfare. The office shall provide other staff to the commission as the office and the commission deem necessary.

128725. The functions and duties of the commission shall include the following:

(a) Advise the office on the implementation of the new, consolidated data system.

(b) Advise the office regarding the ongoing need to collect and report health facility data and other provider data.

(c) Annually develop a report to the director of the office regarding changes that should be made to existing data collection systems and forms. Copies of the report shall be provided to the Senate Health and Human Services Committee and to the Assembly Health Committee.

(d) Advise the office regarding changes to the uniform accounting and reporting systems for health facilities.

(e) Conduct public meetings for the purposes of obtaining input from health facilities, other providers, data users, and the general public regarding this chapter and Chapter 1 (commencing with Section 127125) of Part 2.

(f) Advise the Secretary of Health and Welfare on the formulation of general policies that shall advance the purposes of this chapter.

(g) Advise the office on the adoption, amendment, or repeal of regulations it proposes prior to their submittal to the Office of Administrative Law.

(h) Advise the office on the format of individual health facility or other provider data reports and on any technical and procedural issues necessary to implement this chapter.

(i) Advise the office on the formulation of general policies that shall advance the purposes of Chapter 1 (commencing with Section 127125) of Part 2.

(j) Recommend, in consultation with a 12-member technical advisory committee appointed by the chairperson of the commission, to the office the data elements necessary for the production of outcome reports required by Section 128745.

(k) The technical advisory committee appointed pursuant to subdivision (j) shall be composed of two members who shall be hospital representatives appointed from a list of at least six persons nominated by the California Association of Hospitals and Health Systems, two members who shall be physicians and surgeons appointed from a list of at least six persons nominated by the California Medical Association, two members who shall be registered nurses appointed from a list of at least six persons nominated by the California Nurses Association, one medical record practitioner who shall be appointed from a list of at least six persons nominated by the California Health Information Association, one member who shall be a representative of a hospital authorized to report as a group pursuant to subdivision (d) of Section 128760, two members who shall be representative of California research organizations experienced in effectiveness review of medical procedures or surgical procedures, or both procedures, one member representing the Health Access Foundation, and one member representing the Consumers Union. Members of the technical advisory committee shall serve without compensation, but shall be reimbursed for any actual and necessary expenses incurred in connection with their duties as members of the technical advisory committee.

The commission shall submit its recommendation to the office regarding the first of the reports required pursuant to subdivision (a) of Section 128745 no later than January 1, 1993. The technical advisory committee shall submit its initial recommendations to the commission pursuant to subdivision (d) of Section 128750 no later than January 1, 1994. The commission, with the advice of the

technical advisory committee, may periodically make additional recommendations under Section 128745 to the office, as appropriate.

(*l*) As the office and the commission deem necessary, the commission may establish committees and appoint persons who are not members of the commission to these committees as are necessary to carry out the purposes of the commission. Representatives of area health planning agencies shall be invited, as appropriate, to serve on committees established by the office and the commission relative to the duties and responsibilities of area health planning agencies. Members of the standing committees shall serve without compensation, but shall be reimbursed for any actual and necessary expenses incurred in connection with their duties as members of these committees.

Whenever the office or the commission does not accept the advice of the other body on proposed regulations or on major policy issues, the office or the commission shall provide a written response on its action to the other body within 30 days, if so requested.

The commission or the office director may appeal to the Secretary of Health and Welfare over disagreements on policy, procedural, or technical issues.

128730. (a) Effective January 1, 1986, the office shall be the single state agency designated to collect the following health facility or clinic data for use by all state agencies:

(1) That data required by the office pursuant to Section 127285.

(2) That data required in the Medi-Cal cost reports pursuant to Section 14170 of the Welfare and Institutions Code.

(3) Those data items formerly required by the California Health Facilities Commission that are listed in Sections 128735 and 128740. Information collected pursuant to subdivision (g) of Section 128735 shall be made available to the State Department of Health Services. The department shall ensure that the patient's rights to confidentiality shall not be violated in any manner. The department shall comply with all applicable policies and requirements involving review and oversight by the State Committee for the Protection of Human Subjects.

(b) The office shall consolidate any and all of the reports listed under this section or Sections 128735 and 128740, to the extent feasible, to minimize the reporting burdens on hospitals. Provided, however, that the office shall neither add nor delete data items from the Hospital Discharge Abstract Data Record or the quarterly reports without prior authorizing legislation, unless specifically required by federal law or regulation or judicial decision.

128735. Every organization that operates, conducts, or maintains a health facility and the officers thereof, shall make and file with the office, at the times as the office shall require, all of the following reports on forms specified by the office that shall be in accord where applicable with the systems of accounting and uniform reporting

required by this part, except the reports required pursuant to subdivision (g) shall be limited to hospitals:

(a) A balance sheet detailing the assets, liabilities, and net worth of the health facility at the end of its fiscal year.

(b) A statement of income, expenses, and operating surplus or deficit for the annual fiscal period, and a statement of ancillary utilization and patient census.

(c) A statement detailing patient revenue by payer, including, but not limited to, Medicare, Medi-Cal, and other payers, and revenue center except that hospitals authorized to report as a group pursuant to subdivision (d) of Section 128760 are not required to report revenue by revenue center.

(d) A statement of cash-flows, including, but not limited to, ongoing and new capital expenditures and depreciation.

(e) A statement reporting the information required in subdivisions (a), (b), (c), and (d) for each separately licensed health facility operated, conducted, or maintained by the reporting organization, except those hospitals authorized to report as a group pursuant to subdivision (d) of Section 128760.

(f) The office shall consult with the County Hospital Committee of the California Hospital Association, the County Supervisors Association of California, and the California Association of Public Hospitals to improve the accuracy of indigent care revenue reporting and shall present legislative or regulatory recommendations for such improvements by March 30, 1985.

(g) A Hospital Discharge Abstract Data Record that includes all of the following:

(1) Date of birth.

(2) Sex.

(3) Race.

(4) ZIP Code.

(5) Patient social security number, if it is contained in the patient's medical record.

(6) Prehospital care and resuscitation, if any, including all of the following:

(A) ''Do not resuscitate'' (DNR) order at admission.

(B) ''Do not resuscitate'' (DNR) order after admission.

(7) Admission date.

(8) Source of admission.

(9) Type of admission.

(10) Discharge date.

(11) Principal diagnosis and whether the condition was present at admission.

(12) Other diagnoses and whether the conditions were present at admission.

(13) External cause of injury.

(14) Principal procedure and date.

(15) Other procedures and dates.
(16) Total charges.
(17) Disposition of patient.
(18) Expected source of payment.

(h) No person reporting data pursuant to this section shall be liable for damages in any action based on the use or misuse of patient-identifiable data that has been mailed or otherwise transmitted to the office pursuant to the requirements of subdivision (g).

A hospital or its designee shall semiannually file the Hospital Discharge Abstract Data Record not later than six months after the end of each semiannually period, commencing six months after January 1, 1986. A hospital may submit the Hospital Discharge Abstract Data Record in a computer tape format, and a hospital shall use coding from the International Classification of Diseases in reporting diagnoses and procedures.

128740. (a) Commencing with the first calendar quarter of 1992, the following summary financial and utilization data shall be reported to the office by each hospital within 45 days of the end of every calendar quarter. Adjusted reports reflecting changes as a result of audited financial statements may be filed within four months of the close of the hospital's fiscal or calendar year. The quarterly summary financial and utilization data shall conform to the uniform description of accounts as contained in the Accounting and Reporting Manual for California Hospitals and shall include all of the following:

(1) Number of licensed beds.
(2) Average number of available beds.
(3) Average number of staffed beds.
(4) Number of discharges.
(5) Number of inpatient days.
(6) Number of outpatient visits.
(7) Total operating expenses.
(8) Total inpatient gross revenues by payer, including Medicare, Medi-Cal, county indigent programs, other third parties, and other payers.
(9) Total outpatient gross revenues by payer, including Medicare, Medi-Cal, county indigent programs, other third parties, and other payers.
(10) Deductions from revenue in total and by component, including the following: Medicare contractual adjustments, Medi-Cal contractual adjustments, and county indigent program contractual adjustments, other contractual adjustments, bad debts, charity care, restricted donations and subsidies for indigents, support for clinical teaching, teaching allowances, and other deductions.
(11) Total capital expenditures.
(12) Total net fixed assets.

(13) Total number of inpatient days, outpatient visits, and discharges by payer, including Medicare, Medi-Cal, county indigent programs, other third parties, self-pay, charity, and other payers.

(14) Total net patient revenues by payer including Medicare, Medi-Cal, county indigent programs, other third parties, and other payers.

(15) Other operating revenue.

(16) Nonoperating revenue net of nonoperating expenses.

(b) Hospitals reporting pursuant to subdivision (d) of Section 128760 may provide the items in paragraphs (7), (8), (9), (10), (14), (15), and (16) of subdivision (a) on a group basis, as described in subdivision (d) of Section 128760.

(c) The office shall make available at cost, to all interested parties, a hard copy of any hospital report made pursuant to this section and in addition to hard copies, shall make available at cost, a computer tape of all reports made pursuant to this section within 105 days of the end of every calendar quarter.

(d) The office, with the advice of the commission, shall adopt by regulation guidelines for the identification, assessment, and reporting of charity care services. In establishing the guidelines, the office shall consider the principles and practices recommended by professional health care industry accounting associations for differentiating between charity services and bad debts. The office shall further conduct the onsite validations of health facility accounting and reporting procedures and records as are necessary to assure that reported data are consistent with regulatory guidelines.

This section shall become operative January 1, 1992.

128745. (a) Commencing July 1993, and annually thereafter, the office shall publish risk-adjusted outcome reports in accordance with the following schedule:

Publication Date	Period Covered	Procedures and Conditions Covered
July 1993	1988–90	3
July 1994	1989–91	6
July 1995	1990–92	9

Reports for subsequent years shall include conditions and procedures and cover periods as appropriate.

(b) The procedures and conditions to be reported shall be divided equally among medical, surgical and obstetric conditions or procedures and shall be selected by the office, based on the recommendations of the commission and the advice of the technical advisory committee set forth in subdivision (j) of Section 128725. The selections shall be in accordance with all of the following criteria:

(1) The patient discharge abstract contains sufficient data to undertake a valid risk adjustment.

(2) The relative importance of the procedure and condition in terms of the cost of cases and the number of cases.

(3) Ability to measure outcome and the likelihood that care influences outcome.

(4) Reliability of the diagnostic and procedure data.

(c) The annual reports shall compare the risk-adjusted outcomes experienced by all patients treated for the selected conditions and procedures in each California hospital during the period covered by each report, to the outcomes expected. Outcomes shall be reported in the five following groupings:

(1) ''Much higher than average outcomes,'' for hospitals with risk-adjusted outcomes much higher than the norm.

(2) ''Higher than average outcomes,'' for hospitals with risk-adjusted outcomes higher than the norm.

(3) ''Average outcomes,'' for hospitals with average risk-adjusted outcomes.

(4) ''Lower than average outcomes,'' for hospitals with risk-adjusted outcomes lower than the norm.

(5) ''Much lower than average outcomes,'' for hospitals with risk-adjusted outcomes much lower than the norm.

128750. (a) Prior to the public release of the annual outcome reports the office shall furnish a preliminary report to each hospital that is included in the report. The office shall allow the hospital and chief of staff 60 days to review the outcome scores and compare the scores to other California hospitals. A hospital or its chief of staff that believes that the risk-adjusted outcomes do not accurately reflect the quality of care provided by the hospital may submit a statement to the office, within the 60 days, explaining why the outcomes do not accurately reflect the quality of care provided by the hospital. The statement shall be included in an appendix to the public report, and a notation that the hospital or its chief of staff has submitted a statement shall be displayed wherever the report presents outcome scores for the hospital.

(b) The office shall, in addition to public reports, provide hospitals and the chiefs of staff of the medical staffs with a report containing additional detailed information derived from data summarized in the public outcome reports as an aid to internal quality assurance.

(c) If, pursuant to the recommendations of the office, based on the advice of the commission, in response to the recommendations of the technical advisory committee made pursuant to subdivision (d) of this section, the Legislature subsequently amends Section 128735 to authorize the collection of additional discharge data elements, then the outcome reports for conditions and procedures for which sufficient data is not available from the current abstract record will

be produced following the collection and analysis of the additional data elements.

(d) The recommendations of the technical advisory committee for the addition of data elements to the discharge abstract should take into consideration the technical feasibility of developing reliable risk-adjustment factors for additional procedures and conditions as determined by the technical advisory committee with the advice of the research community, physicians and surgeons, hospitals, and medical records personnel.

(e) The technical advisory committee at a minimum shall identify a limited set of core clinical data elements to be collected for all of the added procedures and conditions and unique clinical variables necessary for risk adjustment of specific conditions and procedures selected for the outcomes report program. In addition, the committee should give careful consideration to the costs associated with the additional data collection and the value of the specific information to be collected.

(f) The technical advisory committee shall also engage in a continuing process of data development and refinement applicable to both current and prospective outcome studies.

128755. (a) (1) Hospitals shall file the reports required by subdivisions (a), (b), (c), and (d) of Section 128735 with the office within four months after the close of the hospital's fiscal year except as provided in paragraph (2).

(2) If a licensee relinquishes the facility license or puts the facility license in suspense, the last day of active licensure shall be deemed a fiscal year end.

(3) The office shall make the reports filed pursuant to this subdivision available no later than three months after they were filed.

(b) (1) Skilled nursing facilities, intermediate care facilities, intermediate care facilities/developmentally disabled, and congregate living facilities, including nursing facilities certified by the state department to participate in the Medi-Cal program, shall file the reports required by subdivisions (a), (b), (c), and (d) of Section 128735 with the office within four months after the close of the facility's fiscal year, except as provided in paragraph (2).

(2) (A) If a licensee relinquishes the facility license or puts the facility licensure in suspense, the last day of active licensure shall be deemed a fiscal year end.

(B) If a fiscal year end is created because the facility license is relinquished or put in suspense, the facility shall file the reports required by subdivisions (a), (b), (c), and (d) of Section 128735 within two months after the last day of active licensure.

(3) The office shall make the reports filed pursuant to paragraph (1) available not later than three months after they are filed.

(4) (A) Effective for fiscal years ending on or after December 31, 1991, the reports required by subdivisions (a), (b), (c), and (d) of

Section 128735 shall be filed with the office by electronic media, as determined by the office.

(B) Congregate living health facilities are exempt from the electronic media reporting requirements of subparagraph (A).

(c) The reports required by subdivision (g) of Section 128735 shall be filed semiannually by each hospital or its designee not later than six months after the end of each semiannual period, commencing six months after January 1, 1986, and shall be available from the office no later than six months after the date that the report was filed.

(d) The reports referred to in paragraph (2) of subdivision (a) of Section 128730 shall be filed with the office on the dates required by applicable law and shall be available from the office no later than six months after the date that the report was filed.

(e) The office shall make available at cost, to all interested parties, a hard copy of any health facility report referred to in subdivision (a), (b), (c), (d), or (g) of Section 128735 and in addition to hard copies, shall make available at cost, computer tapes of the health facility reports referred to in subdivision (a), (b), (c), (d), or (g) of Section 128735, unless the office determines that an individual patient's rights of confidentiality would be violated.

128760. (a) On and after January 1, 1986, those systems of health facility accounting and auditing formerly approved by the California Health Facilities Commission shall remain in full force and effect for use by health facilities but shall be maintained by the office with the advice of the Health Policy and Data Advisory Commission.

(b) The office, with the advice of the commission, shall allow and provide, in accordance with appropriate regulations, for modifications in the accounting and reporting systems for use by health facilities in meeting the requirements of this chapter if the modifications are necessary to do any of the following:

(1) To correctly reflect differences in size of, provision of, or payment for, services rendered by health facilities.

(2) To correctly reflect differences in scope, type, or method of provision of, or payment for, services rendered by health facilities.

(3) To avoid unduly burdensome costs for those health facilities in meeting the requirements of differences pursuant to paragraphs (1) and (2).

(c) Modifications to discharge data reporting requirements. The office, with the advice of the commission, shall allow and provide, in accordance with appropriate regulations, for modifications to discharge data reporting format and frequency requirements if these modifications will not impair the office's ability to process the data or interfere with the purposes of this chapter. This modification authority shall not be construed to permit the office to administratively require the reporting of discharge data items not specified in Section 128735.

(d) Reporting provisions for health facilities. The office, with the advice of the commission, shall establish specific reporting provisions for health facilities that receive a preponderance of their revenue from associated comprehensive group-practice prepayment health care service plans. These health facilities shall be authorized to utilize established accounting systems, and to report costs and revenues in a manner that is consistent with the operating principles of these plans and with generally accepted accounting principles. When these health facilities are operated as units of a coordinated group of health facilities under common management, they shall be authorized to report as a group rather than as individual institutions. As a group, they shall submit a consolidated income and expense statement.

Hospitals authorized to report as a group under this subdivision may elect to file cost data reports required under the regulations of the Social Security Administration in its administration of Title XVIII of the federal Social Security Act in lieu of any comparable cost reports required under Section 128735. However, to the extent that cost data is required from other hospitals, the cost data shall be reported for each individual institution.

The office, with the advice of the commission, shall adopt comparable modifications to the financial reporting requirements of this chapter for county hospital systems consistent with the purposes of this chapter.

128765. (a) The office, with the advice of the commission, shall maintain a file of all the reports filed under this chapter at its Sacramento office. Subject to any rules the office, with the advice of the commission, may prescribe, these reports shall be produced and made available for inspection upon the demand of any person, with the exception of hospital discharge abstract data that shall be available for public inspection unless the office determines that an individual patient's rights of confidentiality would be violated.

(b) Copies certified by the office as being true and correct, copies of reports properly filed with the office pursuant to this chapter, together with summaries, compilations, or supplementary reports prepared by the office, shall be introduced as evidence, where relevant, at any hearing, investigation, or other proceeding held, made, or taken by any state, county, or local governmental agency, board, or commission that participates as a purchaser of health facility services pursuant to the provisions of a publicly financed state or federal health care program. Each of these state, county, or local governmental agencies, boards, and commissions shall weigh and consider the reports made available to it pursuant to the provisions of this subdivision in its formulation and implementation of policies, regulations, or procedures regarding reimbursement methods and rates in the administration of these publicly financed programs.

(c) The office, with the advice of the commission, shall compile and publish summaries of the data for the purpose of public disclosure. The commission shall approve the policies and procedures relative to the manner of data disclosure to the public. The office, with the advice of the commission, may initiate and conduct studies as it determines will advance the purposes of this chapter.

(d) In order to assure that accurate and timely data are available to the public in useful formats, the office shall establish a public liaison function. The public liaison shall provide technical assistance to the general public on the uses and applications of individual and aggregate health facility data and shall provide the director and the commission with an annual report on changes that can be made to improve the public's access to data.

(e) In addition to its public liaison function, the office shall continue the publication of aggregate industry and individual health facility cost and operational data published by the California Health Facilities Commission as described in subdivision (b) of Section 441.95, as that section existed on December 31, 1985. This publication shall be submitted to the Legislature not later than March 1 of each year commencing with calendar year 1986 and in addition shall be offered for sale as a public document.

128770. (a) Any health facility that does not file any report as required by this chapter with the office is liable for a civil penalty of one hundred dollars ($100) a day for each day the filing of any report is delayed. No penalty shall be imposed if an extension is granted in accordance with the guidelines and procedures established by the office, with the advice of the commission.

(b) Any health facility that does not use an approved system of accounting pursuant to the provisions of this chapter for purposes of submitting financial and statistical reports as required by this chapter shall be liable for a civil penalty of not more than five thousand dollars ($5,000).

(c) Civil penalties are to be assessed and recovered in a civil action brought in the name of the people of the State of California by the office. Assessment of a civil penalty may, at the request of any health facility, be reviewed on appeal, and the penalty may be reduced or waived for good cause.

(d) Any money that is received by the office pursuant to this section shall be paid into the General Fund.

128775. Any health facility affected by any determination made under this chapter by the office may petition the office for review of the decision. This petition shall be filed with the office within 15 business days, or within a greater time that the office, with the advice of the commission, may allow, and shall specifically describe the matters that are disputed by the petitioner.

A hearing shall be commenced within 60 calendar days of the date that the petition was filed. The hearing shall be held before an

employee of the office, a hearing officer employed by the Office of Administrative Hearings, or a committee of the commission chosen by the chairperson for this purpose. If held before an employee of the office or a committee of the commission, the hearing shall be held in accordance with procedures as the office, with the advice of the commission, shall prescribe. If held before a hearing officer employed by the Office of Administrative Hearings, the hearing shall be held in accordance with Chapter 5 (commencing with Section 11500) of Division 3 of the Government Code. The employee, hearing officer, or committee shall prepare a recommended decision including findings of fact and conclusions of law and present it to the office for its adoption. The decision of the office shall be in writing and shall be final. The decision of the office shall be made within 60 calendar days after the conclusion of the hearing and shall be effective upon filing and service upon the petitioner.

Judicial review of any final action, determination, or decision may be had by any party to the proceedings as provided in Section 1094.5 of the Code of Civil Procedure. The decision of the office shall be upheld against a claim that its findings are not supported by the evidence unless the court determines that the findings are not supported by substantial evidence.

The employee of the office, the hearing officer employed by the Office of Administrative Hearings, the Office of Administrative Hearings, or the committee of the commission, may issue subpoenas and subpoenas duces tecum in a manner and subject to the conditions established by Section 11510 of the Government Code.

128780. Notwithstanding any other provision of law, the disclosure aspects of this chapter shall be deemed complete with respect to district hospitals, and no district hospital shall be required to report or disclose any additional financial or utilization data to any person or other entity except as is required by this chapter.

128782. Notwithstanding any other provision of law, upon the request of a small and rural hospital, as defined in Section 124840, that did not file financial reports with the office by electronic media as of January 1, 1993, the office shall, on a case-by-case basis, do one of the following:

(a) Exempt the small and rural hospital from any electronic filing requirements of the office regarding annual or quarterly financial disclosure reports specified in Sections 128735 and 128740.

(b) Provide a one-time reduction in the fee charged to the small and rural hospital not to exceed the maximum amount assessed pursuant to Section 127280 by an amount equal to the costs incurred by the small and rural hospital to purchase the computer hardware and software necessary to comply with any electronic filing requirements of the office regarding annual or quarterly financial disclosure reports specified in Sections 443.31 and 443.32.

128785. On January 1, 1986, all regulations previously adopted by the California Health Facilities Commission that relate to functions vested in the office and that are in effect on that date, shall remain in effect and shall be fully enforceable to the extent that they are consistent with this chapter, as determined by the office, unless and until readopted, amended, or repealed by the office following review and comment by the commission.

128790. Pursuant to Section 16304.9 of the Government Code, the Controller shall transfer to the office the unexpended balance of funds as of January 1, 1986, in the California Health Facilities Commission Fund, available for use in connection with the performance of the functions of the California Health Facilities Commission to which it has succeeded pursuant to this chapter.

128795. All officers and employees of the California Health Facilities Commission who, on December 31, 1985, are serving the state civil service, other than as temporary employees, and engaged in the performance of a function vested in the office by this chapter shall be transferred to the office. The status, positions, and rights of persons shall not be affected by the transfer and shall be retained by them as officers and employees of the office, pursuant to the State Civil Service Act except as to positions exempted from civil service.

128800. The office shall have possession and control of all records, papers, offices, equipment, supplies, moneys, funds, appropriations, land, or other property, real or personal, held for the benefit or use of the California Health Facilities Commission for the performance of functions transferred to the office by this chapter.

128805. The office may enter into agreements and contracts with any person, department, agency, corporation, or legal entity as are necessary to carry out the functions vested in the office by this chapter or any other law.

128810. The office shall administer this chapter and shall make all regulations necessary to implement the provisions and achieve the purposes stated herein. The commission shall advise and consult with the office in carrying out the administration of this chapter.

128815. This chapter shall remain in effect only until January 1, 1997, and as of that date is repealed unless a later enacted statute chaptered prior to that date extends or deletes that date.

CHAPTER 2. ANNUAL LICENSURE REPORTS (Reserved)

CHAPTER 3. ANNUAL CLINIC REPORTS (Reserved)

PART 6. FACILITIES LOAN INSURANCE AND FINANCING

CHAPTER 1. HEALTH FACILITY CONSTRUCTION LOAN INSURANCE

Article 1. General Provisions

129000. This chapter may be cited as the ''California Health Facility Construction Loan Insurance Law.''

129005. The purpose of this chapter is to provide, without cost to the state, an insurance program for health facility construction, improvement, and expansion loans in order to stimulate the flow of private capital into health facilities construction, improvement, and expansion and in order to rationally meet the need for new, expanded and modernized public and nonprofit health facilities necessary to protect the health of all the people of this state. The provisions of this chapter are to be liberally construed to achieve this purpose.

129010. Unless the context otherwise requires, the definitions in this section govern the construction of this chapter and of Section 32127.2.

(a) ''Bondholder'' means the legal owner of a bond or other evidence of indebtedness issued by a political subdivision or a nonprofit corporation.

(b) ''Borrower'' means a political subdivision or nonprofit corporation that has secured or intends to secure a loan for the construction of a health facility.

(c) ''Construction, improvement, or expansion'' or ''construction, improvement, and expansion'' includes construction of new buildings, expansion, modernization, renovation, remodeling and alteration of existing buildings, acquisition of existing buildings or health facilities, and initial or additional equipping of any of these buildings.

In connection therewith, ''construction, improvement, or expansion'' or ''construction, improvement, and expansion'' includes the cost of construction or acquisition of all structures, including parking facilities, real or personal property, rights, rights-of-way, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any land where the buildings or structures may be moved, the cost of all machinery and equipment, financing charges, interest (prior to, during and for a period after completion of the construction), provisions for working capital, reserves for principal and interest and for extensions, enlargements, additions, replacements, renovations and improvements, cost of engineering, financial and legal services,

plans, specifications, studies, surveys, estimates of cost and of revenues, administrative expenses, expenses necessary or incident to determining the feasibility or practicability of constructing or incident to the construction; or the financing of the construction or acquisition.

(d) ''Commission'' means the California Health Policy and Data Advisory Commission.

(e) ''Debenture'' means any form of written evidence of indebtedness issued by the State Treasurer pursuant to this chapter, as authorized by Section 4 of Article XVI of the California Constitution.

(f) ''Fund'' means the Health Facility Construction Loan Insurance Fund.

(g) ''Health facility'' means any facility providing or designed to provide services for the acute, convalescent, and chronically ill and impaired, including, but not limited to, public health centers, community mental health centers, facilities for the developmentally disabled, nonprofit community care facilities that provide care, habilitation, rehabilitation or treatment to developmentally disabled persons, facilities for the treatment of chemical dependency, including a community care facility, licensed pursuant to Chapter 3 (commencing with Section 1500) of Division 2, a clinic, as defined pursuant to Chapter 1 (commencing with Section 1200) of Division 2, an alcoholism recovery facility, defined pursuant to former Section 11834.11, and a structure located adjacent or attached to another type of health facility and that is used for storage of materials used in the treatment of chemical dependency, and general tuberculosis, mental, and other types of hospitals and related facilities, such as laboratories, outpatient departments, extended care, nurses' home and training facilities, offices and central service facilities operated in connection with hospitals, diagnostic or treatment centers, extended care facilities, nursing homes, and rehabilitation facilities. ''Health facility'' also means an adult day health center and a multilevel facility. Except for facilities for the developmentally disabled, facilities for the treatment of chemical dependency, or a multilevel facility, or as otherwise provided in this subdivision, ''health facility'' does not include any institution furnishing primarily domiciliary care.

''Health facility'' also means accredited nonprofit work activity programs as defined in subdivision (e) of Section 19352 and Section 19355 of the Welfare and Institutions Code, and nonprofit community care facilities as defined in Section 1502, excluding foster family homes, foster family agencies, adoption agencies, and residential care facilities for the elderly.

Unless the context dictates otherwise, ''health facility'' includes a political subdivision of the state or nonprofit corporation that

operates a facility included within the definition set forth in this subdivision.

(h) ‘‘Office’’ means the Office of Statewide Health Planning and Development.

(i) ‘‘Lender’’ means the provider of a loan and its successors and assigns.

(j) ‘‘Loan’’ means money or credit advanced for the costs of construction or expansion of the health facility, and includes both initial loans and loans secured upon refinancing and may include both interim, or short-term loans, and long-term loans. A duly authorized bond or bond issue, or an installment sale agreement, may constitute a ‘‘loan.’’

(k) ‘‘Maturity date’’ means the date that the loan indebtedness would be extinguished if paid in accordance with periodic payments provided for by the terms of the loan.

(*l*) ‘‘Mortgage’’ means a first mortgage on real estate. ‘‘Mortgage’’ includes a first deed of trust.

(m) ‘‘Mortgagee’’ includes a lender whose loan is secured by a mortgage. ‘‘Mortgagee’’ includes a beneficiary of a deed of trust.

(n) ‘‘Mortgagor’’ includes a borrower, a loan to whom is secured by a mortgage, and the trustor of a deed of trust.

(o) ‘‘Nonprofit corporation’’ means any corporation formed under or subject to the Nonprofit Public Benefit Corporation Law (Part 2 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code) that is organized for the purpose of owning and operating a health facility and that also meets the requirements of Section 501(c)(3) of the Internal Revenue Code.

(p) ‘‘Political subdivision’’ means any city, county, joint powers entity, local hospital district, or the California Health Facilities Authority.

(q) ‘‘Project property’’ means the real property where the health facility is, or is to be, constructed, improved, or expanded, and also means the health facility and the initial equipment in that health facility.

(r) ‘‘Public health facility’’ means any health facility that is or will be constructed for and operated and maintained by any city, county, or local hospital district.

(s) ‘‘Adult day health center’’ means a facility defined under subdivision (b) of Section 1570.7, that provides adult day health care, as defined under subdivision (a) of Section 1570.7.

(t) ‘‘Multilevel facility’’ means an institutional arrangement where a residential facility for the elderly is operated as a part of, or in conjunction with, an intermediate care facility, a skilled nursing facility, or a general acute care hospital. ‘‘Elderly,’’ for the purposes of this subdivision, means a person 62 years of age or older.

129015. The office shall administer this chapter and shall make all regulations necessary to implement the provisions and achieve the

purposes stated herein. The commission, as authorized by this chapter and by Section 129460, shall advise and consult with the office in carrying out the administration of this chapter.

129020. The office shall implement the loan insurance program for the construction, improvement, and expansion of public and nonprofit corporation health facilities so that, in conjunction with all other existing facilities, the necessary physical facilities for furnishing adequate health facility services will be available to all the people of the state.

The office shall make an inventory of all existing health facilities and shall survey the need for construction, improvement, and expansion of public and nonprofit corporation health facilities and, on the basis of that inventory and survey, shall develop a state plan. The office shall submit copies of the state plan to the Senate Health and Human Services, Senate Appropriations, Assembly Health, and Assembly Ways and Means Committees.

The health facility construction loan insurance program shall provide for health facility distribution throughout the state in a manner that will make all types of health facility services reasonably accessible to all persons in the state according to the state plan.

In performing its duties under this section, the office may utilize the state plan developed pursuant to former Section 439.3.

129022. Applications submitted to the office shall be signed under penalty of perjury by the applicant.

129025. No insurance shall be provided for loans under this chapter until a statewide system of health facility planning has been established so that all hospitals as defined in Section 1250 and facilities licensed by the department pursuant to Chapter 1 (commencing with Section 1200) to Chapter 2.5 (commencing with Section 1440), inclusive, except for Chapter 2.2 (commencing with Section 1340) of Division 2, have been reviewed by an area health planning agency prior to licensure. No insurance shall be provided for a loan under this chapter for a hospital or facility unless it has been finally approved through the statewide system of health facility planning.

129030. The proceeds of all loans insured pursuant to this chapter shall be disbursed only upon order of the office or its designated agent. The office shall make regulations to insure the security of these proceeds.

129035. From time to time the office or its designated agent shall inspect each construction project for which loan insurance was approved, and if the inspection so warrants, the office or agent shall certify that the work has been performed upon the project, or purchases have been made, in accordance with the approved plans and specifications, and that payment of an installment of the loan proceeds is due to the borrower. The office shall charge the borrower a fee for such inspections and certifications, that in no instance shall exceed four dollars ($4) for each one thousand dollars ($1,000) of the

borrower's loan that is insured. These fees shall be deposited in the fund.

129040. The office shall establish an annual premium charge for the insurance of hospital construction loans under this chapter, and this charge shall be deposited in the fund. The annual premium charge shall not be more than an amount equivalent to one-half of 1 percent per annum of the average amount of the principal obligation of the loan during the year in which the charge is made, without taking into account delinquent payments. The office may reduce or eliminate the premium charges for insured loans outstanding for a period in excess of three years. These premium charges shall be payable by the borrower, or, where practicable, by the lender on account of a delinquent borrower, to the office at times that shall be established by the office. The office may require the payment of one or more premium charges at the time the loan is insured, at a discount rate as it may prescribe not in excess of the interest rate specified in the loan. In the event that the principal obligation of any insured loan is paid in full prior to the maturity as the office shall determine to be equitable, of the current unearned premium charges theretofore paid by the borrower.

Article 2. Insurable Loans and Applications Therefor

129050. A loan shall be eligible for insurance under this chapter if all of the following conditions are met:

(a) When the borrower is a nonprofit corporation, the loan shall be secured by a mortgage, first lien, trust indenture, or other security agreement that the office may require subject only to those conditions, covenants and restrictions, easements, taxes, and assessments of record approved by the office. When the borrower is a political subdivision, the loan may be evidenced by a duly authorized bond issue. A loan to a local hospital district or county may meet the requirement of this subdivision by either method.

(b) The borrower obtains an American Land Title Association title insurance policy with the office designated as beneficiary, with liability equal to the amount of the loan insured under this chapter, and with additional endorsements that the office may reasonably require.

(c) The proceeds of the loan shall be used exclusively for the construction, improvement, or expansion of the health facility, as approved by the office under Section 129020. However, loans insured pursuant to this chapter may include loans to refinance another prior loan, whether or not state insured and without regard to the date of the prior loan, if the office determines that the prior loan would have been eligible for insurance under this chapter at the time it was made. The office may not insure a loan for a health facility that is not

needed as determined by the state plan developed under the authorization of Section 129020.

(d) The loan shall have a maturity date not exceeding 30 years from the date of the beginning of amortization of the loan, except as authorized by subdivision (e), or 75 percent of the office's estimate of the economic life of the health facility, whichever is the lesser.

(e) The loan shall contain complete amortization provisions requiring periodic payments by the borrower not in excess of its reasonable ability to pay as determined by the office. The office shall permit a reasonable period of time during which the first payment to amortization may be waived on agreement by the lender and borrower. The office may, however, waive the amortization requirements of this subdivision and of subdivision (g) of this section when a term loan would be in the borrower's best interest.

(f) The loan shall bear interest on the amount of the principal obligation outstanding at any time at a rate, as negotiated by the borrower and lender, as the office finds necessary to meet the loan money market. As used in this chapter, ''interest'' does not include premium charges for insurance and service charges if any. Where a loan is evidenced by a bond issue of a political subdivision, the interest thereon may be at any rate the bonds may legally bear.

(g) The loan shall provide for the application of the borrower's periodic payments to amortization of the principal of the loan.

(h) The loan shall contain those terms and provisions with respect to insurance, repairs, alterations, payment of taxes and assessments, foreclosure proceedings, anticipation of maturity, additional and secondary liens, and other matters the office may in its discretion prescribe.

(i) The loan shall have a principal obligation not in excess of an amount equal to 90 percent of the total construction cost. Where the borrower is a political subdivision, the office may fully insure loans equal to the total construction cost.

(j) The borrower shall offer reasonable assurance that the services of the health facility will be made available to all persons residing or employed in the area served by the facility.

(k) A certificate of need or certificate of exemption has been issued for the project to be financed pursuant to Chapter 1 (commencing with Section 127125) of Part 2, unless the project is not subject to this requirement.

(*l*) In the case of acquisitions, a project loan shall be guaranteed only for transactions not in excess of the fair market value of the acquisition.

Fair market value shall be determined, for purposes of this subdivision, pursuant to the following procedure, that shall be utilized during the state review of a loan guarantee application:

(1) Completion of a property appraisal by an appraisal firm qualified to make appraisals, as determined by the office, before closing a loan on the project.

(2) Evaluation of the appraisal in conjunction with the book value of the acquisition by the office. When acquisitions involve additional construction, the office shall evaluate the proposed construction to determine that the costs are reasonable for the type of construction proposed. In those cases where this procedure reveals that the cost of acquisition exceeds the current value of a facility, including improvements, then the acquisition cost shall be deemed in excess of fair market value.

(m) Notwithstanding subdivision (i), any loan in the amount of five million dollars ($5,000,000) or less may be insured up to 95 percent of the total construction cost.

In determining financial feasibility of projects of counties pursuant to this section, the office shall take into consideration any assistance for the project to be provided under Sections 14085.5 and 16715 of the Welfare and Institutions Code or from other sources. It is the intent of the Legislature that the office endeavor to assist counties in whatever ways are possible to arrange loans that will meet the requirements for insurance prescribed by this section.

129052. A pledge by or to the office of, or the grant to the office of a security interest in, revenues, moneys, accounts, accounts receivable, contract rights, general intangibles, documents, instruments, chattel paper, and other rights to payment of whatever kind made by or to the office pursuant to the authority granted in this chapter shall be valid and binding from the time the pledge is made for the benefit of pledgees and successors thereto. The revenues, moneys, accounts, accounts receivable, contract rights, general intangibles, documents, instruments, chattel paper, and other rights to payment of whatever kind pledged by or to the office or its assignees shall immediately be subject to the lien of the pledge without physical delivery or further act. The lien of such pledge shall be valid and binding against all parties, irrespective of whether the parties have notice of the lien. The indenture, trust agreement, resolution, or another instrument by which such pledge is created need not be recorded or the security interest otherwise perfected.

129055. In order to comply with subdivision (j) of Section 129050, the borrower shall demonstrate that its facility is used by persons for whom the cost of care is reimbursed under Chapter 7 (commencing with Section 14000) of Part 3 of Division 9 of the Welfare and Institutions Code in a proportion that is reasonable based upon the proportion of Medi-Cal patients in the community served by the borrower and by persons for whom the costs of care is reimbursed under Title XVIII of the federal Social Security Act in a proportion that is reasonable based upon the proportion of Medicare patients in the community served by the borrower.

For the purposes of this chapter, the community served by the facility shall mean the health facility planning area designated for the planning and review of health facility beds pursuant to Chapter 1 (commencing with Section 127125) of Part 2 where the facility is located, unless the office determines that, or the borrower demonstrates to the satisfaction of the office that, a different definition is more appropriate for the borrower's facility.

129060. Subdivisions (b) and (c) of Section 129355 shall apply to any residential or nonresidential alcoholism or drug abuse recovery or treatment program or facility, as certified under Section 11831.5, or licensed under former Section 11834.19; and any facility that provides an organized program of therapeutic, social, and health activities and services to persons with functional impairments, as licensed under Section 1576.

129065. As part of its assurance under subdivision (j) of Section 129050, the borrower shall agree to the following actions:

(a) To advise each person seeking services at the borrower's facility as to the person's potential eligibility for Medi-Cal and Medicare benefits or benefits from other governmental third party payers.

(b) To make available to the office and to any interested person a list of physicians with staff privileges at the borrower's facility, that includes:

(1) Name.

(2) Speciality.

(3) Language spoken.

(4) Whether takes Medi-Cal and Medicare patients.

(5) Business address and phone number.

(c) To inform in writing on a periodic basis all practitioners of the healing arts having staff privileges in the borrower's facility as to the existence of the facility's community service obligation. The required notice to practitioners shall contain a statement, as follows:

''This hospital has agreed to provide a community service and to accept Medi-Cal and Medicare patients. The administration and enforcement of this agreement is the responsibility of the Office of Statewide Health Planning and Development and this facility.''

(d) To post notices in the following form, that shall be multilingual where the borrower serves a multilingual community, in appropriate areas within the facility, including but not limited to, admissions offices, emergency rooms, and business offices:

NOTICE OF COMMUNITY SERVICE OBLIGATION

''This facility has agreed to make its services available to all persons residing or employed in this area. This facility is prohibited by law from discriminating against Medi-Cal and Medicare patients. Should you believe you may be eligible for Medi-Cal or Medicare, you should

contact our business office (or designated person or office) for assistance in applying. You should also contact our business office (or designated person or office) if you are in need of a physician to provide you with services at this facility. If you believe that you have been refused services at this facility in violation of the community service obligation you should inform (designated person or office) and the Office of Statewide Health Planning and Development.''

The borrower shall provide copies of this notice for posting to all welfare offices in the county where the borrower's facility is located.

129070. In the event the borrower cannot demonstrate that it meets the requirement of Section 129055, it may nonetheless be eligible for a loan under this chapter if it presents a plan that is satisfactory to the office, that details the reasonable steps and timetables that the borrower agrees to take to bring the facility into compliance with Section 129055.

129075. Each borrower shall make available to the office and to the public upon request an annual report substantiating compliance with the requirements of subdivision (j) of Section 129050. The annual report shall set forth sufficient information and verification therefore to indicate the borrower's compliance. The report shall include at least the following:

(a) By category for inpatient admissions, emergency admission, and where the facility has a separate identifiable outpatient service:

(1) The total number of patients receiving services.

(2) The total number of Medi-Cal patients served.

(3) The total number of Medicare patients served.

(4) The dollar volume of services provided to each patient category listed in paragraphs (1), (2), and (3) of this subdivision.

(b) Where appropriate, the actions taken pursuant to Section 129070 and the effect the actions have had on the data specified in subdivision (a) of this section.

(c) Any other information as the office may reasonably require.

129080. The office may impose appropriate remedies and sanctions against a borrower when the office determines that the annual compliance report required in Section 129075 indicates that the borrower is out of compliance with subdivision (j) of Section 129050. The sanctions shall include, but not be limited to, the following:

(a) Rendering the borrower ineligible for federal and state financial assistance under the Hill-Burton Program.

(b) Requiring a borrower that had originally met the conditions of Section 129055, but who no longer does, to submit a plan that is satisfactory to the office that details the reasonable steps and timetables that the borrower agrees to take to bring the facility back into compliance with Section 129055.

(c) Referring the violation to the office of the Attorney General of California for legal action authorized under existing law or other remedy at law or equity, when a facility fails to carry out the actions agreed to in a plan approved by the office pursuant to Section 129070 or subdivision (b) of this section, or when the facility fails to submit compliance reports as required by Section 129075.

However, the remedies obtainable by legal action shall not include withdrawal or cancellation of the loan insurance provided under this chapter.

129085. (a) If a borrower is unable to comply with subdivision (j) of Section 129050 due to selective provider contracting under the Medi-Cal program, and the office has determined the borrower has negotiated in good faith but was not awarded a contract, the borrower may be eligible for insurance under this chapter as provided in subdivision (b).

(b) The office may determine that a noncontracting borrower shall be considered as meeting the requirements of subdivision (j) of Section 129050 if the borrower otherwise provides a community service in accordance with regulations adopted by the office. The regulations shall describe alternative methods of meeting the obligation, that may include, but not be limited to, providing free care, charity care, trauma care, community education, or primary care outreach and care to the elderly, in amounts greater than the community average. The regulations shall include a requirement that a general acute care hospital, that is not a small and rural hospital as defined in former Section 442.2, shall have, and continue to maintain, a 24-hour basic emergency medical service with a physician on duty, if it provided this service on January 1, 1990. The office shall have the authority to waive this requirement upon a determination by the director that this requirement would create a hardship for the hospital, be inconsistent with regionalization of emergency medical services, or not be in the best interest of the population served by the hospital.

129090. Political subdivisions and nonprofit corporations may apply for state insurance of needed construction, improvement, or expansion loans for construction, remodeling, or acquisition of health facilities to be or already owned, established, and operated by them as provided in this chapter. Applications shall be submitted to the office by the nonprofit corporation or political subdivision authorized to construct and operate a health facility. Each application shall conform to state requirements, shall be submitted in the manner and form prescribed by the office, and shall be accompanied by an application fee of one-half of 1 percent of the amount of the loan applied for, but in no case shall the application fee exceed five hundred dollars ($500). The fees shall be deposited by the office in the fund and used to defray the office’s expenditures in the administration of this chapter.

129095. (a) The office shall not regulate, impose requirements on, or require approval by the office of a professional, or a fee charged by a professional, used by applicants for the initial application for loan insurance. The choice of any professional and the funding source used shall be left entirely to the participants.

(b) For purposes of this section, ''professional'' includes, but is not limited to, an underwriter, bond counsel, or consultant.

(c) Nothing in this section shall prohibit the office, in the event of defaults, from taking any action authorized under this chapter to protect the financial interest of the state.

129100. Every applicant for insurance shall be afforded an opportunity for a fair hearing before the council upon 10 days' written notice to the applicant. If the office, after affording reasonable opportunity for development and presentation of the application and after receiving the advice of the council, finds that an application complies with the requirements of this article and of Section 129020 and is otherwise in conformity with the state plan, it may approve the application for insurance. The office shall consider and approve applications in the order of relative need set forth in the state plan in accordance with Section 129020.

129105. The office may upon application of the borrower insure any loan that is eligible for insurance under this chapter; and upon terms as the office may prescribe, may make commitments for the insuring of the loans prior to their date of execution or disbursement thereon. The office may, for five years after the effective date of this chapter, accept and approve applications for insurance of loans executed during the period from and including November 5, 1968, to the effective date of this chapter.

129110. Any contract of insurance executed by the office under this chapter shall be conclusive evidence of the eligibility of the loan for insurance and the validity of any contract of insurance so executed shall be incontestable from the date of the execution of the contract, except in case of fraud or misrepresentation on the part of the lender.

Article 3. Defaults

129125. In any case when the lender under a loan to a nonprofit corporation insured under this chapter shall have foreclosed and taken possession of the property under a mortgage in accordance with regulations of, and within a period to be determined by the office, or shall, with the consent of the office, have otherwise acquired the property from the borrower after default, the lender shall be entitled to receive the benefit of the insurance as provided in this section, upon (a) the prompt conveyance to the office of title to the property that meets the requirements of the regulations of the office in force at the time the loan was insured, and that is evidenced in the

manner prescribed by the regulations, and (b) the assignment to the office of all claims of the lender against the borrower or others arising out of the loan transaction or foreclosure proceedings except claims that may have been released with the consent of the office. Upon the conveyance and assignment, the office shall notify the Treasurer, who shall issue to the lender debentures having a total face value equal to the outstanding value of the loan.

For the purposes of this section, the outstanding value of the loan shall be determined, in accordance with the regulations prescribed by the office, by (a) adding to the amounts of the original principal obligation of the loan and interest that are accrued and unpaid the amount of all payments that have been made by the lender for the following: taxes and assessments, ground rents, water rates, and other liens that are prior to the mortgage; charges for the administration, operation, maintenance and repair of the health facility property; insurance on the project property, loan insurance premiums, and any tax imposed by a city or county upon any deed or other instrument by which the property was acquired by the lender and transferred or conveyed to the office; and the costs of foreclosure or of acquiring the property by other means actually paid by the lender and approved by the office; and by (b) deducting from the total amount any amounts received by the lender after the borrower's default on account of the loans or as rent or other income from the property.

129130. In any case when a political subdivision defaults on the payment of interest or principal accrued and due on bonds or other evidences of indebtedness insured under this chapter, debentures in an amount equal to the outstanding original principal obligation and interest on the bonds that were accrued and unpaid on the date of default and bearing interest at a rate equal to and payment schedule identical with those of the bonds shall be issued by the Treasurer upon notification thereof by the office to the bondholders upon the surrender of the bonds to the office.

In any case in which a hospital district defaults on the payment of interest or principal accrued and due on an insured loan secured by a first mortgage, first deed of trust, or other security agreement as authorized by Section 32127.2, debentures in an amount equal to the outstanding original principal obligation and interest on the bonds that were accrued and unpaid on the date of default and bearing interest at a rate equal to and payment schedule identical with those of the bonds shall be issued by the Treasurer upon notification thereof by the office to the bondholders upon surrender of the bonds to the office after the state has enforced its rights under the first mortgage, first deed of trust, or other security agreement.

129135. Notwithstanding any requirement contained in this chapter relating to acquisition of title and possession of the project property by the lender and its subsequent conveyance and transfer to the office, and for the purpose of avoiding unnecessary conveyance

expense in connection with payment of insurance benefits under the provisions of this chapter, the office may, subject to regulations that it may prescribe, permit the lender to tender to the office a satisfactory conveyance of title and transfer of possession direct from the borrower or other appropriate grantor and to pay to the lender the insurance benefits to which it would otherwise be entitled if the conveyance had been made to the lender and from the lender to the office.

129140. Upon receiving notice of the default of any loan insured under this chapter, the office, in its discretion and for the purpose of avoiding foreclosure under Section 129125 and notwithstanding the fact that it has previously approved a request of the lender for extensions of the time for curing the default and of the time for commencing foreclosure proceedings or for otherwise acquiring title to the project property, or has approved a modification of the loan for the purpose of changing the amortization provisions by recasting the unpaid balance, may acquire the loan and security agreements securing the loans upon the issuance to the lender of debentures in an amount equal to the unpaid principal balance of the loan plus any accrued unpaid loan interest plus reimbursement for the costs and attorney's fees of the lender enumerated in Section 129125.

After the acquisition of the loan and security interests therefor by the office, the lender shall have no further rights, liabilities, or obligations with respect thereto. The provisions of Section 129125 relating to the issuance of debentures incident to the acquisition of foreclosed properties shall apply with respect to debentures issued under this section, and the provisions of this chapter relating to the rights, liabilities, and obligations of a lender shall apply with respect to the office when it has acquired an insured loan under this section, in accordance with and subject to any regulations prescribed by the office modifying the provisions to the extent necessary to render their application for these purposes appropriate and effective.

129145. Notwithstanding any other provision of this chapter, after the office determines that the lender and borrower have exhausted all reasonable means of curing any default, the office within its discretion may, when it is in the best interests of the state, the borrower, and the lender, cure the default of the borrower by making payment from the fund directly to the lender of any amounts of the original principal obligation and interest of the loan that are accrued and unpaid. The payment shall be secured by an assignment to the office of a pro rata share of the security agreements made to the lender and, upon the payment, the borrower shall become liable for repayment of the amount thereof to the office over a period and at a rate of interest as shall be determined by the office.

129150. The office may at any time, under the terms and conditions that it may prescribe, consent to the lender's release of the borrower from its liability under the loan or the security agreement

securing the loan, or consent to the release of parts of the project property from the lien of any security agreement.

129155. Debentures issued under this chapter shall be in the form and denomination, subject to the terms and conditions, and include provisions for redemption, if any, as may be prescribed by the office with the approval of the Treasurer, and may be in coupon or registered form.

129160. (a) All debentures issued under this chapter to any lender or bondholder shall be executed in the name of the fund as obligor, shall be signed by the State Treasurer, and shall be negotiable. Pursuant to Sections 129125 and 129130, all debentures shall be dated as of the date of the institution of foreclosure proceedings or as of the date of the acquisition of the property after default by other than foreclosure, or as of another date as the office, in its discretion, may establish. The debentures shall bear interest from that date at a rate approved by the State Treasurer, equal to either the rate applicable to the most recent issue of State General Fund bonds or that specified in Section 129130, which shall be payable on the dates as the office, in its discretion, may establish except in the case of bonds or other evidences of indebtedness as specified in Section 129130, and shall have the same maturity date as the loan which they insured. All debentures shall be exempt, both as to principal and interest, from all taxation now or hereafter imposed by the state or local taxing agencies, shall be paid out of the fund, which shall be primarily liable therefor, and shall be, pursuant to Section 4 of Article XVI of the California Constitution, fully and unconditionally guaranteed as to principal and interest by the State of California, which guaranty shall be expressed on the face of the debentures. In the event that the fund fails to pay upon demand, when due, the principal of or interest on any debentures issued under this chapter, the State Treasurer shall pay to the holders the amount thereof which is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the State Treasurer shall succeed to all the rights of the holders of the debentures. The fund shall be liable for repayment to the Treasury of any money paid therefrom pursuant to this section in accordance with procedures jointly established by the State Treasurer and the office.

(b) In the event of a default, any debenture issued under this article shall be paid on a par with general obligation bonds issued by the state.

129165. Notwithstanding any other provision of law relating to the acquisition, management or disposal of real property by the state, the office shall have power to deal with, operate, complete, lease, rent, renovate, modernize, insure, or sell for cash or credit, in its discretion, any properties conveyed to it in exchange for debentures as provided in this chapter; and notwithstanding any other provision

of law, the office shall also have power to pursue to final collection by way of compromise or otherwise all claims against borrowers assigned by lenders to the office as provided in this chapter. All income from the operation, rental, or lease of the property and all proceeds from the sale thereof shall be deposited in the fund and all costs incurred by the office in its exercise of powers granted in this section shall be met by the fund.

The power to convey and to execute in the name of the office deeds of conveyance, deeds of release, assignments and satisfactions of loans and mortgages, and any other written instrument relating to real or personal property or any interest therein acquired by the office pursuant to the provisions of this chapter may be exercised by the office or by any officer of the office appointed by it.

129170. No lender or borrower shall have any right or interest in any property conveyed to the office or in any claim assigned to it, nor shall the office owe any duty to any lender or borrower with respect to the management or disposal of this property.

129172. Notwithstanding any other provision of law, if, prior to foreclosing on any collateral provided by a borrower, the office institutes a judicial proceeding or takes any action against a borrower to enforce compliance with the obligations set out in the regulatory agreement, the contract of insurance, or any other contractual loan closing document or law, including, but not limited to, Section 129173, that remedy or action shall not constitute an action within the meaning of subdivision (a) of Section 726 of the Code of Civil Procedure, or in any way constitute a violation of the intent or purposes of Section 726 of the Code of Civil Procedure, or constitute a money judgment or a deficiency judgment within the meaning of Sections 580a, 580b, 580d, or subdivision (b) of Section 726 of the Code of Civil Procedure. However, these provisions of the Code of Civil Procedure shall apply to any judicial proceeding instituted, or nonjudicial foreclosure action taken by the office to collect the principal and interest due on the loan with the borrower.

129173. In fulfilling the purposes of this article, as set forth in Section 129005, and upon making a determination that the financial status of a borrower may jeopardize a borrower’s ability to fulfill its obligations under any insured loan transaction so as to threaten the economic interest of the office in the borrower or to jeopardize the borrower’s ability to continue to provide needed healthcare services in its community, including, but not limited to, a declaration of default under any contract related to the transaction, the borrower missing any payment to its lender, or the borrower’s accounts payable exceeding three months, the office may assume or direct managerial or financial control of the borrower in any or all of the following ways:

(a) The office may supervise and prescribe the activities of the borrower in the manner and under the terms and conditions as the office may stipulate in any contract with the borrower.

(b) Notwithstanding the provisions of the articles of incorporation or other documents of organization of a nonprofit corporation borrower, this control may be exercised through the removal and appointment by the office of members of the governing body of the borrower sufficient such that the new members constitute a voting majority of the governing body.

(c) In the event the borrower is a nonprofit corporation or a political subdivision, the office may request the Secretary of the Health and Welfare Agency to appoint a trustee, this trustee shall have full and complete authority of the borrower over the insured project, including all property on which the office holds a security interest. No trustee shall be appointed unless approved by the office. A trustee appointed by the secretary pursuant to this subdivision may exercise all the powers of the officers and directors of the borrower, including the filing of a petition for bankruptcy. No action at law or in equity may be maintained by any party against the office or a trustee by reason of their exercising the powers of the officers and directors of a borrower pursuant to the direction of, or with the approval of, the secretary.

(d) The office may institute any action or proceeding, or the office may request the Attorney General to institute any action or proceeding against any borrower, to obtain injunctive or other equitable relief, including the appointment of a receiver for the borrower or the borrower's assets, in the superior court in and for the county in which the assets or a substantial portion of the assets are located. The proceeding under this section for injunctive relief shall conform with the requirements of Chapter 3 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, except that the office shall not be required to allege facts necessary to show lack of adequate remedy at law, or to show irreparable loss or damage. Injunctive relief may compel the borrower, its officers, agents, or employees to perform each and every provision contained in any regulatory agreement, contract of insurance, or any other loan closing document to which the borrower is a party, or any obligation imposed on the borrower by law, and require the carrying out of any and all covenants and agreements and the fulfillment of all duties imposed on the borrower by law or such documents.

A receiver may be appointed pursuant to Chapter 5 (commencing with Section 564) of Title 7 of Part 2 of the Code of Civil Procedure. Upon a proper showing, the court shall grant the relief provided by law and requested by the office or the Attorney General. No receiver shall be appointed unless approved by the office. A receiver appointed by the superior court pursuant to this subdivision and Section 564 of the Code of Civil Procedure may, with the approval

of the court, exercise all of the powers of the officers and directors of the borrower, including the filing of a petition for bankruptcy. No action at law or in equity may be maintained by any party against the office, the Attorney General, or a receiver by reason of their exercising the powers of the officers and directors of a borrower pursuant to the order of, or with the approval of, the superior court.

(e) The borrower shall inform the office in advance of all meetings of its governing body. The borrower shall not exclude the office from attending any meeting of the borrower's governing body.

Article 4. Termination of Insurance

129175. Should a borrower be more than 10 days delinquent in paying the premium charges or inspection fees for insurance under this chapter, the office shall notify the borrower in writing. If that payment remains delinquent more than 30 days after the sending of the office's notice to the borrower, the office shall make every reasonable effort to notify the lender in writing. If that delinquency continues, on the 31st day after sending of the office's notice to the lender, the insurance shall be terminated and become null and void.

129180. The obligation to pay any subsequent premium charge for insurance shall cease, and all rights of the lender and the borrower under this chapter shall terminate as of the date of the notice, as herein provided, in the event that (a) any lender under a loan forecloses on the mortgaged property, or has otherwise acquired the project property from the borrower after default, but does not convey the property to the office in accordance with this chapter, and the office is given written notice thereof, or (b) the borrower pays the obligation under the loan in full prior to the maturity thereof, and the office is given written notice thereof.

129185. The office is authorized to terminate any insurance contract upon joint request by the borrower and the lender and upon payment of a termination charge that the office determines to be equitable, taking into consideration the necessity of protecting the fund. Upon the termination, borrowers and lenders shall be entitled to the rights, if any, that they would be entitled to under this chapter if the insurance contract were terminated by payment in full of the insured loan.

Article 5. Health Facility Construction Loan Insurance Fund

129200. There is hereby established a Health Facility Construction Loan Insurance Fund, that shall be used by the office as a revolving fund for carrying out the provisions and administrative costs of this chapter. The money in the fund is hereby appropriated to the office without regard to fiscal years for the purposes of this chapter.

129205. Moneys in the fund not needed for the current operations of the office under this chapter shall be invested pursuant to law. The office may, with the approval of the State Treasurer, purchase the debentures issued under this chapter. Debentures so purchased shall be canceled and not reissued.

129210. (a) The office's authorization to insure health facility construction, improvement, and expansion loans under this chapter shall be limited to a total of not more than two billion five hundred million dollars ($2,500,000,000). However, when the office completes the state plan as is required by Section 129020, and the plan is approved by the Governor and submitted to the legislative committees referred to in that section by December 31, 1992, and the plan includes a finding that the limit should be further increased, then the limit shall be increased on January 1, 1993, from two billion five hundred million dollars ($2,500,000,000) to three billion dollars ($3,000,000,000).

(b) Notwithstanding the limitation in subdivision (a), the office may exceed the specific dollar limitation in either of the following instances:

(1) Refinancing a preexisting loan, if the refinancing results in savings to the health facility and increases the probability that a loan can be repaid.

(2) The need for financing results from earthquakes or other natural disasters.

129215. The Health Facility Construction Loan Insurance Fund, established pursuant to Section 129200, shall be a trust fund and neither the fund nor the interest or other earnings generated by the fund shall be used for any purpose other than those purposes authorized by this chapter.

Article 6. Community Mental Health Facilities Loan Insurance

129225. This article shall be known as, and may be cited as, the Community Mental Health Facilities Loan Insurance Law.

129230. It is the intent of the Legislature in enacting this article to encourage the development of facilities for community-based programs that assist mental health clients living in any institutional setting, including state and local inpatient hospitals, skilled nursing homes, intermediate care facilities, and community care facilities to move to more independent living arrangements. It is further the intent of the Legislature to encourage local programs to seek funding for facility development from private sources and with the assistance provided pursuant to this chapter.

To achieve this purpose in determining eligibility for loan insurance pursuant to this chapter, the following special provisions apply to facilities approved in the county Short-Doyle plan and meeting the intentions of this article:

(a) Facilities shall not require approval pursuant to Section 129295 by the statewide system of health facility planning, the area health planning agency, or the Health Advisory Council, for the issuance of loan insurance, unless specifically required for the facilities by the facility category of licensure.

(b) Notwithstanding subdivision (i) of Section 129050, any loan of under three hundred thousand dollars ($300,000) for a nonprofit corporation as well as a political subdivision may be fully insured equal to the total construction cost, except a loan to any proprietary corporation that is insured pursuant to subdivision (d) of this section.

(c) The State Department of Mental Health or the local mental health program may provide all application fees, inspection fees, premiums and other administrative payments required by this chapter, except with respect to any loan to a proprietary corporation that is insured pursuant to subdivision (d) of this section.

(d) The borrower may be a proprietary corporation, provided that the facility is leased to the local mental health program for the duration of the insurance agreement. In these instances, all provisions in this chapter and this article that apply to a nonprofit corporation shall apply to the proprietary corporation, except as provided in subdivisions (b) and (c) of this section.

(e) For the purposes of this article, subdivision (c) of Section 129010 shall include the purchase of existing buildings.

(f) Facilities shall not require approval pursuant to Section 129020 by the statewide system of health facility planning, the area health planning agency, or the Health Advisory Council, for the issuance of loan insurance, until the director of the office and the Director of the Department of Mental Health determine that the state plan developed pursuant to Section 129020 adequately and comprehensively addresses the need for community mental health facilities and that finding is reported to the appropriate policy committees of the Legislature.

129235. Loans of under three hundred thousand dollars ($300,000) for any single facility shall have priority for obtaining loan insurance under the special provisions established pursuant to Section 129230.

129240. The total amount of loans that may be insured pursuant to this article shall not exceed fifteen million dollars ($15,000,000).

129245. No loan insurance shall be provided pursuant to this article for the purpose of providing psychiatric inpatient services in an acute psychiatric hospital or a general acute care hospital.

129250. The Legislative Analyst shall review and comment on the utilization and effectiveness of this article in the annual budget analysis and in hearings.

129255. If, in construing Article 6 (commencing with Section 129225) of this chapter as applied to the other provisions of this

chapter, any conflict arises, this article shall prevail over the other provisions of this chapter.

129260. If any provision of this article or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of this article that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Article 7. Small Facility Loan Guarantee for Developmental Disability Programs

129275. This article shall be known and may be cited as the Small Facility Loan Guarantee for Developmental Disability Programs.

129280. It is the intent of the Legislature in enacting this article to encourage the development of facilities for community-based programs that assist developmentally disabled clients living in any institutional setting, including state and local inpatient hospitals, skilled nursing homes, intermediate care facilities, and community care facilities to move to more independent living arrangements. It is further the intent of the Legislature to encourage local programs to seek funding for facility development from private sources and with the assistance provided pursuant to this chapter.

To achieve this purpose in determining eligibility for loan insurance pursuant to this chapter, the following special provisions apply to facilities approved by area developmental disabilities boards and meeting the intentions of this article:

(a) Facilities shall not require approval pursuant to Section 129295 by the statewide system of health facility planning, the area health planning agency, or the Health Advisory Council, for the issuance of loan insurance, unless specifically required for the facilities by the facility category of licensure.

(b) Notwithstanding subdivision (i) of Section 129050, any loan of under three hundred thousand dollars ($300,000) for a nonprofit corporation as well as a political subdivision may be fully insured equal to the total construction cost.

(c) Facilities shall not require approval pursuant to Section 129020 by the statewide system of health facility planning, the area health planning agency, or the Health Advisory Council, for the issuance of loan insurance, until the director of the office and the Director of the Department of Developmental Services determine that the state plan developed pursuant to Section 129020 adequately and comprehensively addresses the need for community developmental services facilities and that finding is reported to the appropriate policy committees of the Legislature.

129285. (a) Loans of under three hundred thousand dollars ($300,000) for any single facility for six or fewer developmentally disabled shall have priority for obtaining loan insurance.

(b) The total amount of loans that may be insured pursuant to this article shall not exceed fifteen million dollars ($15,000,000).

129290. If any provision of this article or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of this article that can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

129295. The office shall establish a pilot program under this article of insuring loans to nonprofit borrowers that are not licensed to operate the facilities for which the loans are insured. The number of facilities for which loans are insured under this section shall not exceed 30 and the aggregate amount of loans insured under this section shall not exceed six million dollars ($6,000,000), this may be in addition to the maximum loan insurance amount otherwise authorized by subdivision (b) of Section 129285. Construction of all projects assisted under this section shall be commenced on or before January 1, 1990.

The office may delay processing or decline acceptance of loan guarantee applications under this section if the volume of applications becomes too large for existing staff to process in a timely manner or if risks associated with the pilot program are determined by the office to be unreasonable.

The office shall submit a report to the Legislature, on or before January 1, 1991, specifically identifying potential problems and financial risks associated with insuring loans authorized by this section.

Article 9. Rural Hospital Grant Program

129325. It is the intent of the Legislature in enacting this article to assist rural hospitals that play a vital role in the health delivery system. The Legislature recognizes the difficulties rural hospitals encounter meeting urban hospital standards while serving a small, rural, or tourist patient base. However, it is not the intent of the Legislature to provide assistance to facilities that can only survive with continuous subsidies. Rather, it is the intent of the Legislature, through this program, to encourage the development and transition to an alternative rural hospital model, and to provide essential access to services not available at the alternative rural hospital level.

129330. In each even-numbered year, the office shall contract for an actuarial study to determine the reserve sufficiency of funds in the Health Facility Construction Loan Insurance Fund. The study shall examine the portfolio of existing insured loans and shall estimate the amount of reserve funds that the office should reasonably have available to be able to respond adequately to potential foreseeable risks, including extraordinary administrative expenses and actual defaults. Actuarial study contracts shall be exempt from Section 10373

of the Public Contract Code and shall be considered sole-source contracts.

129335. (a) In each odd-numbered year when the reserve balance in the fund is projected to be in excess of that actuarially needed, the office may, subject to authority in the Budget Act, grant excess reserve funds to rural hospitals.

(b) Whenever the office administers the grant program, it shall do so by a competitive process where potential grantees have sufficient time to apply. Priority for funds shall be given to alternative rural hospitals and rural hospitals that are sole community providers. Priority shall also be given to applicants that are otherwise financially viable, but request one-time financial assistance for equipment expenditures or other capital outlays. The maximum amount of any grant for a single project in any one grant year shall be two hundred fifty thousand dollars ($250,000).

(c) For the purposes of this article, ‘‘rural hospital’’ shall have the same meaning as contained in subdivision (a) of Section 124840.

Article 10. Community Health Center Facilities Loan Insurance

129350. This article shall be known and may be cited as the Community Health Center Facilities Loan Insurance Law.

129355. (a) ‘‘Community health center facilities,’’ as used in this article, means those licensed, nonprofit primary care clinics as defined in paragraph (1) of subdivision (a) of Section 1204.

(b) Notwithstanding subdivision (i) of Section 129050, any loan in the amount of five million dollars ($5,000,000) or less for a community health center facility pursuant to this chapter may be insured up to 95 percent of the total construction cost.

(c) Community health center facilities applying for any loan insurance pursuant to this chapter, may use existing equity in buildings, equipment, and donated assets, including, but not limited to, land and receipts from expenses related to the capital outlay for the project, notwithstanding the date of occurrence to meet the equity requirements of this chapter. In determining the value of the equity in any donated property, the office may use the original purchase price or the current appraised value.

(d) Any state plan referred to in Section 129020 developed by the office shall include a chapter identifying any impediments that preclude small facilities from utilizing the California Health Facility Construction Loan Insurance Program. The state plan shall also include specific programmatic remedies to enable small projects to utilize the program if impediments are found.

CHAPTER 2. HOSPITAL SURVEY AND CONSTRUCTION (HILL BURTON PROGRAM)

Article 1. Definitions and General Provisions

129375. This chapter may be cited as the ''California Hospital Survey and Construction Act.''

129380. As used in this chapter, the terms defined in this article have the meanings set forth in this article.

129385. ''The federal act'' includes Public Law 725 of the 79th Congress, approved August 13, 1946, entitled the Hospital Survey and Construction Act, as amended by Public Law 482 of the 83d Congress, approved July 12, 1954, entitled the Medical Facilities Survey and Construction Act of 1954, Public Law 88-164 of the 88th Congress, approved October 31, 1963, entitled Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, and any other law now enacted by Congress concerning hospitals as defined in this article.

129390. ''The Surgeon General'' means the Surgeon General of the Public Health Service of the United States, or the Secretary of the Department of Health, Education and Welfare of the United States.

129395. ''Hospital'' includes hospitals for the chronically ill and impaired, public health centers, community mental health centers, facilities for the mentally retarded, and general, tuberculosis, mental and other types of hospitals and related facilities, such as laboratories, outpatient departments, nurses' home and training facilities, and central service facilities operated in connection with hospitals, diagnostic or treatment centers, nursing homes, and rehabilitation facilities, but except for facilities for the mentally retarded does not include any institution furnishing primarily domiciliary care.

129400. ''Public health center'' means a publicly owned facility for the provision of public health services, including related facilities such as laboratories, clinics, provisions for bed care, and administrative offices operated in connection with public health centers.

129405. ''Nonprofit hospital,'' ''nonprofit diagnostic or treatment center,'' ''nonprofit rehabilitation facility,'' and ''nonprofit nursing home'' mean any hospital, diagnostic or treatment center, rehabilitation facility, and nursing home, as the case may be, that is owned and operated by one or more nonprofit corporations or associations no part of the net earnings of that inures, or may lawfully inure, to the benefit of any private shareholder or individual, or a hospital publicly owned or operated by a public entity or agency of this state.

129410. ''Construction'' includes construction of new buildings, expansion, remodeling, and alteration of existing buildings, and initial equipment of any buildings; including architects' fees, but

excluding the cost of off-site improvements and, except with respect to public health centers, the cost of the acquisition of land.

129415. This chapter shall not apply to any sanatorium or institution conducted by or for the adherents of any well recognized church or religious denomination for the purpose of providing facilities for the care or treatment of the sick who depend upon prayer or spiritual means for healing in the practice of the religion of the church or denomination.

129420. ''Diagnostic or treatment center'' means a facility for the diagnosis or diagnosis and treatment of ambulatory patients (1) that is operated in connection with a hospital, or (2) where patient care is under the professional supervision of persons licensed to practice medicine or surgery in the State, or, in the case of dental diagnosis or treatment, under the professional supervision of persons licensed to practice dentistry in the state.

129425. ''Hospital for the chronically ill and impaired'' shall not include any hospital primarily for the care and treatment of mentally ill or tuberculous patients.

129430. ''Rehabilitation facility'' means a facility that is operated for the primary purpose of assisting in the rehabilitation of disabled persons through an integrated program of medical, psychological, social, and vocational evaluation and services under competent professional supervision, and in the case of which (1) the major portion of the evaluation and services is furnished within the facility; and (2) either (a) the facility is operated in connection with a hospital, or (b) all medical and related health services are prescribed by, or are under the general direction of, persons licensed to practice medicine or surgery in the state.

129435. ''Nursing home'' means a facility for the accommodation of convalescents or other persons who are not acutely ill and not in need of hospital care, but who require skilled nursing care and related medical services (1) that is operated in connection with a hospital, or (2) where nursing care and medical services are prescribed by, or are performed under the general direction of, persons licensed to practice medicine or surgery in the state.

Article 2. Administration

129450. The office shall constitute the sole agency of the state for the following purposes:

(a) Making an inventory of existing hospitals, surveying the need for construction of hospitals, and developing a program of hospital construction as provided in Article 3 (commencing with Section 129475) of this chapter.

(b) Developing and administering a state plan for the construction of public and other nonprofit hospitals as provided in Article 3 (commencing with Section 129475) of this chapter.

129455. In carrying out the purposes of this chapter, the department shall:

(a) Require reports, make inspections and investigations, and prescribe regulations as the department deems necessary.

(b) Provide methods of administration, appoint personnel, and take other action as may be necessary to comply with the requirements of the federal act, this chapter, and the regulations thereunder.

(c) Make an annual report to the Governor and to the Legislature on activities and expenditures pursuant to this chapter, including recommendations for additional legislation as the director considers appropriate to furnish adequate hospital, clinic, and similar facilities to the people of this state.

129460. The California Health Policy and Data Advisory Commission shall advise and consult with the department in carrying out the administration of this chapter and succeeds to and is vested with the functions, authority and responsibility of the Advisory Hospital Council and the Health Planning Council.

Any reference in any code to the Advisory Hospital Council or to the Health Planning Council shall be deemed a reference to the California Health Policy and Data Advisory Commission.

Article 3. Survey and Planning

129475. The department shall make an inventory of existing hospitals, including public, nonprofit, and proprietary hospitals, to survey the need for construction of hospitals, and, on the basis of the inventory and survey, shall develop a program for the construction of public and other nonprofit hospitals as will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic, and similar services to all the people of the state.

129480. The construction program shall provide, in accordance with regulations prescribed under the federal act, this chapter, and the regulations thereunder, for adequate hospital facilities for the people residing in this state, and as much as possible shall provide for their distribution throughout the state in a manner that makes all types of hospital service reasonably accessible to all persons in the state.

129485. The office may make application to the Surgeon General for federal funds to assist in carrying out the survey and planning activities provided for in this article. These funds shall be deposited in the Office of Statewide Health Planning and Development Fund in the State Treasury.

129490. The department shall prepare and submit to the Surgeon General a state plan, and any revisions thereof or supplements thereto, that shall include the hospital construction program

developed under this article, and that shall provide for the establishment, administration, and operation of hospital construction activities in accordance with the requirements of the federal act and regulations thereunder.

129495. The department shall, by regulation, prescribe minimum requirements for the maintenance and operation of hospitals that receive federal aid for construction under the state plan and shall adopt and submit building standards for approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13 as required for those purposes.

129500. The state plan shall set forth the relative need for the several projects included in the construction program, determined on the basis of the relative need of different sections of the population and of different areas lacking adequate hospital facilities, giving special consideration to areas with relatively small financial resources, and in accordance with the regulations of the Surgeon General prescribed pursuant to the federal act, and shall provide for their construction in the order of relative need so determined, insofar as financial resources available therefor and for maintenance and operations make it possible. In enacting this section it is the intent of the Legislature to encourage the design of projects and the development of programs that undertake responsibility to provide in an efficient manner comprehensive health care, including outpatient and preventive care, as well as hospitalization, to a defined population or populations.

For purposes of this section, the criterion of efficiency referred to herein shall include, but not be limited to, a consideration of the utilization of health facilities and services, including policies, mechanisms, and procedures to prevent excessive utilization.

129505. Applications for hospital construction projects for which federal funds are requested shall be submitted to the department, and may be submitted by the state or any political subdivision thereof or by any public or nonprofit agency authorized to construct and operate a hospital. Each application for a construction project shall conform to federal and state requirements, and shall be submitted in the manner and form prescribed by the department.

Any county that applies for or accepts federal funds for any hospital does so on condition that the hospital for which assistance is requested and accepted, at all times during which it is operated, (a) shall be qualified for a license under Chapter 2 (commencing with Section 1250) of Division 2 (whether or not that chapter is otherwise applicable to the hospital), and be subject to inspection under that chapter to the same extent as are other hospitals to which that chapter applies; and (b) shall not restrict patients to those unable to pay for their care.

129510. The department shall afford to every applicant for assistance for a construction project an opportunity for a fair hearing

before the council upon 10 days' written notice to the applicant. If the department, after affording reasonable opportunity for development and presentation of applications in the order of relative need, finds that a project application complies with the requirements of Section 129505 and is otherwise in conformity with the state plan, it shall approve the application and shall recommend and forward it to the Surgeon General. The department shall consider and forward applications in the order of relative need set forth in the state plan in accordance with Section 129500.

129515. From time to time the department shall inspect each construction project approved by the Surgeon General, and if the inspection so warrants, the department shall certify to the Surgeon General that work has been performed upon the project, or purchases have been made, in accordance with the approved plans and specifications, and that payment of an installment of federal funds is due to the applicant.

129520. The office is hereby authorized to receive federal funds in behalf of, and transmit them to, the applicants. Money received from the federal government for a construction project approved by the Surgeon General shall be deposited in the Office of Statewide Health Planning and Development Fund, and shall be used solely for payments due applicants for work performed, or purchases made, in carrying out approved projects.

129525. Any moneys deposited in the Office of Statewide Health Planning and Development Fund in accordance with this article are appropriated for expenditure by the office director for the purposes for which moneys were received, in accordance with the provisions of this chapter. Any funds received and not expended for the purposes of this article shall be repaid to the Treasury of the United States.

129530. The Legislature finds that in certain areas there is a need for nursing and convalescent homes for persons who are indigent. It is the purpose of this section to provide authorization for the construction of the homes, so that public medical assistance may be provided, under the state's medical assistance programs, for indigent persons.

The office may issue a certificate of need upon application by a chartered nonprofit corporation, for a nursing and convalescent home that provides or makes available medical care for indigent persons, to be constructed under the Mortgage Insurance Program of the Federal Housing Administration.

129535. The department shall, to the extent required by federal law, ascertain and enforce compliance with federal and state provisions and regulations adopted pursuant to this section during the period that an applicant who receives federal assistance remains obligated in order to assure the provision of uncompensated services for persons unable to pay for those services.

The department shall adopt regulations, in accordance with applicable federal regulations and Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, for administering federal requirements for uncompensated services for persons unable to pay for those services. The regulations shall include all of the following:

(a) Identify categories of persons eligible for uncompensated services.

(b) Define the services that applicants may provide to meet their obligations under this section.

(c) Require obligated facilities to submit information, data, budgets, and reports, in a form and manner as the department may prescribe, describing the method under which the facility elects to establish the level at which it will provide uncompensated services.

(d) Permit department approval of requests to provide uncompensated services at a lesser level than prescribed, based on facility's inability to provide the prescribed level.

(e) Specify procedures for public hearings to inform the public of levels of uncompensated services to be provided by individual facilities or to resolve disputes and complaints relating to these levels.

(f) Set forth procedures for publication of notice concerning public hearings and, thereafter, for notices announcing the levels of uncompensated services to be provided by facilities.

(g) Describe the surveillance program utilized by the department to assure that individual facility's obligations to provide a determined level of uncompensated services are met.

Article 4. State Assistance for Hospital Construction

129550. As used in this article, ''public agency'' means cities, counties, and local hospital districts.

129555. ''Public agency'' also means any corporation, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual, who is authorized to construct and operate a hospital.

129560. The office shall administer this article, and shall make regulations as may be necessary to carry out its provisions.

129565. From any state moneys made available to it for that purpose, the department shall provide assistance pursuant to this article for the construction of hospitals to public agencies that apply therefor, if the public agencies are eligible for assistance under this article and apply for and accept assistance upon the conditions specified in this article.

129570. A public agency is eligible for state assistance under this article only if it qualifies for and receives assistance from the United States Government under the federal act.

129575. Any public agency that applies for or accepts state assistance for any hospital under this article does so on condition that the hospital for which such assistance is requested and accepted, at all times during which it is operated, (a) shall be qualified for a license under Chapter 2 (commencing with Section 1400) of Division 2 of this code (whether or not Chapter 2 is otherwise applicable to the hospital), and be subject to inspection under Chapter 2 to the same extent as are other hospitals to which Chapter 2 applies; or shall be qualified for a license under Part 2 (commencing with Section 5699) of Division 5 of the Welfare and Institutions Code (whether or not Division 5 is otherwise applicable to the hospital), and be subject to inspection under Division 5 to the same extent as are other hospitals to which Division 5 applies; and (b) shall not restrict patients to those unable to pay for their care.

129580. The amount of state assistance that shall be provided to any public agency for any hospital under this article shall be a sum equal to the assistance received by the agency for its project under the federal act, but in no event shall the amount of the state assistance exceed one-third of the cost of construction of the project.

129585. Application for state assistance under this article shall be made to the office, in the manner and form prescribed by the office. The office shall prescribe the time and manner of payment of state assistance, if granted.

129590. Funds utilized for community mental health center purposes shall be allocated in a manner consistent with the intent of Section 9000 of the Welfare and Institutions Code and priority shall be given to the establishment or enlargement of clinical service facilities in general hospitals that are a part of a project proposal that provides a comprehensive service.

CHAPTER 3. FIRE SAFETY LOAN PROGRAM (Reserved)

PART 7. FACILITIES DESIGN REVIEW AND CONSTRUCTION

CHAPTER 1. HEALTH FACILITIES

Article 1. General Provisions

129675. This chapter shall be known and may be cited as the Alfred E. Alquist Hospital Facilities Seismic Safety Act of 1983.

129680. It is the intent of the Legislature that hospitals, that house patients who have less than the capacity of normally healthy persons to protect themselves, and that must be reasonably capable of providing services to the public after a disaster, shall be designed and constructed to resist, insofar as practical, the forces generated by earthquakes, gravity, and winds. In order to accomplish this purpose,

the Legislature intends to establish proper building standards for earthquake resistance based upon current knowledge, and intends that procedures for the design and construction of hospitals be subjected to independent review. It is the intent of the Legislature to preempt from local jurisdictions the enforcement of all building standards published in the California Building Standards Code relating to the regulation of hospital projects and the enforcement of other regulations adopted pursuant to this chapter, and all other applicable state laws, including plan checking and inspection of the design and details of the architectural, structural, mechanical, plumbing, electrical, and fire and panic safety systems, and the observation of construction. The Office of Statewide Health Planning and Development shall assume these responsibilities by establishing, maintaining, and operating separate, but coordinated, plan review and field inspection units within the statewide office.

It is the intent of the Legislature that where local jurisdictions have more restrictive requirements for the enforcement of building standards, other building regulations, and construction supervision, these requirements shall be enforced by the statewide office.

It shall be the responsibility of each local jurisdiction to keep the office advised as to the existence of any more restrictive local requirements. Where a reasonable doubt exists as to whether the requirements of the local jurisdiction are more restrictive, the effect of these requirements shall be determined by the Hospital Building Safety Board.

It is further the intent of the Legislature that the office, with the advice of the Hospital Building Safety Board, may conduct or enter into contracts for research regarding the reduction or elimination of seismic or other safety hazards in hospital buildings or research regarding hospital building standards.

Article 2. Definitions

129700. Unless the context otherwise requires, the definitions in this article govern the construction of this chapter.

129705. ''Architect'' means a person who is certified and holds a valid license under Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code.

129710. ''Construction or alteration'' includes any construction, reconstruction, or alteration of, or addition to, any hospital building.

129715. ''Director'' means the Director of the Office of Statewide Health Planning and Development.

129720. ''Engineering geologist'' means a person who is validly certified under Chapter 12.5 (commencing with Section 7800) of Division 3 of the Business and Professions Code.

129725. (a) (1) ''Hospital building'' includes any building not specified in subdivision (b) that is used, or designed to be used, for

a health facility of a type required to be licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.

(2) Except as provided in paragraph (9) of subdivision (b), hospital building includes a correctional treatment center, as defined in subdivision (j) of Section 1250, the construction of which was completed on or after March 7, 1973.

(b) ''Hospital building'' does not include any of the following:

(1) Any building where outpatient clinical services of a health facility licensed pursuant to Section 1250 are provided that is separated from a building in which hospital services are provided. If any one or more outpatient clinical services in the building provides services to inpatients, the building shall not be included as a ''hospital building'' if those services provided to inpatients represent no more than 25 percent of the total outpatient services provided at the building. Hospitals shall maintain on an ongoing basis, data on the patients receiving services in these buildings, including the number of patients seen, categorized by their inpatient or outpatient status. Hospitals shall submit this data annually to the department.

(2) Any building used, or designed to be used, for a skilled nursing facility or intermediate care facility if the building is of single-story, wood-frame or light steel frame construction.

(3) Any building of single-story, wood-frame or light steel frame construction where only skilled nursing or intermediate care services are provided if the building is separated from a building housing other patients of the health facility receiving higher levels of care.

(4) Any freestanding structures of a chemical dependency recovery hospital exempted under subdivision (c) of Section 1275.2.

(5) Any building licensed to be used as an intermediate care facility/developmentally disabled habilitative with six beds or less and any intermediate care facility/developmentally disabled habilitative of 7 to 15 beds that is a single-story, wood-frame or light steel frame building.

(6) Any building that has been used as a community care facility licensed pursuant to Chapter 3 (commencing with Section 1500) of Division 2, and was originally licensed to provide that level of care prior to March 7, 1973, if (A) the building complied with applicable building and safety standards at the time of that licensure, (B) the Director of the State Department of Health Services, upon application, determines that in order to continue to properly serve the facility's existing client population, relicensure as an intermediate care facility/developmentally disabled will be required, and (C) a notice of intent to obtain a certificate of need was filed with the area health planning agency and the office on or before March 1, 1983. The exemption provided in this paragraph extends only to use of the building as an intermediate care facility/developmentally disabled.

(7) Any building that has been used as a community care facility pursuant to paragraph (1) or (2) of subdivision (a) of Section 1502, and was originally licensed to provide that level of care if all of the following conditions are satisfied:

(A) The building complied with applicable building and safety standards for a community care facility at the time of that licensure.

(B) The facility conforms to the 1973 Edition of the Uniform Building Code of the International Conference of Building Officials as a community care facility.

(C) The facility is other than single story, but no more than two stories, and the upper story is licensed for ambulatory patients only.

(D) A certificate of need was granted prior to July 1, 1983, for conversion of a community care facility to an intermediate care facility.

(E) The facility otherwise meets all nonstructural construction standards for intermediate care facilities in existence on the effective date of this act or obtains waivers from the appropriate agency.

The exemption provided in this paragraph extends only to use of the building as an intermediate care facility as defined in subdivision (d) of Section 1250 and the facility is in Health Facilities Planning Area 1420.

(8) Any building subject to licensure as a correctional treatment center, as defined in subdivision (j) of Section 1250, the construction of which was completed prior to March 7, 1973.

(9) (A) Any building that meets the definition of a correctional treatment center, pursuant to subdivision (j) of Section 1250, for which the final design documents were completed or the construction of which was begun prior to January 1, 1994, operated by or to be operated by the Department of Corrections, the Department of the Youth Authority, or by a law enforcement agency of a city, county, or a city and county.

(B) In the case of reconstruction, alteration, or addition to, the facilities identified in this paragraph, and paragraph (8) or any other building subject to licensure as a general acute care hospital, acute psychiatric hospital, correctional treatment center, or nursing facility, as defined in subdivisions (a), (b), (j), and (k) of Section 1250, operated or to be operated by the Department of Corrections, the Department of the Youth Authority, or by a law enforcement agency of a county, only the reconstruction, alteration, or addition, itself, and not the building as a whole, nor any other aspect thereof, shall be required to comply with this chapter or the regulations adopted pursuant thereto.

129730. (a) Space for the following functions shall be considered ‘‘outpatient clinical services,’’ when provided in a freestanding building that is separated from a hospital building where inpatient hospital services are provided: administrative space, central sterile supply; storage; morgue and autopsy facilities; employee dressing

rooms and lockers; janitorial and housekeeping facilities; and laundry.

(b) The outpatient portions of the following services may also be delivered in a freestanding building and shall be considered ''outpatient clinical services:'' intermediate care; chronic dialysis; psychiatry; rehabilitation; occupational therapy; physical therapy; maternity; dentistry; skilled nursing; and chemical dependency.

(c) Services that duplicate basic services, as defined in subdivision (a) of Section 1250, or services that are provided as part of a basic service, but are not required for facility licensure may also be provided in a freestanding building.

(d) The office shall not approve any plans that propose to locate any function listed in subdivision (a) in a freestanding building until the department certifies to the office that it has received and approved a plan acceptable to the department that demonstrates how the health facility will continue to provide all basic services in the event of any emergency when the freestanding building may no longer remain functional.

(e) Services listed in subdivisions (b) and (c) are subject to the same 25-percent inpatient limitation described in Section 129725.

129735. ''Light steel frame construction'' means building construction using bearing walls composed of light gauge steel studs for its primary vertical support systems.

129740. ''Office'' means the Office of Statewide Health Planning and Development.

129745. ''Structural engineer'' means a person who is validly certified to use the title structural engineer under Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code.

Article 3. General Requirements and Administration

129750. The office shall observe the construction of, or addition to, any hospital building or the reconstruction or alteration of any hospital building, as it deems necessary to comply with this chapter for the protection of life and property.

129755. Notwithstanding this chapter or any other provision of law, a city or county may operate a federally owned facility for the purpose of providing services to persons with human immunodeficiency (HIV) infections, and the operation of that facility shall be subject only to those seismic safety standards contained in federal law.

129760. The governing board of each hospital or other hospital governing authority, before adopting any plans for the hospital building, shall submit the plans to the office for approval and shall pay the fees prescribed in this chapter.

129765. In each case, the application for approval of the plans shall be accompanied by the plans, by full, complete, and accurate specifications, by structural design computations, and by the specified fee, which shall comply with the requirements prescribed by the office.

129770. (a) The office shall pass upon and approve or reject all plans for the construction or the alteration of any hospital building, independently reviewing the design to assure compliance with the requirements of this chapter. The office shall review the structural systems and related details, including the independent review of the geological data. Geological data shall be reviewed by an engineering geologist, and structural design data shall be reviewed by a structural engineer.

(b) Whenever the office finds a violation of this chapter that requires correction, a citation of the violation shall be issued to the hospital governing board or authority in writing and shall include a proper reference to the regulation or statute being violated.

129775. (a) Except as otherwise provided in subdivision (b), plans submitted pursuant to this chapter for work that affects structural elements shall contain an assessment of the nature of the site and potential for earthquake damage, based upon geologic and engineering investigations and reports by competent personnel of the causes of earthquake damage. One-story Type V wood frame or light steel frame, or light steel and wood frame construction of 4,000 square feet or less, shall be exempt from the provisions of this section, unless the project is within a special study zone established pursuant to Section 2622 of the Public Resources Code.

(b) The requirements of subdivision (a) may be waived by the office when the office determines that these requirements for the proposed hospital project are unnecessary and would not be beneficial to the safety of the public. The office, after consultation with the Building Safety Board, shall adopt regulations defining the criteria upon which the determination of a waiver shall be made.

129780. The engineering investigation shall be correlated with the geologic evaluation made pursuant to Section 129775.

129785. The application shall be accompanied by a filing fee in an amount that the office determines will cover the costs of administering this chapter. The fee shall not exceed 2 percent of the estimated construction cost. The fee shall be established in accordance with applicable procedures established in Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.

The minimum fee in any case shall be two hundred fifty dollars ($250).

The office shall issue an annual permit upon submission, pursuant to Section 129765, of an application for a project only if its estimated construction cost is twenty-five thousand dollars ($25,000) or less.

The cost of this annual permit shall be two hundred fifty dollars ($250) and this fee shall constitute the filing fee and shall cover all projects undertaken for a particular skilled nursing or intermediate care facility by the applicant up to an estimated construction cost of twenty-five thousand dollars ($25,000) during the state fiscal year in which the annual permit is issued. The fees for projects over the twenty-five thousand dollar ($25,000) limit shall be assessed at a rate established by the office in regulation. However, the rate established by the office shall not exceed 1.5 percent of the estimated construction cost for projects of skilled nursing and intermediate care facilities, as defined in subdivision (c), (d), (e), or (g) of Section 1250.

If the actual construction cost exceeds the estimated construction cost by more than 5 percent, a further fee shall be paid to the office, based on the above schedule and computed on the amount that the actual cost exceeds the amount of the estimated cost. If the estimated construction cost exceeds the actual construction cost by more than 5 percent, the office shall refund the excess portion of any paid fees, based on the above schedule and computed on the amount that the estimated cost exceeds the amount of the actual cost. A refund shall not be required if the applicant did not complete construction or alteration of 75 percent of the square footage included in the project, as contained in the approved drawings and specifications for the project. In addition, the office shall adopt regulations specifying other circumstances when the office shall refund to an applicant all or part of any paid fees for projects submitted under this chapter. The regulations shall include, but not be limited to, refunds of paid fees for a project that is determined by the office to be exempt or otherwise not reviewable under this chapter, and for a project that is withdrawn by the applicant prior to the commencement of review by the office of the drawing and specifications submitted for the project. All refunds pursuant to this section shall be paid from the Hospital Building Account in the Architecture Public Building Fund, as established pursuant to Section 129795.

129787. (a) The payment of the filing fee described in Section 15046 may be postponed by the statewide office if all of the following conditions are met:

(1) The proposed construction or alteration has been proposed as a result of a seismic event that has been declared to be a disaster by the Governor.

(2) The statewide office determines that the applicant cannot presently afford to pay the filing fee.

(3) The applicant has applied for federal disaster relief from the Federal Emergency Management Agency (FEMA) with respect to the disaster described in paragraph (1).

(4) The applicant is expected to receive disaster assistance within one year from the date of the application.

(b) If the statewide office does not receive full payment of any fee for which payment has been postponed pursuant to subdivision (a) within one year from the date of plan approval, the statewide office may request an offset from the Controller for the unpaid amount against any amount owed by the state to the applicant, and may request additional offsets against amounts owed by the state to the applicant until the fee is paid in full. This subdivision shall not be construed to establish an offset as described in the preceding sentence as the exclusive remedy for the collection of any unpaid fee amount as described in that same sentence.

129790. The office shall adopt specific space, architectural, structural, mechanical, plumbing, and electrical standards for correctional treatment centers in cooperation with the Board of Corrections, the Department of Corrections, and the Department of the Youth Authority.

129795. All fees shall be paid into the State Treasury and credited to the Hospital Building Fund, that is hereby created and continuously appropriated without regard to fiscal years for the use of the office, subject to approval of the Department of Finance, in carrying out this chapter. Adjustments in the amounts of the fees, as determined by the office and approved by the Department of Finance, shall be made within the limits set in Section 129785 in order to maintain a reasonable working balance in the account. Notwithstanding any other provision of law, any moneys collected pursuant to this chapter contained in the hospital building fund established by the Department of Finance, that are in the fund on January 1, 1994, shall be available for expenditure in accordance with this section.

129800. The director shall request the Department of Finance or the Auditor General to perform an audit of the uses of fees collected pursuant to Section 129785. This audit shall include, but not be limited to, an accounting of staff resources allocated to hospital plan reviews by the office and by the Office of the State Architect in the Department of General Services since these reviews are funded by fees collected pursuant to Section 129785. If the Department of Finance and the Auditor General indicate that other audit responsibilities will prohibit them from performing and completing the audit within six months of being initially requested to do so, then the office may contract with an independent organization to perform the audit.

129805. All plans and specifications shall be prepared under the responsible charge of an architect or a structural engineer, or both. A structural engineer shall prepare the structural design and shall sign plans and specifications related thereto. Administration of the work of construction shall be under the responsible charge of the architect and structural engineer, except that where plans and specifications for alterations or repairs do not affect architectural or

structural conditions, the plans and specifications may be prepared and work of construction may be administered by a professional engineer duly qualified to perform the services and holding a valid certificate under Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code for performance of services in that branch of engineering in which the plans, specifications, and estimates and work of construction are applicable.

129810. Before commencing any construction or alteration of any hospital building, the written approval of the necessary plans as to safety of design and construction, by the office, shall be obtained.

129815. Any permit or authorization issued or provided pursuant to this chapter shall be subject to Chapter 3 (commencing with Section 15374) of Part 6.7 of Division 3 of Title 2 of the Government Code.

129820. No contract for the construction or alteration of any hospital building, made or executed on or after January 1, 1983, by the governing board or authority of any hospital or other similar public board, body, or officer otherwise vested with authority to make or execute such a contract, is valid, and no money shall be paid for any work done under such a contract or for any labor or materials furnished in constructing or altering any such building unless all of the following requirements are satisfied:

(a) The plans and specifications comply with this chapter and the requirements prescribed by the office.

(b) The approval thereof in writing has first been had and obtained from the office.

(c) The hospital building is to be accessible to, and usable by, the physically handicapped.

(d) The plans and specifications comply with the fire and panic safety requirements of the State Fire Marshal.

129825. (a) The hospital governing board or authority shall provide for and require competent and adequate inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer, or both, and the office. Except as otherwise provided in subdivision (b), the inspector shall act under the direction of the architect or structural engineer, or both, and be responsible to the board or authority. Nothing in this section shall be construed to prohibit any licensed architect, structural engineer, mechanical engineer, electrical engineer, or any facility maintenance personnel, if approved by the office, from performing the duties of an inspector.

(b) If alterations or repairs are to be conducted under the supervision of a professional engineer pursuant to Section 129805, the inspector need only be satisfactory to the office and to the professional engineer, and the inspector shall act under the direction of the professional engineer.

(c) The office shall make an inspection of the hospital buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this chapter and the protection of the safety of the public.

Whenever the office finds a violation of this chapter that requires correction, the citation of the violation shall be issued to the hospital governing board or authority in writing and shall include a proper reference to the regulation or statute being violated.

(d) The office shall approve inspectors that shall be limited to the following:

(1) ''A'' inspectors, who may inspect all phases of construction, including, but not limited to, structural.

(2) ''B'' inspectors, who may inspect all phases of construction, except structural.

(3) ''C'' inspectors, who may inspect all phases of construction projects that the office determines do not materially alter the mechanical, electrical, architectural, or structural integrity of the health facility.

(e) (1) As part of its approval process, the office shall initially and periodically examine inspectors by giving either a written examination or a written and oral examination. The office may charge a fee for the examination process calculated to cover its costs. Inspectors who have not passed a written examination shall not be approved by the office until they have successfully passed the written examination. No employee of the office performing field inspections or supervising the field inspections shall be approved as an inspector on any construction project pursuant to this chapter for a period of one year after leaving employment of the office.

(2) The office shall develop regulations for the testing and approval of inspectors.

129830. From time to time, as the work of construction or alteration progresses and whenever the office requires, the architect or structural engineer, or both, in charge of construction or registered engineer in charge of other work, the inspector on the work, and the contractor shall each make a report, duly verified by him or her, upon a form prescribed by the office showing, of his or her own personal knowledge, that the work during the period covered by the report has been performed and materials used and installed are in accordance with the approved plans and specifications, setting forth detailed statements of fact as required by the office.

The term ''personal knowledge,'' as used in this section and as applied to the architect or registered engineer, or both, means personal knowledge that is the result of the general administration of construction as is required and accepted of, and for, these persons in the construction of buildings. These persons shall, however, use reasonable diligence to obtain the information required.

The term ‘‘personal knowledge,’’ as applied to the inspector, means the actual personal knowledge of the inspector obtained by his or her personal observation of the work of construction at the construction site in all stages of progress.

The term ‘‘personal knowledge,’’ as applied to the contractor, means the personal knowledge that is obtained from the construction of the building. The exercise of reasonable diligence to obtain the facts is required.

129835. Upon written request to the office by the governing board or authority of any hospital, the office shall make, or cause to be made, an examination and report on the structural condition of any hospital building subject to the payment by the governing board or authority of the actual expenses incurred by the office.

129840. Subsequent to the occurrence of any earthquake, the office may make, or cause to be made, studies of health facilities within the area involved.

129845. The office, in cooperation with the California Seismic Safety Commission, Emergency Medical Services Authority, the department, State Fire Marshal, the office of the State Architect, and representatives from the health care industry shall design a policy study identifying health care services required during and after a disaster and seismic standards for those services, and a financial strategy that would enable identified settings to meet those standards. The design of the study shall include an assessment of the capacity, efficacy, and demand for medical services provided in nonhospital settings following a disaster.

129850. Except as provided in Sections 18929 and 18930, the office shall from time to time make any regulations that it deems necessary, proper, or suitable to effectually carry out this chapter. The office shall also propose and submit building standards to the California Building Standards Commission for adoption and approval pursuant to Chapter 4 (commencing with Section 18935) of Part 2.5 of Division 13 relating to seismic safety for hospital buildings.

129855. The office may enter into any agreements and contracts with any qualified person, department, agency, corporation, or legal entity, as determined by the office, when necessary in order to facilitate the timely performance of the duties and responsibilities relating to the review and inspection of architectural, mechanical, electrical, and plumbing systems of hospital buildings to be constructed or altered or buildings under construction or alteration.

If the office determines that the structural review of plans for a hospital building cannot be completed without undue delay, the office may enter into contractual agreements with private structural engineers or local governments for the purpose of facilitating the timely performance of the duties and responsibilities relating to the review and inspection of plans and specifications of the structural systems of hospital construction projects.

The office, with the advice of the Building Safety Board, shall prepare regulations, containing qualification criteria, for implementing the contractual agreement provisions of this section.

Article 4. Special Requirements

129875. Construction or alterations of buildings specified in paragraphs (2) and (3) of subdivision (b) of Section 129725 shall conform to the latest edition of the California Building Standards Code. The office shall independently review and inspect these buildings. For purposes of this section, ''construction or alteration'' includes the conversion of a building to a purpose specified in paragraphs (2) and (3) of subdivision (b) of Section 129725. Any construction or alteration of any building subject to this section shall be exempt from any plan review and approval or construction inspection requirement of any city or county.

The office may also exempt from the plan review process or expedite those projects undertaken by an applicant for a hospital building that the office determines do not materially alter the mechanical, electrical, architectural, or structural integrity of the facility. The office shall set forth criteria to expedite projects or to implement any exemptions made pursuant to this paragraph.

The Legislature recognizes the relative safety of single-story, wood frame, and light steel frame construction for use in housing patients requiring skilled nursing and intermediate care services and it is, therefore, the intent of the Legislature to provide for reasonable flexibility in seismic safety standards for these structures. The office shall be reasonably flexible in the application of seismic standards for other buildings by allowing incidental and minor nonstructural additions or nonstructural alterations to be accomplished with simplified written approval procedures as established by the office, with the advice of the office of the State Architect and the State Fire Marshal.

The office shall continue to implement, and modify as necessary, criteria that were initially developed and implemented prior to July 2, 1989, to exempt from the plan review process or expedite those projects for alterations of buildings specified in paragraphs (2) and (3) of subdivision (b) of Section 12975 that may include, but are not limited to, renovations, remodeling, or installations of necessary equipment such as hot water heaters, air-conditioning units, dishwashers, laundry equipment, handrails, lights, television brackets, small emergency generators (up to 25 kilowatts), storage shelves, and similar plant operations equipment; and decorative materials such as wall coverings, floor coverings, and paint.

The office shall include provisions for onsite field approvals by available office construction advisers and the preapproval of projects that comply with the requirements for which the office has

developed standard architectural or engineering detail, or both standard architectural and engineering detail.

This section shall remain in effect only until January 1, 1997, and shall have no force or effect on or after that date, unless a later enacted statute, that is enacted before January 1, 1997, deletes or extends that date.

129880. Construction or alterations of buildings specified in paragraphs (1), (2), and (3) of subdivision (b) of Section 129725 shall conform to the applicable provisions of the latest edition of the California Building Standards Code. The office shall independently review and inspect these buildings. For purposes of this section, ''construction or alteration'' includes the conversion of a building to a purpose specified in paragraphs (1), (2), and (3) of subdivision (b) of Section 129725. Any construction or alteration of any building subject to this section shall be exempt from any plan review and approval or construction inspection requirement of any city or county. The building standards for the construction or alteration of buildings specified in paragraph (1) of subdivision (b) of Section 129725 shall not be more restrictive or comprehensive than comparable building standards established, or otherwise applied, by the office to clinics licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2.

The office may also exempt from the plan review process or expedite those projects undertaken by an applicant for a hospital building that the office determines do not materially alter the mechanical, electrical, architectural, or structural integrity of the facility. The office shall set forth criteria to expedite projects or to implement any exemptions made pursuant to this paragraph.

The Legislature recognizes the relative safety of single story, wood frame, and light steel frame construction for use in housing patients requiring skilled nursing and intermediate care services and it is, therefore, the intent of the Legislature to provide for reasonable flexibility in seismic safety standards for these structures. The office shall be reasonably flexible in the application of seismic standards for other buildings by allowing incidental and minor nonstructural additions or nonstructural alterations to be accomplished with simplified written approval procedures as established by the office, with the advice of the office of the State Architect and the State Fire Marshal.

The office shall continue to implement, and modify as necessary, criteria that were initially developed and implemented prior to July 2, 1989, to exempt from the plan review process or expedite those projects for alterations of buildings specified in paragraphs (2) and (3) of subdivision (b) of Section 129725 that may include, but are not limited to, renovations, remodeling, or installations of necessary equipment such as hot water heaters, air-conditioning units, dishwashers, laundry equipment, handrails, lights, television

brackets, small emergency generators (up to 25 kilowatts), storage shelves, and similar plant operations equipment; and decorative materials such as wall coverings, floor coverings, and paint.

The office shall include provisions for onsite field approvals by available office construction advisers and the preapproval of projects that comply with the requirements for which the office has developed standard architectural or engineering detail, or both standard architectural and engineering detail.

This section shall become operative on January 1, 1997.

129885. A city or county, as applicable, shall have plan review and building inspection responsibilities for the construction or alteration of buildings described in paragraph (1) of subdivision (b) of Section 129725. The building standards for the construction or alteration of buildings specified in paragraph (1) of subdivision (b) of Section 129725 established or applied by a city or county, shall not be more restrictive or comprehensive than comparable building standards established, or otherwise applied, to clinics licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2.

This section shall remain in effect only until January 1, 1997, and shall have no force or effect on or after that date, unless a later enacted statute, that is enacted before January 1, 1997, deletes or extends that date.

129890. (a) Notwithstanding any other provision of law, the office shall, on or before January 1, 1991, set forth and implement criteria for the alteration or construction of buildings specified in subdivision (a) of Section 129725 that provide for onsite field review and approval by construction advisors of the office and provide for preapproval of project plans that comply with the requirements for which the office has developed standard architectural or engineering detail, or both standard architectural and engineering detail.

(b) On site field reviews shall be performed by available area construction advisors of the office. The area construction advisors shall have the responsibility to coordinate any approvals required by the State Fire Marshal. The approvals may be obtained prior to the start of construction or on a deferred basis, at the discretion of the area construction advisor.

(c) An annual building permit project classified as a ‘‘field review’’ shall be reviewed and approved by the area construction advisor.

(d) Effective January 1, 1991, all plans submitted for the alteration or construction of buildings specified in subdivision (a) of Section 129725 to the office for plan review shall be evaluated to determine if it is exempt from the plan review process or if it qualifies for an expedited plan review. The evaluation shall give priority to plans that are for minor renovation, remodeling, or installation of equipment.

129895. (a) The office shall adopt by regulations seismic safety standards for hospital equipment anchorages, as defined by the

office. Such regulations shall include criteria for the testing of equipment anchorages.

(b) Any fixed hospital equipment anchorages purchased or acquired on or after either the effective date of the regulations adopted pursuant to subdivision (a), shall not be used or installed in any hospital building unless the equipment anchorages are approved by the office.

(c) Manufacturers, designers, or suppliers of equipment anchorages may submit data sufficient for the state department to evaluate equipment anchorages' seismic safety prior to the selection of equipment anchorages for any specific hospital building.

(d) The office may charge a fee based on the actual costs incurred by it for data review, approvals, and field inspections pursuant to this section.

129900. Notwithstanding any other provision of law, plans for the construction or alteration of any hospital building, or any building specified in Section 129875, that are prepared by or under the supervision of the Department of General Services shall not require the review and approval of the office. In lieu of review and approval by the office, the Department of General Services shall certify to the office that the plans are in full conformance with all applicable building standards and the requirements of this chapter. The Department of General Services shall also observe all aspects of construction and alteration, including the architectural, structural, mechanical, plumbing and electrical systems.

It is the intent of the Legislature that projects developed by, or under the supervision of, the Department of General Services shall still meet all applicable building standards published in the State Building Standards Code relating to the regulation of hospital projects where applicable, and all regulations adopted pursuant to this chapter and all other applicable state laws.

129905. Subject to the complete exemption contained in paragraphs (8) and (9) of subdivision (b) of Section 129726, and notwithstanding any other provision of law, plans for the construction or alteration of any hospital building, as defined in Section 1250, or any building specified in Section 129875, that are prepared by or under the supervision of the Department of Corrections or on behalf of the Department of the Youth Authority shall not require the review and approval of the statewide office. In lieu of review and approval by the statewide office, the Department of Corrections and the Department of the Youth Authority shall certify to the statewide office that their plans and construction are in full conformance with all applicable building standards, including, but not limited to, fire and life and safety standards, and the requirements of this chapter for the architectural, structural, mechanical, plumbing, and electrical systems. The Department of Corrections and the Department of the Youth Authority shall use a

secondary peer review procedure to review designs to ensure the adherence to all design standards for all new construction projects, and shall ensure that the construction is inspected by a competent, onsite inspector to ensure the construction is in compliance with the design and plan specifications.

Subject to the complete exemption contained in paragraphs (8) and (9) of subdivision (b) of Section 129725, and notwithstanding any other provision of law, plans for the construction or alteration of any correctional treatment center that are prepared by or under the supervision of a law enforcement agency of a city, county, or city and county shall not require the review and approval of the statewide office. In lieu of review and approval by the statewide office, the law enforcement agency of a city, county, or city and county shall certify to the statewide office that the plans and construction are in full conformance with all applicable building standards, including, but not limited to, fire and life and safety standards, and the requirements of this chapter for the architectural, structural, mechanical, plumbing, and electrical systems.

It is the intent of the Legislature that, except as specified in this section, all hospital buildings as defined by this chapter constructed by or under the supervision of the Department of Corrections or local law enforcement agencies, or constructed on behalf of the Department of the Youth Authority shall at a minimum meet all applicable regulations adopted pursuant to this chapter and all other applicable state laws.

Article 5. Building Safety Board

129925. There is in the office a Hospital Building Safety Board that shall be appointed by the director. The board shall advise the director and, notwithstanding Section 13142.6 and except as provided in Section 18945, shall act as a board of appeals in all matters relating to the administration and enforcement of building standards relating to the design, construction, alteration, and seismic safety of hospital building projects submitted to the office pursuant to this chapter.

Further, notwithstanding Section 13142.6, the board shall act as the board of appeals in matters relating to all fire and panic safety regulations and alternate means of protection determinations for hospital building projects submitted to the office pursuant to this chapter.

129930. The board shall consist of 16 members appointed by the director of the office. Of the appointive members, two shall be structural engineers, two shall be architects, one shall be an engineering geologist, one shall be a geotechnical engineer, one shall be a mechanical engineer, one shall be an electrical engineer, one shall be a hospital facilities manager, one shall be a local building official, one shall be a general contractor, one shall be a fire and panic

safety representative, one shall be a hospital inspector of record, and three shall be members of the general public.

129932. (a) Each member shall be appointed by the director for a term of four years and shall hold office until the appointment and qualification of his or her successor or until one year has elapsed since the expiration of the term for which he or she was appointed, whichever first occurs. No person shall serve as a member of the board for more than two consecutive terms. The director may remove any member of the board for neglect of duty or other just cause.

(b) The terms of the appointive members of the board who are in office before January 1, 1994, shall expire as follows:

(1) The terms of two members shall expire January 1, 1994.
(2) The terms of two members shall expire January 1, 1995.
(3) The terms of two members shall expire January 1, 1996.
(4) The terms of two members shall expire January 1, 1997.
(5) The terms of three members shall expire January 1, 1998.
(6) The terms of three members shall expire January 1, 1999.

The terms shall expire in the same relative order as the original appointment dates.

(c) Vacancies occurring during a term shall be filled by appointment for the unexpired term.

129935. Appointive members, except for the public members, shall be qualified by close connection with hospital design and construction and highly knowledgeable in their respective fields with particular reference to seismic safety. Appointive members, except for the public members, shall be appointed from nominees recommended by the governing bodies of the Structural Engineers Association of California; the American Institute of Architects; the Earthquake Engineering Research Institute; the Association of Engineering Geologists; the Consulting Engineers and Land Surveyors of California; the California Association of Local Building Officials; the American Society for Heating, Refrigerating, and Air-Conditioning Engineers, Inc.; the California Association of Hospitals and Health Systems; the Associated General Contractors of California; the American Construction Inspectors' Association; and the California Fire Chiefs' Association. Board members shall be residents of California.

129940. (a) There shall be six ex officio members of the board, who shall be the director of the office, the State Fire Marshal, the State Geologist, the Executive Director of the California Building Standards Commission, the State Director of Health Services, and the Deputy Director of the Division of Facilities Development in the office, or their officially designated representatives.

(b) The director may also appoint up to three additional ex officio members, with the advice of the chair. On January 1, 1994,

director-appointed ex officio members may continue to serve until appointment of their successors by the director.

129942. (a) Only appointed members shall vote at board meetings.

(b) Appointed members, ex officio members, and others appointed to a committee, including an appeal committee, by the chair, may vote at committee meetings.

129945. The chair of the board shall be an appointive member and shall be elected by a majority of the appointive members.

129950. The board shall be served by an executive director who shall be a member of the office staff.

129955. The Building Safety Board shall convene upon request of the chairperson thereof. The chairperson may convene a meeting of the board whenever it may be necessary, in the chairperson's judgment, for the board to meet. The board shall adopt rules of procedure as necessary to enable it to perform its duties. The chairperson shall, at his or her discretion, or upon instructions from the board, designate subcommittees to study and report back to the board upon any technical subject or matter for which an independent review or further study is desired.

129960. Members of the board shall be reimbursed from the Hospital Building Account in the Architecture Public Building Fund for their reasonable actual expenses in attending meetings conducted to carry out the provisions of this chapter, and they shall receive from that account per diem of one hundred dollars ($100) for each day actually spent in the discharge of official duties where attendance at one or more publicly scheduled meetings or hearings of the board is required by the board's chairperson. However, they shall receive no other compensation from that account for their services.

Article 6. Enforcement

129975. The director of the office may conduct studies relating to the implementation of this chapter to ensure that the implementation of its provisions results in the least amount of increases in costs, staffing, and regulation.

129980. Whenever any construction or alteration of any hospital building is being performed contrary to the provisions of this chapter, the office may order the construction or alteration stopped by written notice served upon any persons engaged in or causing the work to be done. Upon service of the written notice, all construction or alteration shall cease until an authorization to remove the notice is issued by the office. Any person so served shall, upon request made within 15 days of the written notice, be entitled to a hearing pursuant to Section 11506 of the Government Code.

129985. (a) Whenever it is necessary to make an inspection to enforce any of the provisions of this chapter or whenever the office or its authorized representatives has reasonable cause to believe that there exists in any building or upon any premises any condition or a violation of any applicable building standards that makes the building or premises unsafe, dangerous, or hazardous, the office or its authorized representatives may enter the building or premises at any reasonable time to make an inspection or to perform any authorized duty. Prior to an entry authorized by this section, the authorized representatives of the office shall first present proper identification and credentials and request entry. In the event that the building or premises are unoccupied, there shall be a reasonable effort made to locate the owner or other person or persons having control or charge of the building or premises in order to request an entry. If a request for entry is refused, the office or its authorized representatives shall have recourse to any remedy prescribed by law to secure entry.

(b) Whenever the owner, occupant, or other person having control or charge of the building or premises is presented with a proper inspection warrant or other authorization prescribed by law to secure entry and a request for entry is made, the owner, occupant, or other person having control or charge of the building or premises shall promptly permit the entry of the authorized representatives of the office for the purpose of inspection and examination authorized by this chapter.

129990. The office may order the vacating of any building or structure found to have been in violation of the adopted regulations of the office and may order the use of the building or structure discontinued within the time prescribed by the office upon the service of notice to the owner or other person having control or charge of the building or structure. Any owner or person having control so served shall, upon request made within 15 days of the written notice, be entitled to a hearing pursuant to Section 11506 of the Government Code.

Article 7. Penalties

129998. (a) Any person who violates any provision of this chapter is guilty of a misdemeanor.

(b) This section shall not apply to correctional treatment centers. This subdivision shall not affect any civil or administrative liability against correctional treatment centers or persons employed by these centers. This subdivision shall remain operative only until January 1, 1994.

Article 8. New State Responsibilities For Seismic Safety in Hospitals

130000. (a) The Legislature hereby finds and declares the following:

(1) The Alfred E. Alquist Hospital Facilities Seismic Safety Act of 1983 was created because of the loss of life in the collapse of hospitals during the Sylmar earthquake of 1971.

(2) We were reminded of the vulnerability of hospitals in the Northridge earthquake of January 17, 1994.

(3) Several hospitals built prior to the act suffered major damage and had to be evacuated.

(4) Hospitals built to the Alfred E. Alquist Hospital Facilities Seismic Safety Act standards resisted the Northridge earthquakes with very little structural damage demonstrating the value and necessity of this act.

(5) Both pre- and post-act hospitals suffered damage to architecture and to power and water systems that prevented hospitals from being operational, caused the loss of one life, triggered evacuations, unacceptable property losses, and added additional concerns on emergency medical response.

(6) An earthquake survivability inventory of California's hospitals completed by the Office of Statewide Health Planning and Development in December 1989 indicated that over 83 percent of the state's hospital beds were in buildings that did not comply with the Alfred E. Alquist Hospital Facilities Seismic Safety Act because they were issued permits prior to the effective date of the act. Furthermore, 26 percent of the beds are in buildings posing significant risks of collapse since they were built before modern earthquake codes. The older hospitals pose significant threats of collapse in major earthquakes and loss of functions in smaller or more distant earthquakes.

(7) The 1989 survey also states: ''Of the 490 hospitals surveyed, nine hospitals are in Alquist–Priolo Earthquake Fault Rupture Zones, 31 are in areas subject to soil liquefaction, 14 in areas with landslide potential, 33 in flood zones, and 29 have a possible loss or disruption of access. Two hundred five hospitals had no emergency fuel for their main boilers on hand, 19 had no emergency fuel for their emergency generators. Onsite emergency potable water was available at 273 hospitals and nonpotable water was available at 102 hospitals. Four hundred eighteen hospitals had emergency radios onsite, and 419 hospitals had inadequate or partially adequate equipment anchorage. In terms of available emergency preparedness, inadequate or partially inadequate equipment anchorage is still the most widespread shortcoming.''

(8) This survey identifies many of the shortcomings that caused 23 hospitals to suspend some or all operations after the Northridge

earthquake. However, one hospital was rebuilt to comply with the Alfred E. Alquist Hospital Facilities Seismic Safety Act after an older hospital building had partially collapsed in the 1971 Sylmar earthquake. The rebuilt hospital suffered failures in water distribution systems and had to be evacuated.

(9) The state must rely on hospitals to support patients and offer medical aid to earthquake victims.

(b) Therefore, it is the intent of the Legislature, that:

(1) By enacting this article, the state shall take steps to ensure that the expected earthquake performance of hospital buildings housing inpatients and providing primary basic services is disclosed to public agencies that have a need and a right to know, because the medical industry cannot immediately bring all hospital buildings into compliance with the Alfred E. Alquist Hospital Facilities Seismic Safety Act.

(2) The state shall encourage structural retrofits or replacements of hospital buildings housing inpatients and providing primary basic services that place lives at risk because of their potential for collapse during an earthquake.

(3) The state shall also encourage retrofits and enhancements to critical hospital architecture, equipment, and utility and communications systems to improve the ability of hospitals to remain operational for those hospitals that do not pose risk to life.

130005. By June 30, 1996:

(a) The Office of Statewide Health Planning and Development, hereinafter called the office, shall develop definitions of earthquake performance categories for earthquake ground motions for both new and existing hospitals that are:

(1) Reasonably capable of providing services to the public after a disaster, designed and constructed to resist, insofar as practical, the forces generated by earthquakes, gravity, and winds, and in full compliance with the regulations and standards developed by the office pursuant to the Alfred E. Alquist Hospital Facilities Seismic Safety Act.

(2) In substantial compliance with the pre-1973 California Building Standards Codes, but not in substantial compliance with the regulations and standards developed by the office pursuant to the Alfred E. Alquist Hospital Facilities Seismic Safety Act. These buildings may not be repairable or functional but will not significantly jeopardize life.

(3) Potentially at significant risk of collapse and that represent a danger to the public.

(b) The office may define other earthquake performance categories as it deems necessary to meet the intent of this article and the Alfred E. Alquist Hospital Facilities Seismic Safety Act.

(c) Earthquake performance categories shall also include subgradations for risk to life, structural soundness, building contents,

and nonstructural systems that are critical to providing basic services to hospital inpatients and the public after a disaster.

(d) Earthquake performance categories shall, as far as practicable, use language consistent with definitions and concepts as developed in the model codes and other state and federal agencies. Where the office finds that deviations from other's definitions and concepts are necessary and warranted to comply with the intent of the Alfred E. Alquist Hospital Facilities Seismic Safety Act, the act that added this article, or the specific nature or functions of hospitals, the office shall provide supporting documentation that justifies these differences.

(e) Insofar as practicable, the office shall define rapid seismic evaluation procedures that will allow owners to determine with reasonable certainty the existing applicable earthquake performance categories and the minimum acceptable earthquake performance categories for hospital buildings. These procedures shall allow for abbreviated analysis when known vulnerability is clear and when construction in accordance with post-1973 codes allows for an evaluation focusing on limited structural and nonstructural elements.

(f) The office, in consultation with the Hospital Building Safety Board, shall develop regulations to identify the most critical nonstructural systems and to prioritize the timeframes for upgrading those systems that represent the greatest risk of failure during an earthquake.

(g) The office shall develop regulations as they apply to the administration of seismic standards for retrofit designs, construction, and field reviews for the purposes of this article.

(h) The office shall develop regulations for the purpose of reviewing requests and granting delays to hospitals demonstrating a need for more time to comply with Section 130060.

(i) The office shall submit all information developed pursuant to subdivisions (a) to (f), inclusive, to the California Building Standards Commission by June 30, 1996.

(j) The office shall submit all information developed pursuant to subdivisions (g) and (h) to the California Building Standards Commission by December 31, 1996.

(k) ''Hospital building,'' as used in Article 8 and Article 9 of this chapter means a hospital building as defined in Section 129725 and that is also licensed pursuant to subdivision (a) of Section 1250, but does not include these buildings if the beds licensed pursuant to subdivision (a) of Section 1250, as of January 1, 1995, comprise 10 percent or less of the total licensed beds of the total physical plant, and does not include facilities owned or operated, or both, by the Department of Corrections.

130010. The office is responsible for reviewing and approving seismic evaluation reports, compliance schedules and construction

documents that are developed by hospital owners, and field review of construction for work done pursuant to this article.

130015. For the 1994–95 through 1997–98 fiscal years, the sum of three hundred eighteen thousand dollars ($318,000) is hereby appropriated from the Hospital Building Fund to the office for the purpose of developing regulations pursuant to subdivisions (a) through (j) of Section 130005.

130020. (a) By December 31, 1996, the California Building Standards Commission shall review, revise as necessary and adopt earthquake performance categories, seismic evaluation procedures, and standards and timeframes for upgrading the most critical nonstructural systems as developed by the office. By June 30, 1997, the California Building Standards Commission shall review, revise as necessary, and adopt seismic retrofit building standards and procedures for reviewing requests and granting delays to hospitals that demonstrate a need for more time to comply with Section 130060.

(b) For purposes of this section all submittals made by the office pursuant to subdivisions (i) and (j) of Section 130005 shall be deemed as emergency regulations and adopted as such.

130025. (a) In the event of a seismic event, or other natural or manmade calamity that the office believes is of such a magnitude that it may have compromised the structural integrity of a hospital building, or any major system of a hospital building, the office shall send one or more authorized representatives to examine the structure or system. ''System'' for these purposes shall include, but not be limited to, the electrical, mechanical, plumbing, and fire and life safety system of the hospital building. If in the opinion of the office, the structural integrity of the hospital building or any system has been compromised and damaged to a degree that the hospital building has been made unsafe to occupy, the office may cause to be placed on the hospital building either a red tag, a yellow tag, or a green tag.

(b) A ''red'' tag shall mean the hospital building is unsafe and shall be evacuated immediately. Access to red-tagged buildings shall be restricted to persons authorized by the office to enter.

(c) A ''yellow'' tag shall mean that the hospital building has been authorized for limited occupancy, and the authorized representative of the office shall write directly on the yellow tag that portion of the hospital building that may be entered with or without restriction and those portions that may not.

(d) A ''green'' tag shall mean the hospital building and all of its systems have been inspected by an authorized agent of the office, and have been found to be safe for use and occupancy.

(e) Any law enforcement or other public safety agency of this state shall grant access to hospital buildings by authorized

representatives of the office upon the showing of appropriate credentials.

Article 9. Hospital Owner Responsibilities

130050. (a) Within three years after the adoption of the standards described in Section 130020, owners of all general acute care hospitals shall:

(1) Conduct seismic evaluations in accordance with procedures developed by the office pursuant to subdivision (e) of Section 130005 and submit evaluations to the office for its review and approval.

(2) Identify the most critical nonstructural systems that represent the greatest risk of failure during an earthquake and submit the timetables for upgrading those systems pursuant to subdivision (f) of Section 130005 to the office for its review and approval.

(b) Within three years after the adoption of standards described in Section 130020, owners of all general acute care hospitals shall prepare a plan and compliance schedule for each building under the office's jurisdiction that indicates the steps by which the hospital intends to bring their hospital buildings into substantial compliance with the regulations and standards developed by the office pursuant to the Alfred E. Alquist Hospital Facilities Seismic Safety Act and this act, identifies the phasing out of or retrofit of noncomplying structures and systems, or outlines steps for relocation of acute care services to facilities that comply with the regulations and standards developed by the office pursuant to Alfred E. Alquist Hospital Facilities Seismic Safety Act and this act, and presents comprehensive plans and compliance schedules to the office for its review and approval, and integrates this schedule into the facility's master plan.

(c) Owners of all general acute care hospitals may be granted a one year allowance from the requirements of subdivision (b) by the office if they demonstrate a need for more time to prepare plans and compliance schedules for their buildings.

130055. Within 60 days following the office's approval of the report submitted pursuant to subdivision (b) of Section 130050, general acute hospital building owners shall do all of the following:

(a) Inform the local office of emergency services or the equivalent agency, the California Office of Emergency Services, and the office, of each building's expected earthquake performance.

(b) Include all pertinent information regarding the building's expected earthquake performance in emergency training, response, and recovery plans.

(c) Include all pertinent information regarding the building's expected earthquake performance in capital outlay plans.

130060. After January 1, 2008, any general acute care hospital building that is determined to be a potential risk of collapse or pose

significant loss of life shall only be used for nonacute care hospital purposes. A delay in this deadline may be granted by the office upon a demonstration by the owner that compliance will result in a loss of health care capacity that may not be provided by other general acute care hospitals within a reasonable proximity.

Upon compliance with this section, the hospital shall be issued a written notice of compliance by the office. The office shall send a written notice of violation to hospital owners that fail to comply with this section.

130065. In accordance with the compliance schedule approved by the office, but in any case no later than January 1, 2030, owners of all acute care inpatient hospitals shall either:

(a) Demolish, replace, or change to nonacute care use all hospital buildings not in substantial compliance with the regulations and standards developed by the office pursuant to the Alfred E. Alquist Hospital Facilities Seismic Safety Act and this act.

(b) Seismically retrofit all acute care inpatient hospital buildings so that they are in substantial compliance with the regulations and standards developed by the office pursuant to the Alfred E. Alquist Hospital Facilities Seismic Safety Act and this act.

Upon compliance with this section, the hospital shall be issued a written notice of compliance by the office. The office shall send a written notice of violation to hospital owners that fail to comply with this section.

130070. The office shall notify the State Department of Health Services of the hospital owners that have received a written notice of violation for failure to comply with either Section 130060 or 130065. Unless the hospital places its license in voluntary suspense, the state department shall suspend or refuse to renew the license of a hospital that has received a notice of violation from the office because of its failure to comply with either Section 130060 or 130065. The license shall be reinstated or renewed upon presentation to the state department of a written notice of compliance issued by the office.

CHAPTER 2. CLINIC CONSTRUCTION STANDARDS (Reserved)

SEC. 10. Section 26 of the Health and Safety Code is repealed.

SEC. 11. Chapter 1 (commencing with Section 100) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 12. Chapter 1.4 (commencing with Section 140) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 13. Chapter 1.5 (commencing with Section 150) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 14. Chapter 1.7 (commencing with Section 175) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 15. Chapter 1.8 (commencing with Section 185) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 16. Chapter 1.85 (commencing with Section 188) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 17. Chapter 1.9 (commencing with Section 190) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 18. Chapter 1.10 (commencing with Section 195) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 19. Chapter 1.11 (commencing with Section 199.20) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 20. Chapter 1.12 (commencing with Section 199.30) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 21. Chapter 1.13 (commencing with Section 199.42) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 22. Chapter 1.14 (commencing with Section 199.45) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 23. Chapter 1.15 (commencing with Section 199.55) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 24. Chapter 1.16 (commencing with Section 199.70) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 25. Chapter 1.17 (commencing with Section 199.81) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 26. Chapter 1.19 (commencing with Section 199.86) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 27. Chapter 1.20 (commencing with Section 199.95) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 28. Article 1 (commencing with Section 200) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 29. Article 1.5 (commencing with Section 225) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 30. Article 1.7 (commencing with Section 230) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 31. Article 1.7 (commencing with Section 235) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 32. Article 1.8 (commencing with Section 242) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 33. Article 1.9 (commencing with Section 246.1) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 34. Article 2 (commencing with Section 248) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 35. Article 2.1 (commencing with Section 275) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 36. Article 2.4 (commencing with Section 283) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 37. Article 2.6 (commencing with Section 289) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 38. Article 2.9 (commencing with Section 295) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 39. Article 3 (commencing with Section 300) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 40. Article 3.1 (commencing with Section 309.7) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 41. Article 3.2 (commencing with Section 309.100) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 42. Article 3.3 (commencing with Section 310) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 43. Article 3.4 (commencing with Section 320) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 44. Article 3.45 (commencing with Section 324.7) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 45. Article 3.5 (commencing with Section 325) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 46. Article 3.6 (commencing with Section 340) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 47. Article 3.7 (commencing with Section 349) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 48. Article 4 (commencing with Section 350) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 49. Article 4.5 (commencing with Section 360) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 50. Article 4.6 (commencing with Section 372) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 51. Article 5 (commencing with Section 374) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 52. Article 5.5 (commencing with Section 380) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 53. Article 5.7 (commencing with Section 390) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 54. Article 6 (commencing with Section 400) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 55. Article 6.1 (commencing with Section 402) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 56. Article 6.5 (commencing with Section 405) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 57. Article 7 (commencing with Section 410) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 58. Article 7.2 (commencing with Section 412) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 59. Article 7.7 (commencing with Section 417) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 60. Article 7.8 (commencing with Section 418) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 61. Article 8 (commencing with Section 420) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 62. Article 8.1 (commencing with Section 421) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 63. Article 8.5 (commencing with Section 423) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 64. Article 8.7 (commencing with Section 424.10) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 65. Article 9.5 (commencing with Section 426) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 66. Article 10 (commencing with Section 427) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 67. Article 10.2 (commencing with Section 427.10) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 68. Article 11 (commencing with Section 428) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 69. Article 13 (commencing with Section 429.11) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 70. Article 13.1 (commencing with Section 429.13) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 71. Article 14.5 (commencing with Section 429.35) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 72. Article 15 (commencing with Section 429.40) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 73. Article 16 (commencing with Section 429.50) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 74. Article 17 (commencing with Section 429.60) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 75. Article 18 (commencing with Section 429.70) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 76. Article 18.5 (commencing with Section 429.90) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 77. Article 19 (commencing with Section 429.94) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 78. Article 20 (commencing with Section 429.994) of Chapter 2 of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 79. Chapter 3 (commencing with Section 430) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 79.5. Chapter 4 (commencing with Section 436) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 80. Chapter 5 (commencing with Section 436.50) of Part 1 of Division 1 of the Health and Safety Code is repealed.

SEC. 81. Part 1.5 (commencing with Section 437.01) of Division 1 of the Health and Safety Code is repealed.

SEC. 82. Part 1.8 (commencing with Section 443) of Division 1 of the Health and Safety Code is repealed.

SEC. 83. Part 1.85 (commencing with Section 444) of Division 1 of the Health and Safety Code is repealed.

SEC. 84. Part 1.95 (commencing with Section 446) of Division 1 of the Health and Safety Code is repealed.

SEC. 85. Part 1.96 (commencing with Section 447.70) of Division 1 of the Health and Safety Code is repealed.

SEC. 86. Part 1.97 (commencing with Section 448) of Division 1 of the Health and Safety Code is repealed.

SEC. 87. Chapter 1 (commencing with Section 450) of Part 2 of Division 1 of the Health and Safety Code is repealed.

SEC. 88. Chapter 2 (commencing with Section 600) of Part 2 of Division 1 of the Health and Safety Code is repealed.

SEC. 89. Chapter 3 (commencing with Section 700) of Part 2 of Division 1 of the Health and Safety Code is repealed.

SEC. 90. Section 850 of the Health and Safety Code is repealed.

SEC. 91. Chapter 6 (commencing with Section 954) of Part 2 of Division 1 of the Health and Safety Code is repealed.

SEC. 92. Chapter 7 (commencing with Section 1000) of Part 2 of Division 1 of the Health and Safety Code is repealed.

SEC. 93. Chapter 7.5 (commencing with Section 1010) of Part 2 of Division 1 of the Health and Safety Code is repealed.

SEC. 94. Chapter 8 (commencing with Section 1100) of Part 2 of Division 1 of the Health and Safety Code is repealed.

SEC. 95. Part 3 (commencing with Section 1170) of Division 1 of the Health and Safety Code is repealed.

SEC. 96. Part 3.5 (commencing with Section 1175) of Division 1 of the Health and Safety Code is repealed.

SEC. 97. Part 6 (commencing with Section 1180) of Division 1 of the Health and Safety Code is repealed.

SEC. 98. Part 6.9 (commencing with Section 1189.101) of Division 1 of the Health and Safety Code is repealed.

SEC. 99. Part 7 (commencing with Section 1190) of Division 1 of the Health and Safety Code is repealed.

SEC. 100. Section 1250.9 of the Health and Safety Code is repealed.

SEC. 101. Section 1250.10 of the Health and Safety Code is repealed.

SEC. 102. Section 1260 of the Health and Safety Code is repealed.

SEC. 102.5. Article 8 (commencing with Section 1630) of Chapter 4 of Division 2 of the Health and Safety Code is repealed.

SEC. 103. Chapter 7 (commencing with Section 1700) of Division 2 of the Health and Safety Code is repealed.

SEC. 104. Division 2.3 (commencing with Section 1795) of the Health and Safety Code is repealed.

SEC. 105. Chapter 2 (commencing with Section 1800) of Division 3 of the Health and Safety Code is repealed.

SEC. 106. Chapter 3 (commencing with Section 1900) of Division 3 of the Health and Safety Code is repealed.

SEC. 107. Chapter 4 (commencing with Section 2100) of Division 3 of the Health and Safety Code is repealed.

SEC. 108. Chapter 5.5 (commencing with Section 2425) of Division 3 of the Health and Safety Code is repealed.

SEC. 109. Chapter 9 (commencing with Section 2950) of Division 3 of the Health and Safety Code is repealed.

SEC. 110. Division 4 (commencing with Section 3000) of the Health and Safety Code is repealed.

SEC. 111. Part 1 (commencing with Section 3700) of Division 1 of the Health and Safety Code is repealed.

SEC. 112. Part 2 (commencing with Section 4100) of Division 1 of the Health and Safety Code is repealed.

SEC. 124. Chapter 6.5 (commencing with Section 5474.20) of Part 3 of Division 5 of the Health and Safety Code is repealed.

SEC. 125. Division 9 (commencing with Section 10000) of the Health and Safety Code is repealed.

SEC. 126. Division 9.5 (commencing with Section 10800) of the Health and Safety Code is repealed.

SEC. 127. Division 9.7 (commencing with Section 10900) of the Health and Safety Code is repealed.

SEC. 128. Division 10.1 (commencing with Section 11670) of the Health and Safety Code is repealed.

SEC. 129. Chapter 1 (commencing with Section 15000) of Part 6 of Division 12.5 of the Health and Safety Code is repealed.

SEC. 130. Chapter 1.5 (commencing with Section 19010) of Part 3 of Division 13 of the Health and Safety Code is repealed.

SEC. 131. Division 17 (commencing with Section 23000) of the Health and Safety Code is repealed.

SEC. 132. Chapter 1 (commencing with Section 24000) of Division 20 of the Health and Safety Code is repealed.

SEC. 133. Chapter 1.2 (commencing with Section 24160) of Division 20 of the Health and Safety Code is repealed.

SEC. 134. Chapter 1.5 (commencing with Section 24180) of Division 20 of the Health and Safety Code is repealed.

SEC. 135. Chapter 3 (commencing with Section 24380) of Division 20 of the Health and Safety Code is repealed.

SEC. 136. Chapter 3.5 (commencing with Section 24385) of Division 20 of the Health and Safety Code is repealed.

SEC. 137. Chapter 4 (commencing with Section 24400) of Division 20 of the Health and Safety Code is repealed.

SEC. 138. Chapter 4.3 (commencing with Section 24425) of Division 20 of the Health and Safety Code is repealed.

SEC. 139. Chapter 4.5 (commencing with Section 24450) of Division 20 of the Health and Safety Code is repealed.

SEC. 140. Chapter 5 (commencing with Section 24800) of Division 20 of the Health and Safety Code is repealed.

SEC. 141. Chapter 6 (commencing with Section 25000) of Division 20 of the Health and Safety Code is repealed.

SEC. 142. Chapter 6.1 (commencing with Section 25015) of Division 20 of the Health and Safety Code is repealed.

SEC. 143. Chapter 6.99 (commencing with Section 25572) of Division 20 of the Health and Safety Code is repealed.

SEC. 144. Chapter 7 (commencing with Section 25600) of Division 20 of the Health and Safety Code is repealed.

SEC. 145. Chapter 7.1 (commencing with Section 25620) of Division 20 of the Health and Safety Code is repealed.

SEC. 146. Chapter 7.2 (commencing with Section 25625) of Division 20 of the Health and Safety Code is repealed.

SEC. 147. Chapter 7.3 (commencing with Section 25650) of Division 20 of the Health and Safety Code is repealed.

SEC. 148. Chapter 7.4 (commencing with Section 25660) of Division 20 of the Health and Safety Code is repealed.

SEC. 149. Chapter 7.5 (commencing with Section 25700) of Division 20 of the Health and Safety Code is repealed.

SEC. 150. Chapter 7.6 (commencing with Section 25800) of Division 20 of the Health and Safety Code is repealed.

SEC. 151. Chapter 7.7 (commencing with Section 25880) of Division 20 of the Health and Safety Code is repealed.

SEC. 152. Chapter 7.8 (commencing with Section 25882) of Division 20 of the Health and Safety Code is repealed.

SEC. 153. Chapter 7.9 (commencing with Section 25884) of Division 20 of the Health and Safety Code is repealed.

SEC. 154. Chapter 8 (commencing with Section 25895) of Division 20 of the Health and Safety Code is repealed.

SEC. 155. Chapter 9 (commencing with Section 25898) of Division 20 of the Health and Safety Code is repealed.

SEC. 156. Chapter 10 (commencing with Section 25900) of Division 20 of the Health and Safety Code is repealed.

SEC. 157. Chapter 10.2 (commencing with Section 25906) of Division 20 of the Health and Safety Code is repealed.

SEC. 158. Chapter 10.5 (commencing with Section 25920) of Division 20 of the Health and Safety Code is repealed.

SEC. 159. Chapter 10.7 (commencing with Section 25930) of Division 20 of the Health and Safety Code is repealed.

SEC. 160. Chapter 10.8 (commencing with Section 25940) of Division 20 of the Health and Safety Code is repealed.

SEC. 161. Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code is repealed.

SEC. 162. Chapter 12 (commencing with Section 25960) of Division 20 of the Health and Safety Code is repealed.

SEC. 163. Chapter 12.7 (commencing with Section 25967) of Division 20 of the Health and Safety Code is repealed.

SEC. 164. Chapter 13 (commencing with Section 25970) of Division 20 of the Health and Safety Code is repealed.

SEC. 165. Chapter 13.7 (commencing with Section 25989.500) of Division 20 of the Health and Safety Code is repealed.

SEC. 166. Chapter 14 (commencing with Section 25990) of Division 20 of the Health and Safety Code is repealed.

SEC. 167. Chapter 14.5 (commencing with Section 25995) of Division 20 of the Health and Safety Code is repealed.

SEC. 168. Chapter 14.7 (commencing with Section 25996.950) of Division 20 of the Health and Safety Code is repealed.

SEC. 169. Division 21 (commencing with Section 26000) of the Health and Safety Code is repealed.

SEC. 170. Division 22 (commencing with Section 27000) of the Health and Safety Code is repealed.

SEC. 171. It is the intent of the Legislature in enacting this act to reorganize and clarify portions of the Health and Safety Code and thereby facilitate its administration. The Legislature intends that the changes made to the Health and Safety Code, as reorganized by this act, have only technical and nonsubstantive effect. Hence, no change made by this act shall create any new right, duty, or other obligation that did not exist on the effective date of this act, or result in the limitation or termination of any right, duty, or other obligation that existed on the effective date of this act.

SEC. 172. The Legislature finds that the reorganization of the Health and Safety Code pursuant to this act, in view of the nonsubstantive statutory changes made, will not result in new or additional costs to local agencies.

SEC. 173. Any section of any act, other than the act for the maintenance of the codes (SB 975), enacted by the Legislature during the 1995 calendar year that takes effect on or before January 1, 1996, and that amends, amends and renumbers, adds, repeals and adds, or repeals a section that is amended, amended and renumbered, added, repealed and added, or repealed by this act, shall prevail over the amendment, amendment and renumbering, addition, repeal and addition, or repeal of that section by this act whether that act is enacted prior to, or subsequent to, the enactment of this act.

O

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 35. Nondiscrimination on the Basis of Disability in State and Local Government Services (Refs & Annos)
Subpart A. General
➡ **§ 35.101 Purpose.**

The purpose of this part is to effectuate subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S.C. 12131), which prohibits discrimination on the basis of disability by public entities.

SOURCE: 56 FR 35716, July 26, 1991; 75 FR 56177, Sept. 15, 2010, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

28 C. F. R. § 35.101, 28 CFR § 35.101

Current through September 29, 2011; 76 FR 60674

Effective: March 15, 2011

Code of Federal Regulations Currentness
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 35. Nondiscrimination on the Basis of Disability in State and Local Government Services (Refs & Annos)
Subpart A. General
➡ **§ 35.104 Definitions.**

For purposes of this part, the term--

1991 Standards means the requirements set forth in the ADA Standards for Accessible Design, originally published on July 26, 1991, and republished as Appendix D to 28 CFR part 36.

2004 ADAAG means the requirements set forth in appendices B and D to 36 CFR part 1191 (2009).

2010 Standards means the 2010 ADA Standards for Accessible Design, which consist of the 2004 ADAAG and the requirements contained in § 35.151.

Act means the Americans with Disabilities Act (Pub.L. 101-336, 104 Stat. 327, 42 U.S.C. 12101-12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids and services includes--

(1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(3) Acquisition or modification of equipment or devices; and

(4) Other similar services and actions.

Complete complaint means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Current illegal use of drugs means illegal use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.

Designated agency means the Federal agency designated under subpart G of this part to oversee compliance activities under this part for particular components of State and local governments.

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in §

35.139.

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase physical or mental impairment means--

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase physical or mental impairment does not include homosexuality or bisexuality.

(2) The phrase major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase is regarded as having an impairment means--

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term disability does not include--

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

Drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

Existing facility means a facility in existence on any given date, without regard to whether the facility may also be considered newly constructed or altered under this part.

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

Historic preservation programs means programs conducted by a public entity that have preservation of historic properties as a primary purpose.

Historic Properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under State or local law.

Housing at a place of education means housing operated by or on behalf of an elementary, secondary, undergraduate, or postgraduate school, or other place of education, including dormitories, suites, apartments, or other places of residence.

Illegal use of drugs means the use of one or more drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 812). The term illegal use of drugs does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Other power-driven mobility device means any mobility device powered by batteries, fuel, or other engines--whether or not designed primarily for use by individuals with mobility disabilities--that is used by individuals with mobility disabilities for the purpose of locomotion, including golf cars, electronic personal assistance mobility devices (EPAMDs), such as the Segway® PT, or any mobility device designed to operate in areas without defined pedestrian routes, but that is not a wheelchair within the meaning of this section. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

Public entity means--

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

Qualified reader means a person who is able to read effectively, accurately, and impartially using any necessary specialized vocabulary.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub.L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended.

Service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Video remote interpreting (VRI) service means an interpreting service that uses video conference technology over dedicated lines or wireless technology offering high-speed, wide-bandwidth video connection that delivers high-quality video images as provided in § 35.160(d).

Wheelchair means a manually-operated or power-driven device designed primarily for use by an individual with a mobility disability for the main purpose of indoor or of both indoor and outdoor locomotion. This definition does not apply to Federal wilderness areas; wheelchairs in such areas are defined in section 508(c)(2) of the ADA, 42 U.S.C. 12207(c)(2).

[Order No. 3180-2010, 75 FR 56177, Sept. 15, 2010; 76 FR 13285, March 11, 2011]

SOURCE: 56 FR 35716, July 26, 1991; 75 FR 56177, Sept. 15, 2010, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

28 C. F. R. § 35.104, 28 CFR § 35.104

Current through September 29, 2011; 76 FR 60674

Effective: March 15, 2011

Code of Federal Regulations Currentness
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 35. Nondiscrimination on the Basis of Disability in State and Local Government Services (Refs & Annos)
Subpart B. General Requirements
➡ § 35.130 General prohibitions against discrimination.

<For statute(s) affecting validity, see: 42 U.S.C.A. § 12101 et seq.>

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability--

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration:

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or

(iii) That perpetuate the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.

(4) A public entity may not, in determining the site or location of a facility, make selections--

(i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or

(ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.

(5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

(8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.

(c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.

(d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

(e)(1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.

(2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

(g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

[Order No. 3180–2010, 75 FR 56178, Sept. 15, 2010]

SOURCE: 56 FR 35716, July 26, 1991; 75 FR 56177, Sept. 15, 2010, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

28 C. F. R. § 35.130, 28 CFR § 35.130

Current through September 29, 2011; 76 FR 60674

END OF DOCUMENT

Effective: March 15, 2011

Code of Federal Regulations Currentness
Title 28. Judicial Administration
Chapter I. Department of Justice
Part 35. Nondiscrimination on the Basis of Disability in State and Local Government Services (Refs & Annos)
Subpart E. Communications
➡ **§ 35.160 General.**

(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c)(1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except--

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) Video remote interpreting (VRI) services. A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides--

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

[Order No. 3180-2010, 75 FR 56183, Sept. 15, 2010]

SOURCE: 56 FR 35716, July 26, 1991; 75 FR 56177, Sept. 15, 2010, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134.

28 C. F. R. § 35.160, 28 CFR § 35.160

Current through September 29, 2011; 76 FR 60674

Effective:[See Text Amendments]

Code of Federal Regulations Currentness
Title 34. Education
Subtitle B. Regulations of the Offices of the Department of Education
Chapter I. Office for Civil Rights, Department of Education
Part 104. Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance (Refs & Annos)
Subpart A. General Provisions
➡ **§ 104.1 Purpose.**

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

SOURCE: 45 FR 30936, May 9, 1980; 55 FR 52141, Dec. 19, 1990; 65 FR 68054, Nov. 13, 2000, unless otherwise noted.

AUTHORITY: 20 U.S.C. 1405; 29 U.S.C. 794.

34 C. F. R. § 104.1, 34 CFR § 104.1

Current through September 29, 2011; 76 FR 60674

(4) names of personnel who treat, prescribe, and/or issue medication; and
(5) location where treated.
(b) The physician/patient confidentiality privilege applies to the medical/
/chiatric record. Access to the medical/psychiatric record shall be controlled
the responsible physician or the medical administrator.
The responsible physician shall insure the confidentiality of each prisoner's
dical record file and such file shall be maintained separately from and in no
y be part of the prisoner's other jail records. The responsible physician or
dical staff designated by him/her shall communicate information obtained
the course of medical screening and care to jail authorities when necessary
the protection of the welfare of the prisoner, of other prisoners, manage-
nt of the jail, or maintenance of jail security and order.
c) Written authorization by the inmate is necessary for transfer of medical/
chiatric record information unless otherwide provided by law or administra-
e regulations having the force and effect of law.
d) Prisoners shall not be used for medical recordkeeping.

TE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
STORY:
. Amendment filed 9-30-82; effective thirtieth day thereafter (Register 82, No. 40).

6. Medical Procedures Manual.

Every facility health administrator/physician shall, in cooperation with the
ility administrator, set forth in writing policy and procedures which include
are not limited to:
a) summoning and application of proper medical aid;
b) contact and consultation with private physicians;
c) emergency and non-emergency medical and dental services, including
nsportation;
d) provision for medically required dental and medical prostheses and eye-
ses;
e) notification of next of kin or legal guardian in case of serious illness;
f) provision for care of pregnant women;
g) screening, referral and care of mentally ill and retarded inmates;
h) implementation of special medical programs;
i) pharmaceuticals and a protocol for over-the-counter (non-prescription)
dication; and
) use of non-physician personnel.

TE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
TORY:
Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

. Pre-Screening.

ccording to procedures established by the responsible physician and the
ity administrator, a pre-screen is performed on all inmates prior to housing
living area. The pre-screening shall be performed by a medically licensed
on or trained non-medical staff per the written order of the physician
onsible for health care at the facility.
here shall be a written plan to provide medical care for any inmate who
ears at pre-screening to be in need of medical treatment or who requests
ical treatment.

E: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
ORY:
Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1208. Pre-Screening for Mental Disorders.

Any inmate who appears to be in need of psychiatric attention or who is suspected of suffering any type of mental disorder shall be brought to the attention of an appropriate medical professional.
Jails with an average daily population of 51 or more shall have a plan for identifying, screening, treatment and/or referral of the mentally disordered inmate which is developed in consultation with the local mental health director or his designee.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
HISTORY:
1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1209. Transfer to Treatment Facility.

A mentally disordered inmate who appears to be a danger to himself or others, or to be gravely disabled, shall be transferred to a treatment facility designated by the county and approved by the State Department of Health Services for diagnosis and treatment of such apparent mental disorder pursuant to Penal Code 4011.6 and/or Welfare and Institutions Code 5150 unless appropriate facilities and personnel, as determined by the local mental health director, are present in the jail for this purpose. Inmates found unable to be cared for adequately within any jail shall be transferred to a designated treatment facility as soon as possible.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
HISTORY:
1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1210. Individualized Treatment Plan.

For each inmate treated by a mental health service, in a jail, the service shall develop a written treatment plan which shall be shared with staff responsible for ongoing care of the inmate and which shall include referral to continuing mental health treatment after release.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
HISTORY:
1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1211. Sick Call.

There shall be a written plan implementing daily sick call conducted for all inmates or provision made that any inmate requesting medical attention be given such attention.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
HISTORY:
1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1212. Vermin Control.

Each facility health administrator/physician shall develop a written plan for the prophylaxis, control and treatment of vermin-infested inmates. There shall be written, medical protocols, signed by the facility physician, if any prophylactic treatment is used for persons suspected of being infested or having contact with a vermin-infested inmate.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.
HISTORY:
1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

California Department of Public Health

Fact Sheet

Tuberculosis Control Branch

Division of Communicable Disease Control

Program Description

Tuberculosis Control Branch Mission Statement: To protect and improve the health of all, the California Tuberculosis Control Branch provides leadership and resources to control and eliminate tuberculosis.

The TB Control Branch works with the state's 61 local health departments to assess and improve our state's ability to:

- Find and treat active cases of TB to prevent deaths from TB, halt TB transmission, and stop the development and spread of drug resistant TB
- Find and treat those who have become infected by breathing in TB bacteria, so they do not develop active TB and spread it to others

Background

Tuberculosis (TB) is a contagious disease that is transmitted through the air from one person to another by tiny infectious airborne particles expelled when a person with TB disease coughs, sneezes or talks. Anyone inhaling the air containing these particles may become infected.

- **Latent TB infection** - In most people, the immune system keeps the TB bacteria in check, so the person does not feel sick and cannot spread TB to others. If untreated, the latent TB bacteria can become active and cause TB disease.

- **TB disease** - If active TB disease develops, TB bacteria attack the lungs or other parts of the body. It usually takes 6 months of treatment to cure the disease, which helps to ensure that the patient doesn't die or remain infectious and spread TB to others. Multi drug-resistant TB (MDR-TB) - active TB caused by bacteria resistant to our most powerful drugs - is much more difficult and costly to treat and can be incurable. Extensively drug-resistant TB (XDR-TB) is from strains of TB resistant to most, if not all, available treatment. XDR-TB may be impossible to treat and has a high mortality.

TB Branch roles include:

- field assistance to investigate outbreaks and help local TB programs fill programmatic gaps that allowed TB to spread
- oversee the care of all multidrug resistant (MDR) and extensively drug resistant (XDR) TB cases and their contacts to prevent spread of these deadliest strains
- work with local programs to evaluate and improve performance on key TB control indicators (TB Indicators Project, TIP)
- collect data and conduct studies to evaluate and guide TB control interventions
- ensure fiscal accountability and efficient application of resources to highest priority needs of the state and local TB programs

Program Goals

- Ensure prompt diagnosis and treatment of individuals with TB and their infected contacts to prevent TB from spreading.
- Expand the use of directly observed therapy to ensure TB patients are cured and do not develop drug-resistant TB.
- Ensure individuals with drug-resistant TB receive appropriate treatment and do not spread these deadly strains to others.
- Improve TB detection and prevention among newly arriving immigrants and refugees.
- Maintain housing and detention capacity so homeless or noncompliant TB patients can complete treatment.
- Work with the federal government and Mexico on a regional strategy to combat TB along the border.
- Halt and prevent TB outbreaks in health care facilities and community settings.

Statistics

California reports the most TB cases of any state, 21% of the nation's total.

More than 2,700 new cases of TB were reported in California in 2007. California also reports the most multi-drug resistant (MDR) TB cases of any state, and 1-2 cases of virtually untreatable, extensively drug resistant (XDR) strains of TB have been reported each year in California since 2000.

California Department of Public Health
Tuberculosis Control Branch

Tuberculosis Control Local Assistance Funds
Policies and Procedures Manual
Fiscal Year 2010-2011

Base Award

Food, Shelter, Incentives and Enablers Funds

Reimbursement for Civil Detention

Revised April 2010

Table of Contents

Part 1 – Policies and General Requirements

1. Overview

The California Department of Public Health (CDPH) Tuberculosis Control Branch (TBCB) sets forth the following policies and procedures. These policies and procedures specify the conditions for receipt of CDPH TBCB local assistance funds.

2. Authority

Health and Safety Code Sections 121350, 121355, 121357, 121360, 121375, 121380, 121390, 121450, 121455, and 121460 authorize the tuberculosis (TB) subvention program and charge the CDPH TBCB with establishing standards and procedures with which to condition the awarding of funds. The following conditions apply to the local health jurisdiction that has been awarded these funds. The local health jurisdiction is hereinafter referred to as the Contractor.

3. Allocation of Local Assistance Funds

Local assistance Base Awards are re-calculated every two years. Fiscal Year (FY) 2010-2011 is the first year of a two-year local assistance funding cycle. Base Award amounts for local health jurisdictions (LHJs) reporting 20 or more cases of TB on average (over five years) are allocated using of a funding formula. A new multi-variable funding formula modeled after the national TB allocation formula was developed in 2009 in collaboration with the California TB Controllers Association (CTCA). See Table 1 below for the new funding formula variables and weights.

Table 1. Base Award Allocation Formula FY 2010-2011

Base Award Allocation Formula 2010-2011	
Variable	**Weight**
Incident cases	32%
Foreign-born/U.S.-born minorities	35%
Pulmonary smear-positive	15%
Immigrants with B-notification	5%
HIV/AIDS co-infection	5%
Substance abuse	5%
Homelessness	5%
Multi-drug resistant (MDR) TB	3%

LHJs reporting 6 – 19 cases on average receive fixed amount Base Awards.

4. Contractor's Responsibilities

The Contractor agrees to:

- Direct activities toward achieving the program objectives set forth by CDPH TBCB.
- Use these funds in accordance with CDPH TBCB policies and procedures as set forth in this Policies and Procedures Manual, and to any additional requirements set forth by the CDPH TBCB regarding the granting, use and reimbursement of the TBCB local assistance funds.
- Use these funds to supplement existing funds and not supplant funds that have been locally appropriated for the same purposes. These funds are intended to provide local entities with increased capabilities or to build capacity to address tuberculosis control needs. Supplanting funds is defined (for the purposes of this agreement) as using Local Assistance Award monies to "replace" or "take the place of" existing local funding. For example, reductions in local funds cannot be offset by the use of CDPH TBCB dollars for the same purpose.
- Abide by the most recent standards of care for tuberculosis treatment, control, and prevention as promulgated by:
    - California Department of Public Health[1]
    - California Tuberculosis Controllers Association (CTCA)[2]
    - American Thoracic Society (ATS)[3]
    - Centers for Disease Control and Prevention (CDC)[4]

5. Base Award

5.1 Tuberculosis Control Branch Priorities, Local Priorities and Objectives

A. CDPH TBCB Priorities

The CDPH TBCB has adopted the national priorities established by the CDC, as described in the article titled, "Essential Components of TB Prevention and Control Programs,"[5] which was published in the Morbidity and Mortality Weekly Report (MMWR) dated September 8, 1995 and in "Controlling Tuberculosis in the United States: Recommendations from the American Thoracic Society,

[1] CDPH TBCB Guidelines can be found at: http://www.cdph.ca.gov/programs/tb/Pages/GuidelinesRegulations.aspx
[2] CTCA Guidelines can be found at: http://www.ctca.org/guidelines/index.html
[3] ATS Guidelines can be found at: http://www.thoracic.org/statements/
[4] CDC TB Guidelines can be found at: http://www.cdc.gov/tb/publications/guidelines/default.htm
[5] Essential Components document can be found at: http://www.cdc.gov/mmwr/PDF/rr/rr4411.pdf

CDC, and the Infectious Diseases Society of America,"[6] published in the November 4, 2005 MMWR. CDC identified three priorities in the control of TB:

- First Priority:
  Identifying and treating persons who have active TB and ensuring they complete appropriate therapy, and, in exceptional cases, using confinement measures. In California, this includes the provision of directly observed therapy (DOT) for TB cases when it is recommended.

- Second Priority:
  Finding and evaluating persons who have been in contact with TB patients to determine whether they have TB infection or disease, and providing them with appropriate treatment.

- Third Priority:
  Targeted testing of high-risk populations to detect people with latent TB infection (LTBI) who could benefit from therapy to prevent the infection from progressing to TB disease.

B. General Guidelines for Local Health Jurisdictions

Local health jurisdictions (LHJs) should prioritize TB control activities toward Priorities 1 and 2 before directing local assistance funding toward Priority 3.

In order to receive approval for Local Assistance Award dollars to be directed toward Priority 3, health departments should ensure that:

- Patients evaluated as part of a designated target population who are identified with latent TB infection (LTBI) are appropriately treated, that a program is established to ensure completion of treatment for LBTI, and

- The jurisdiction has met the CDC objectives for Priority 1 and 2 and can sustain these activities while implementing Priority 3.

C. Additional Guidelines for Local Health Jurisdictions Participating in the TB Indicators Project (TIP)

Participation in TIP is a funding requirement for high morbidity (≥ 55 annual cases) jurisdictions. TIP jurisdictions should establish local assistance funding priorities that are based on TIP goals and

[6] Controlling TB in the U.S. can be found at: http://www.cdc.gov/mmwr/PDF/rr/rr5412.pdf

performance objectives. Local objectives should be established that are time-phased, measurable, and attainable. A list of the 14 local health jurisdictions currently participating in TIP and the assigned TBCB staff working with each LHD is located on the CDPH TBCB internet site at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-TIP-Team-Assignments.pdf.

D. Additional Guidelines for Local Health Jurisdictions not Participating in the TB Indicators Project (TIP)

Local health jurisdictions not participating in TIP are encouraged to review "TIP goals and performance objectives"[7] and consider how local assistance funding can be used to improve performance in high priority areas. In assessing performance, it may be useful to review the most recent "Report on Tuberculosis in California"[8] which includes some jurisdiction-specific performance data (e.g., TB Cases by Type of Therapy Administration, TB Cases by Initial Drug Regimen). Additional TIP documents are available on the CDPH TBCB internet site at: http://www.cdph.ca.gov/programs/tb/pages/TuberculosisindicatorsProject.aspx.

5.2 Use of Base Award Funds

Base Award funds must be used exclusively for TB-related activities in accordance with the requirements set forth in Part 1, Sections 4 and 5.1. Allowable expenses include: salaries and benefits for personnel involved in TB control activities, equipment, and supplies (including equipment and supplies to support public health laboratories performing mycobacteriology services). See Table 2 for a complete list of allowable expenditures.

[7] TIP goals and performance objectives can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-TIP-CaliforniaObjectives.doc

[8] Report on Tuberculosis in California (all years 2000-2008) can be found at: http://www.cdph.ca.gov/data/statistics/Pages/TuberculosisDiseaseData.aspx

Table 2. Allowable and Non-allowable Expenditures FY 2010-2011

Allowable: The following expenditures are usually approved when used to support TB Control Priorities 1 and 2. This list is not comprehensive and the presence of an item on the Allowable list does not imply automatic approval. Please contact the TBCB Fiscal Analyst for guidance.

Personnel
- MDs, NPs, Clinical RNs, Radiologists, PHNs, CDIs, Community Workers, Lab Staff, Clerks, Social Workers, Financial Screeners, Epidemiologists, Interpreters

Public Health Tuberculosis Laboratory
- Supplies (BACTEC, DNA probes)
- Equipment (incubators, fluorescent microscopes, centrifuge)

Patient Incentives & Enablers [applies to Food, Shelter, Incentives and Enablers (FSIE) Allotment]
- Patient housing
- Food vouchers
- Other personal products
- Transportation tokens or vouchers

Purchase of Fixed Assets
Radiographic equipment
- Sputum induction devices (booths or hoods)
- Isolation tents
- In-room air cleaners (HEPA Filters)

Indirect Costs
- Subcontract ONLY

Vehicle Leasing Fees

Travel (In-State ONLY)
- Local & Out of Jurisdiction

Equipment
- Cell phones
- Bubble pack packagers for DOT medications
- Fax machines
- Computer hardware
- Computer software for data management of cases and contacts
- Printers
- Scanners

Supplies
- Medical clinic supplies, anti-tuberculosis medications (State Funds ONLY)
- Office supplies
- Respirators (OSHA required individual masks and/or filters)

TB Training
- CTCA Conference Expenses
- Francis J. Curry National TB Center
- Tuberculosis training and educational materials

Non-Allowable: These expenditures will not be approved:

- **Leasing or Rental Fees**
  - Building or office space
- **General Building Renovation Fees**
- **Laboratory Renovations**
- **TB Clinic Renovations**
- **Desks and Tables**
- **File Cabinets**
- **Modular Furniture**
- **Out-of-State Travel**
- **Promotional items and Advertising (e.g., TB Program or Health Department Labeled Pens, Coasters, Banners)**

5.3 Use of Housing Award Funds

Some Base Awards include a portion of funds previously allocated as part of the Housing Award. Each year the letter announcing the request for application (RFA) identifies the amount of these funds. Housing Award funds must be budgeted for activities that enhance adherence in TB patients who are homeless, and/or at risk for homelessness or for default from therapy, so that civil detention is not necessary to complete therapy.

A. Purpose of former Housing Award Funds

These funds were awarded to the CDPH TBCB to be used specifically with the TB patients who are:

- Homeless, or
- At risk of becoming homeless, or
- At risk for defaulting from therapy

The housing funds in the Base Award are not intended for expenditures for food, shelter, incentives and enablers (FSIE). Separate funds have been set aside for the FSIE expenditures. Some jurisdictions have a designated annual FSIE allotment. Jurisdictions without an FSIE allotment may submit requests for reimbursement of these expenditures. See Part 1, Section 6, and Part 2, Section 3.

B. Eligible Expenditures

Eligible activities and expenditures for the former Housing Award funds included as part of the Base Award are those that foster the use of less restrictive alternatives to decrease or obviate the need for detention. Some examples are:

- Personnel salaries and benefits, e.g., outreach worker, social worker, public health nurse staff who work with the specified population to attain the expected outcomes
- Local mileage for personnel to perform DOT or other services that meet the eligibility criteria above, or
- Other expenditures that meet the criteria for use of these funds

5.4 Base Award Application: Required Forms and Information

Applications must be completed in accordance with the instructions given in Part 2. The application must include a:

- Summary Budget, Detail Budget and line item justifications (including expenditures budgeted using former Housing Award funds, when applicable)
- Funding Matrix
- Personnel Roster and Designated Correctional Liaison
- Plan for Housing Homeless TB Patients[9] – required only if not previously submitted, or if your current plan needs to be updated (see Part 1, Section 6.1)

All required budget forms can be found on the CDPH TBCB website at: http://www.cdph.ca.gov/programs/tb/pages/LocalAssistanceAward.aspx

For questions regarding the Base Award application process, please contact the CDPH TBCB Fiscal Analyst, David Beers, at (510) 620-3012 or via e-mail at david.beers@cdph.ca.gov.

5.5 Submitting Your Base Award Application

Submit electronically to tbawards@cdph.ca.gov or mail by Tuesday, June 1, 2010, to:

California Department of Public Health
Tuberculosis Control Branch
850 Marina Bay Parkway, Building P, Second Floor
Richmond, CA 94804-6403
Attention: David Beers – Application for Funding

5.6 Notice of Base Award Application Approval

The CDPH TBCB issues a Letter of Award to the recipient upon approval of the application package. Jurisdictions receiving both a Base Award and an FSIE allotment will receive a single Letter of Award announcing the amounts of the Base Award and the allotment. Attached to the letter is an Acceptance of Award page to return with an authorized signature.

5.7 Acceptance of Award

As an official acknowledgement of receipt of the award, the Acceptance of Award form must be returned to the CDPH TBCB with an authorized signature. By signing the Acceptance of Award, the recipient agrees to all the conditions of the award as set forth by the CDPH TBCB. A signed agreement is a prerequisite for reimbursement of invoices. The

[9] The Plan for Housing Homeless Tuberculosis Patients template can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-Special%20Populations-Plan%20for%20Housing%20Homeless%20Tuberculosis%20Patients.doc

following signed forms should be sent with the signed acceptance of award:

- Drug-Free Workplace Certification (Submit with Acceptance of Award)
- Certification Regarding Lobbying (Submit with Acceptance of Award)
- Disclosure of Lobbying Activities (Submit with Acceptance of Award)
- Darfur Contracting Act (Submit with Acceptance of Award)

All required certifications and disclosures can be found on the CDPH TBCB website at:
http://www.cdph.ca.gov/programs/tb/pages/LocalAssistanceAward.aspx

5.8 Rights of the California Department of Public Health Tuberculosis Control Branch

The CDPH TBCB reserves the right to modify the terms and conditions of this award. Additional information and documentation may be required.

5.9 Reimbursement

- The CDPH TBCB reimburses the Contractor, in arrears, for actual expenditures in accordance with an approved budget.
- Reimbursement occurs only after the CDPH TBCB has received a signed original copy of the Acceptance of Award agreement that is provided with the Letter of Award.
- Reimbursement is contingent upon TBCB approval of expenditures submitted in an invoice.
- Reimbursement will be withheld if the CDPH TBCB determines that the Contractor is not adhering to the terms and conditions described in the Policies and Procedures Manual.
- Reimbursements will be made provided that sufficient funds are available in the budget of the CDPH TBCB for the period of this award.
- Total reimbursement shall not exceed the sum specified in the Base Award - Letter of Award, with the exception of an FSIE allotment or a Special Needs Funds award. Additional funds may be requested when a jurisdiction has exceeded its designated FSIE allotment. See Part 1, Section 6.3 for additional information. LHJs experiencing events which require acute and non-enduring

tuberculosis (TB) control activities, *for which no other funds are available*, such as extended contact investigations, cases of multi-drug resistant TB (MDR TB), and outbreaks may request Special Needs Funds (See Part 1, Section 7 for additional information). Reimbursement for expenditures from Base Awards, FSIE allotments and Special Needs Funds awards will not be made more frequently than quarterly.

5.10 Communicating with the CDPH TBCB

- Address questions about fiscal or reimbursement issues with the CDPH TBCB Fiscal Analyst, David Beers.
- Address questions about programmatic issues with your CDPH TBCB Program Liaison.

6. Food, Shelter, Incentives and Enablers (FSIE) Funds

6.1 Award of Funds

FSIE funds are granted as designated allotments to those local health jurisdictions that were recipients of Housing Award funds in prior funding cycles. These funds are also available for reimbursement of eligible expenses on a case-by-case basis to local health jurisdictions that do not receive an allotment.

Recipients of a designated allotment receive a Letter of Award specifying the amount of the allotment. Recipients of both a Base Award and an FSIE allotment receive a single Letter of Award specifying the amounts of the Base Award and the FSIE allotment.

A copy of the "Plan for Housing Homeless TB Patients"[9] must be on file with the CDPH TBCB. The CDPH TBCB originally requested these plans when Housing Awards were granted starting in FY 1998-1999. If a plan has been submitted, it is not necessary to re-submit unless the plan on file with the CDPH TBCB needs to be updated.

6.2 Use of Food, Shelter, Incentives and Enablers (FSIE) Funds

FSIE funds are to be used to provide services that include measures to enhance adherence, prevent homelessness, and allow the use of less restrictive alternatives that decrease or obviate the need for detention. Use of these funds requires that all confirmed and suspected TB cases housed with these funds must be placed and maintained on Directly Observed Therapy (DOT). For additional requirements, please see the

"Policy for Housing Patients with Confirmed or Suspected Tuberculosis Who Are Considered Infectious."[10]

A. Funds may be used to provide food, shelter, incentives and enablers to:

   a) Confirmed or suspected TB cases that fall into the following groups:

      - Homeless – See Part 1, Section 6.2 D for definition
      - At risk of becoming homeless
      - At risk for detention
      - At risk for defaulting from therapy

   b) Contacts of confirmed or suspected TB cases if the contacts are homeless, at risk of becoming homeless, or at risk of defaulting from therapy for latent TB infection (LTBI).

B. Using FSIE Funds for the Hospitalization of Homeless Patients

   By providing funds to house homeless tuberculosis (TB) patients, it was the intent of the 1997-1998 State Budget Initiative to improve completion of therapy (COT) for TB, decrease the need for detention of homeless TB patients, and decrease the number of homeless TB patients who are lost to follow-up. The initiative was also intended to reduce the need for hospitalization of homeless TB patients. The CDPH TBCB recognizes, however, that when no other form of housing is available (or the patient is acutely ill), there may still be a need to hospitalize a homeless TB patient.
   The CDPH TBCB may approve the use of housing funds for hospitalization when the following criteria are met:

   a) The patient is homeless at the time of hospital admission.

   b) The patient is infectious or too ill to place in any other available housing. This must be clearly documented by the health department in the patient's health department chart.

   c) All other payer sources have been explored and found inadequate or unavailable. Please note that patients otherwise eligible for Medi-Cal except for their immigration status may be eligible for Emergency Medi-Cal services. A description of these efforts must be documented in the patient's health department chart.

[10] The Policy for Housing Patients with Confirmed or Suspected Tuberculosis who are Considered Infectious can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-Policy-for-housing-patients-considered-infectious.pdf

d) The patient is not under an order of detention as stated in Health and Safety Code Section 121365(d), (e). The CDPH TBCB has a separate mechanism for reimbursement for civil detention (See Part I, Section 9). Each proposed detention should be discussed with a CDPH TBCB Program Liaison as soon as the need for detention arises. However, the patient may be under an order of isolation as stated in Health and Safety Code 121365(g). Note that while both Health and Safety Code 121365(d) and (g) require the isolation of the patient, Health and Safety Code 121365(g) does not require the patient to be detained.

Additionally, as required by Health and Safety Code Sections 121361 and 121362, the hospital must submit a written treatment plan to the health department and receive approval prior to discharging or transferring the patient. The health department should develop a plan for transferring the patient to a location identified in the LHJ's housing plan.

C. Requesting Funds for the Hospitalization of Homeless Patients

Local health jurisdictions receiving an FSIE allotment should notify the CDPH TBCB Fiscal Analyst if they are giving consideration to using their FSIE allotment to cover part or all of the cost of the hospitalization.

D. Definition of Homelessness

This definition is taken from the Report of Verified Cases of Tuberculosis Form Completion Instructions, Tuberculosis Registry Guidelines, Version 4.1, April 2010.[11] A homeless person may be defined as:

i) An individual who lacks a fixed, regular, and adequate nighttime residence;

ii) An individual who has a primary nighttime residence that is:

- A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

[11] Tuberculosis Registry Guidelines (Poppy Manual) can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-Tuberculosis-Registry-Guidelines.pdf

or

- An institution that provides a temporary residence for individuals intended to be institutionalized;

or

- A public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for human beings.

A homeless person may also be defined as a person who has no home, e.g., is not paying rent, does not own a home, and is not steadily living with relatives or friends. Another definition is a person who lacks customary and regular access to a conventional dwelling or residence. Included as homeless are persons who live on streets or in nonresidential buildings. Also included are residents of homeless shelters, shelters for battered women, welfare hotels, and single room occupancy (SRO) hotels which are not designated for permanent long-term housing.

6.3 Requesting Additional FSIE Funds – Local Health Jurisdictions (LHJs) Receiving an Allotment

Additional FSIE funds may be requested by and granted to jurisdictions that exhaust their allotment in accordance with the following criteria:

- The CDPH TBCB should be the funding source of last resort for additional FSIE funds.
- The health jurisdiction must attempt to find resources that will allow the local TB control program to provide the necessary services to the TB patient. The CDPH TBCB Fiscal Analyst will assist the local health jurisdiction in identifying appropriate alternate sources of funding.
- Requests for additional funds should be primarily for the purpose of providing housing to suspected and confirmed TB cases. Circumstances warranting exceptions to this will be considered and approval will be made on a case-by-case basis. Exceptions should be in accordance with the prescribed use of these funds as described in Part I, Section 6.2 of this manual.
- Local health jurisdictions should submit requests to the CDPH TBCB Fiscal Analyst as soon as the need for additional funds is identified. Invoices for additional funds will be reviewed at the end

of each quarter and will be reimbursed, provided that expenses submitted are allowable and sufficient funds are available. Instructions for submitting requests and invoicing for reimbursement are located in Part 2, Section 3.3.

- The CDPH TBCB cannot ensure that sufficient funds will always be available to pay every request. However, the CDPH TBCB will take every step possible to identify all available appropriate funds. Payment is on a first come, first served basis, and made in accordance with available funds.

- The CDPH TBCB reserves the right to question and re-negotiate reimbursement for any expenditure that may appear to exceed a reasonable cost for the service.

6.4 Availability of FSIE Funds – LHJs with no Allotment

Funds for FSIE are available by prior approval from the CDPH TBCB to local health jurisdictions that do not receive an FSIE allotment in accordance with the criteria described in Part 1, Section 6.2. The following criteria apply:

- A copy of the "Plan for Housing Homeless TB Patients"[9] must be on file with the CDPH TBCB. The CDPH TBCB originally requested these plans when Housing Awards were granted starting in FY 1998-1999. If a plan has been submitted, it is not necessary to re-submit unless the plan on file with the CDPH TBCB needs to be updated.

- The CDPH TBCB should be the funding source of last resort for additional FSIE funds.

- The local health jurisdiction must attempt to find local resources that will allow the local TB control program to provide the necessary services to the TB patient. The CDPH TBCB Fiscal Analyst is available to assist the local health jurisdiction in identifying appropriate alternate sources of funding.

- Should the local TB control program exhaust available resources, or be unable to identify adequate resources, requests for funds should be directed to the CDPH TBCB Fiscal Analyst. Instructions for requesting these funds and invoicing for approved requests are described in Part 2, Section 3.2 of this manual.

- Requests for funds should be primarily for the purpose of providing housing to suspect and confirmed TB cases. Exceptions to this will be considered, and approval will be made, on a case-by-case

basis. Exceptions should be in accordance with the prescribed use of these funds as described in Part I, Section 6.2.

- Requests may be submitted at any time during the fiscal year. Approved requests may be invoiced quarterly up to the amount approved.

- The CDPH TBCB cannot ensure that sufficient funds will always be available to meet every request. However, the CDPH TBCB will take every step possible to identify all available appropriate funds. Payment is on a first come, first served basis, and will be made in accordance with available funds.

7. Special Needs Funds

Special Needs Funds awards are made available when possible to LHJs experiencing the need for acute and non-enduring tuberculosis (TB) control activities such as extended contact investigations, unexpected cases of MDR TB, and outbreaks. The amount available each year is variable. Available funds may be federal, State General Fund or both; allowable expenditures will be based on federal guidelines.

7.1 Requesting Special Needs Funds

Special Needs Funds may be requested by and granted to jurisdictions that have no other funds available in accordance with the following criteria:

- Eligible expenditures reimbursed with Special Needs Funds include support for additional personnel, benefits, travel, translation services, laboratory testing, supplies and services such as a portable X-ray van to conduct on-site screening of contacts for active TB disease.

- Non-eligible expenditures include in-patient care, medications, any expenditure for routine, on-going TB control activities, expenditures listed as "not allowed" on the "Allowable Expenditures" (see Table 2) and any expenditure that can be covered by another source of funds.

- Health departments that receive funds through a Cooperative Agreement with the Centers for Disease Control and Prevention are only eligible for State General Funds, when available.

- Requests may be submitted at any time during the fiscal year. Approved requests may be invoiced quarterly up to the amount approved.

For additional information regarding the Special Needs Funds application process, the Special Needs Funds application[12] and/or the Application Checklist,[13] please contact the CDPH TBCB Fiscal Analyst.

8. Reporting Requirements

8.1 Case Reports

All Contractors shall comply with morbidity reporting requirements. Beginning in 2010, all cases will be reported using the revised Report of Verified Case of Tuberculosis (RVCT). Contractors will submit complete and timely reporting of TB case data, participate in training of the revised RVCT, and participate in requisite quality control procedures, including reconciliation of case counts.

8.2 Electronic Reporting

All Contractors are required to work with TBCB staff to identify the appropriate reporting mechanisms to submit case reports to the California Reportable Disease Information Exchange (CalREDIE), the CDPH-DCDC web-based reporting software for notifiable diseases. Options include entering case data directly into CalREDIE, and electronic messaging from local software systems. Submission of hard copy RVCTs for data entry into CalREDIE by TBCB is a short-term option available to some LHDs. All Contractors must submit an RVCT electronically or via hard copy within 2 weeks of case confirmation.

8.3 California Aggregate Report for Program Evaluation (ARPE): Follow-up and Treatment for Contacts of TB Cases, Preliminary and Final Reports (Contact Report)

All Contractors are required to submit completed ARPE-Contact Investigation (CI) forms to the CDPH TBCB semi-annually. See the TBCB website for the required form, instructions, and ARPE due dates http://www.cdph.ca.gov/programs/tb/Pages/TBSurvFormsTBCB.aspx.

8.4 Protocols for People who Move

All Contractors are required to use the March 2002 National Tuberculosis Controllers Association (NTCA) protocol and forms for the

[12] Special Needs Funds application can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-PPM-Special-TB-Needs-Funding-Application.doc

[13] Special Needs Funds application checklist can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-PPM-Special-Needs-App-Checklist.doc

transfer of patient care between jurisdictions in California or between states.[14]

Instructions and forms for patients that move out of the U.S. can be found on the CDC website.[15]

Instructions for RVCT reporting of patients who move are included in the Tuberculosis Registry Guidelines, Version 4.1, April 2010.[11]

8.5 Outbreak Reporting

Timely TB outbreak reporting is required by the California Code of Regulations. Consistent with these regulations, the CDPH TBCB requires that local health officers or their designees report TB outbreaks or suspected outbreaks within one week of recognition. Reports should be conveyed by calling the CDPH TBCB Outbreak Duty Officer at (510) 620-3000. LHJs may also report TB outbreaks by fax or email using form CDPH 9060 (10/08) "Preliminary Report of Communicable Disease Outbreak."[16]

The suggested trigger for reporting suspected or confirmed outbreaks to CDPH TBCB is when three or more cases with epidemiologic links are identified. The characteristics of the case and/or setting may lower the threshold of the number of cases that define an outbreak. For example, jurisdictions may want to report two epidemiologically or genotypically linked cases involving multiple households, high risk populations (e.g., persons with HIV infection, children < 5 years of age, or persons with chronic medical conditions associated with elevated risk of TB), MDR TB, or occurrence in congregate settings. Jurisdictions are encouraged to report a situation if unclear whether or not it is an outbreak, or if State assistance may be useful.

Notes:

- For all situations: If the genotype is available, cases with > 1 different spoligotype or mycobacterial interspersed repetitive units (MIRU) locus should not be counted towards the number of cases defining an outbreak. Please report immediately, even while awaiting genotype results.

[14] NTCA Interjurisdictional Transfer Recommendations and protocols can be found at: http://www.cdph.ca.gov/programs/tb/Pages/TBSurvFormsTBCB.aspx
[15] CDC forms for international referrals can be found at: http://www.cdc.gov/tb/programs/international/default.htm
[16] CDPH form 9060 (10/08) "Preliminary Report of Communicable Disease Outbreak" can be found at: http://www.cdph.ca.gov/pubsforms/forms/CtrldForms/cdph9060.pdf

- For the purpose of an operational outbreak definition: Please include epidemiologic links that are both known (known contact or exposure in common) and possible (shared demographic features, geographic locations, and/or social interactions).

- For information about TBCB's Outbreak Response Team and investigation-related consultation and assistance available to local health departments, please see the Outbreak Response Team fact sheet.[17]

8.6 Immigrants and Refugees with B Notifications

Contractors are required to submit to CDPH TBCB the results of U.S. evaluations of immigrants and refugees arriving with A/B notifications using the Electronic Disease Notification (EDN) B notification Follow-up Worksheet[18] within 90 days of arrival in the U.S., or as soon as the TB American Thoracic Society (ATS) classification has been assigned. LHJs receiving e-mail notifications are required to enter the Worksheet results on-line into EDN; LHJs receiving paper notifications are required to submit the Worksheet by fax or mail to the CDPH TBCB.

8.7 Requests for Information and Reports

The CDPH TBCB reserves the right to request information and reports of all Contractors. All Contractors will submit information and reports as requested by the TBCB.

9. Reimbursement for Civil Detention of Persistently Non-Adherent Tuberculosis Patients

9.1 Reimbursement Policies

- All jurisdictions requesting reimbursement for the civil detention of a persistently non-adherent tuberculosis patient must have a current civil detention plan[19] on file with the CDPH TBCB.

- Consideration for reimbursement of persistently non-adherent tuberculosis patients for detention is on a case-by-case basis. Health and Safety Code 121358(a) prohibits the use of these funds for detentions carried out in correctional facilities.

[17] The Outbreak Response Team factsheet can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-ORT-Fact-Sheet.pdf

[18] Forms A/B Notification Reporting including the B notification Follow-up Worksheet can be found at: http://www.cdph.ca.gov/programs/tb/Pages/TBSurvFormsTBCB.aspx

[19] The Plan for the Detention of Persistently Non-Adherent Tuberculosis Patients template can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-Special%20Populations-Civil%20Detention%20Plan.doc

- Reimbursement is available for detentions for isolation [Health and Safety Code 121365(d)] and completion of therapy [Health and Safety Code 121365(e)].
- Reimbursement for detention is a fixed rate per day based on type of facility. Contact the Civil Detention Coordinator for information about the current rate (Table 3).
- Prior to submitting an invoice to the CDPH TBCB, local health jurisdictions should seek third party reimbursement for expenses for all eligible detainees.
- The reimbursement process is described in Part 2, Section 4 and in the Procedure for Requesting Reimbursement of Civil Detention of a Persistently Non-Adherent Tuberculosis Patient algorithm.[20]

Table 3. Allowable and Non-allowable Expenditures – Civil Detention

Allowable: All civil detention reimbursements are reviewed on a case by case basis. The CDPH TBCB is the payer of last resort. Proof of third party payer non-eligibility must be provided to the Tuberculosis Control Branch at the end of each fiscal year.
Room Accommodation (including access to toileting and bathing, meals, housekeeping, and laundry, provision of nursing care for administration of TB medication by DOT and visitation procedures)
• Health or Other Treatment Facility o Acute Care Hospital ($285 per day) o Skilled Nursing Facility ($285 per day) o Alcohol and Drug Rehabilitation Facility ($50 per day) o Mental Health Rehabilitation Center ($248 per day) o Other Health Care/Treatment Facility (up to $285 per day) o Motel (up to $285 per day) with elopement prevention

[20] Procedure for Requesting Reimbursement of Civil Detention of a Persistently Non-Adherent Tuberculosis Patient algorithm can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-CivilDetention-Procedure-for-requesting-reimbursement.pdf

Allowable: All civil detention reimbursements are reviewed on a case by case basis. The CDPH TBCB is the payer of last resort. Proof of third party payer non-eligibility must be provided to the Tuberculosis Control Branch at the end of each fiscal year.

Other Expenditures

- **Additional Patient Services**
  - Provision of TB clinical services for medical evaluation, monitoring, and follow-up
  - Mental health, substance abuse and spiritual counseling
  - Recreation
  - Elopement prevention
    (may include: 24 hour security, security guard, closed circuit television, electronic monitoring, alarm on doors, and electronic key pad for entry and exit)

- **Medication**

The most cost efficient method of purchasing TB medication must be utilized (i.e., third party payer, or a discounted drug purchasing program)

- **Transportation**
  - Mental health, substance On a case-by-case basis
  - Ground transportation to and from a regional civil detention site and to and from medical appointments

Non-Allowable: These expenditures will not be approved for reimbursement:

Detention in a Correctional Facility	**Detention in a Private Residence**
Personal Monitoring Devices (Unless Ordered by a Court)	**Air Transportation Within the State of California**

9.2 CDPH TBCB Civil Detention Coordinator

Jan Young, R.N., M.S.N., Chief, Program Development Section, may be reached at (510) 620-3029 or via e-mail at Jan.Young@cdph.ca.gov, or contact your program liaison for technical assistance.

Part 2 – Procedures

1. Completing the Application for Funding

1.1 Completing the Budget

A. Salary Savings and the Contractor's Initial Budget

The CDPH TBCB requires a budget submitted without projected salary savings. However, for jurisdictions that must include salary savings in their application budget to meet local requirements, the following are required:

- Prepare a budget that does not include salary savings
- Prepare a separate revised budget that includes projected salary savings
- Submit both budgets with your application

All required budget forms, certifications and disclosures can be found on the CDPH TBCB website at: http://www.cdph.ca.gov/programs/tb/pages/LocalAssistanceAward.aspx.

B. Medi-Cal Fee-for-Service Reimbursement of Directly Observed Therapy and Directly Observed Preventive Therapy

The CDPH TBCB encourages the use of directly observed therapy (DOT) as a strategy for improving completion of therapy and reducing adverse treatment outcomes. To the extent possible, DOT services should be reimbursed by Medi-Cal on a fee-for-service basis of $19.23 per encounter.

The following rules apply when you plan to claim Medi-Cal reimbursement for your DOT services:

- For Medi-Cal fee-for-service reimbursement, DOT or directly observed preventive therapy (DOPT) must be provided by personnel who are either fully or partially funded with local revenue dollars. Personnel who are fully funded through CDPH TBCB local assistance funds do **not** qualify for this fee-for-service reimbursement. A county or local overmatch is required to claim this Federal Financial Participation reimbursement.
- Contractors should determine which position(s), if any, will provide Medi-Cal fee-for-service DOT or DOPT, and structure their local and CDPH TBCB local assistance budgets to maximize this revenue stream. Reimbursement is limited by the amount of

county or local overmatch budgeted for the personnel providing the service.

Suggested options for structuring your budget:

Option A:

1. Identify the number and type of personnel who will provide this reimbursable service.

2. Budget these positions to be fully funded with local revenue dollars.

Option B:

1. Identify the number and type of personnel who will provide this reimbursable service.

2. Estimate the amount of expected reimbursement for each personnel line item identified.

3. Budget each personnel line item identified to be partially funded through local revenue dollars for an amount equal to or greater than the expected amount of reimbursement.

4. Budget the remainder of each personnel item to be funded through State or federal local assistance funds.

C. Personnel (Benefit and Non-Benefit)

Budget information for Personnel line items is required on the Summary and Detailed Budget forms, and in the Line Item Justification.

Summary Budget

Personnel (Benefit) line item category

- Enter the total amount budgeted for benefited personnel

Personnel (Non-Benefit) line item category

- Enter the total amount budgeted for non-benefited personnel and miscellaneous personnel items

- Detailed Budget

- Personnel (Benefit) line item category

- List and consecutively number each benefited position as a separate line item
- For each position listed, include the following information:
- Position Title
- New or Continuing
- Number of Full Time Equivalents (FTE)
- Total Line Item Amount

EXAMPLE DETAILED BUDGET

Line Item Category			Amount
Personnel (Benefit) (Title, New or Continuing, #FTE)			
Community Worker	Continuing	1.5	$ 42,516
Epidemiology Analyst	New	1.0	$ 40,056
Total Personnel (Benefit)			$ 82,572
Benefits (@ 35%)			
1. Community Worker			$ 14,880
2. Epidemiology Analyst			$ 14,019
Total Benefits			$ 28,899
Personnel (Non-Benefit) (Title, New or Continuing, #FTE)			
Community Worker	New	1.0	$ 28,344
Total Personnel (Non-Benefit)			$ 28,344
GRAND TOTAL PERSONNEL SERVICES			$139,815

Line Item Justification:

Include the following information for each position listed in the Detailed Budget.

- Position Title
- Name(s) of the individual(s) filling the position. State "vacant" if position(s) are not filled

- Brief summary of the duties for the position; describe how the position contributes to meeting a program objective
- Identify the designated personnel previously funded in the Housing Award and identify their activities and the amount of FTE that match the criteria for the use of these dollars
- Identify personnel engaged in Priority 3 Activities (see also Part 2, Section 1K)
- Identify personnel fulfilling the duties of a Correctional Liaison (see also Part 2, Section 1L)

In addition to the above information, CDPH TBCB is required by CDC to submit information about DOT services and surveillance activities. Include the following information in your line item justification. Refer to the sample line item justification that follows when completing this portion of your application.

- If positions provide DOT, indicate the percentage of time spent in this activity expressed as FTE
- If positions provide fee-for-service DOT that will be claimed for reimbursement through Medi-Cal, indicate the number of FTE devoted to providing this service
- If positions provide support for an RVCT registry or laboratory data registry, or analyze RVCT data to identify disease trends and monitor patient outcomes, indicate the number of FTE providing these surveillance activities

EXAMPLE LINE ITEM JUSTIFICATION

PERSONNEL (Benefit & Non-Benefit)
Henry Trevon (1.0 FTE), Leo Segundo (1.0 FTE), Luther X. Ray (0.5 FTE) Henry Trevon and Leo Segundo provide .75 FTE of DOT each along with other patient follow-up services in a public health clinic. Luther X. Ray provides (1.0 FTE) provides .5 FTE DOT which is billed through the Medi-Cal TB Program fee-for-service DOT. He is supported for this portion of his effort by local revenue dollars. Epidemiology Analyst (Vacant) This individual assists the epidemiologist in analyzing RVCT data to identify disease trends and monitor patient outcomes. This individual also provides support to the RVCT Registry. This individual devotes 1.0 FTE to surveillance activities.

D. Benefits

- Benefit rates of greater than 35% must be justified. Include official documentation of the rate, as well as a breakdown of the benefits
- Benefit information is required on the Summary and Detailed Budget sheets
- Summary Budget – Benefits line item category
- Enter the rate at which benefits are computed and the total amount budgeted
- Detailed Budget – Benefits line item category
- Enter the benefit rate or range and the amount of benefits budgeted for each consecutively numbered position listed in the Personnel (Benefit) category

EXAMPLE DETAILED BUDGET

Line Item Category			Amount
Personnel (Benefit) (Title, New or Continuing, #FTE)			
Community Worker	Continuing	1.5	$ 42,516
Epidemiology Analyst	New	1.0	$ 40,056
Total Personnel (Benefit)			$ 82,572
Benefits (@%)			
1. @ 22%			$ 9,354
2. @ 28.2%			$ 11,296
Total Benefits			$ 20, 650
Personnel (Non-Benefit) (Title, New or Continuing, #FTE)			
Community Worker	New	1.0	$ 28,344
Total Personnel (Non-Benefit)			$ 28,344
GRAND TOTAL PERSONNEL SERVICES			$ 131,566

E. Miscellaneous Personnel Line Items

Budget information for miscellaneous personnel line items, i.e., Nurse Retention Bonus, Bilingual Bonus, is required on the Summary and Detailed Budget forms, and in the Line Item Justification.

Summary Budget – Personnel (Non-Benefit) line item category

Include in the total amount budgeted for miscellaneous personnel line items

Detailed Budget – Personnel (Non-Benefit) line item category

List any miscellaneous personnel line items as separate line items

EXAMPLE DETAILED BUDGET

Line Item Category				Amount
Personnel (Benefit) (Title, New or Continuing, #FTE)				
Community Worker	Continuing	1.5		$ 42,516
Epidemiology Analyst	New	1.0		$ 40,056
Total Personnel (Benefit)				$ 82,572
Benefits (@%)				
@ 22%				$ 9,354
@ 28.2%				$ 11,296
Total Benefits				$ 20,650
Personnel (Non-Benefit) (Title, New or Continuing, #FTE)				
Community Worker	New	1.0		$ 28,344
Bilingual Bonus	$ 80 per month	12 months	9 Nurses	$ 8,640
Nurse Retention Bonus	$110 per month	12 months	9 Nurses	$ 11,880
Total Personnel (Non-Benefit)				$ 48,864
GRAND TOTAL PERSONNEL SERVICES				$ 152,086

Line Item Justification:

For each miscellaneous personnel item listed in the Detailed Budget, include the following information in the Line Item Justification:

- Name of the line item

- A brief justification describing how these line items assist your staff in meeting identified program needs

EXAMPLE PERSONNEL (Non-Benefit)

Bilingual Bonus These bilingual individuals provide direct services to non-English speaking persons. Nurse Retention Bonus These individuals are registered nurses. Nurse Retention Bonuses are required by the local department of health services for all registered nurses providing nursing services.

F. Travel and Per Diem

Allowable Travel and Per Diem Expenses and Reimbursement (In-State only)

- Mileage – Private Car: 50¢ per mile (or current State reimbursement rate)
- Contractors must maintain a travel log that includes the individual's name, purpose of the trip (e.g., DOT visit), date(s) of travel, and the total mileage for the trip
- Daily Subsistence Rates (when travel exceeds 24 consecutive hours)*
- Lodging with a receipt up to $84.00 plus tax**
- Lodging without a receipt $24.50
- Breakfast $ 6.00
- Lunch $10.00
- Dinner $18.00
- Incidentals $ 6.00

*Reimbursement is made on the actual amount of the lodging or expense up to the designated maximum. All expenses invoiced must be for the actual amount of the expense. Local health jurisdiction personnel traveling on Base Award dollars should maintain receipts for all claimed expenses.

**Designated reimbursement maximums for lodging are higher for (receipted) hotel stays in the following counties:

- Los Angeles and San Diego: $110 plus tax

- Alameda, San Francisco, San Mateo, Santa Clara: $140 plus tax
- Reimbursement for travel and per diem shall be in accordance with the policies for State employees (see http://www.dpa.ca.gov/personnel-policies/travel/employees.htm)

Summary Budget – Travel line item category

List the total amount of combined travel and per diem

Detailed Budget – Travel line item category

- List projected within-jurisdiction travel separately from out-of-jurisdiction travel
- For within-jurisdiction travel, indicate the number of miles and mileage rate
- For out-of-jurisdiction travel, indicate travel and per diem expenses separately

Line Item Justification

- For within-jurisdiction and out-of-jurisdiction travel and per diem, briefly describe the purpose of the travel relative to stated program objectives. If applicable, identify the dollar amount of Housing Award funds and how the activities meet the criteria for the use of these funds (see Part 1, Section 5.3 for guidance on the use of former Housing Award funds).

EXAMPLE TRAVEL

Within-jurisdiction travel is required for community outreach workers and public health nurses to perform field directly observed therapy, case interviewing, and contact investigation. $10,000 – Housing Award funds: outreach worker's travel for DOT to high risk patients.

Out-of-jurisdiction travel is required for medical, nursing, other health professional staff to participate in continuing education through the annual CTCA conferences.

G. Equipment

Note: The CDPH requires that certain equipment purchased with State funds be documented on the "Current Contract Year Equipment

Purchased with State Funds.[21]" Return the completed form to the CDPH TBCB with the final invoice.

- Approval to purchase equipment is contingent on the Contractor's ability to demonstrate that the purchase is a cost effective means to meet a need related to the control and prevention of TB. This is best accomplished by clearly relating the purchase of this equipment to a stated program objective
- Equipment procurement shall not exceed an annual (fiscal year) maximum of $50,000
- All equipment and products purchased should be American-made, to the greatest extent practicable

Summary Budget – Equipment line category

List the total amount of all equipment purchases

Detailed Budget – Equipment line item category

Itemize equipment purchases. Include:

- The number of units, cost per unit, and total cost
- Make and model number

Line Item Justification

Briefly describe how the equipment will enhance your ability to meet a stated program objective. If applicable, identify the dollar amount of Housing Award funds and how the use of the equipment meets the criteria for the use of these funds (see Part 1, Section 5.3 for guidance on the use of former Housing Award funds).

H. Supplies

Use this line item for office supplies and clinic supplies, such as pens and tuberculin syringes.

Summary Budget

List the total amount for all supplies to be purchased.

Detailed Budget

[21] The Current Year Equipment Purchased with State Funds form can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-PPMBud-Contractor-Equipment-Purchased.doc

Itemize projected expenditures into two categories:

- Office Supplies: State the total amount to be expended for these supplies. It is not necessary to list all the types of supplies
- Clinic Supplies: Itemize all the types of supplies you will purchase with the dollar amount for each type

EXAMPLE DETAILED BUDGET

Supplies	$745
Office Supplies	$500
Clinic Supplies	
Tuberculin Syringes	$200
Band-Aids	$ 20
Alcohol Wipes	$ 25

I. Sub-Contracts

Important: A copy of each sub-contract must accompany the application. A final draft is acceptable. A copy of the signed contract must be submitted to the CDPH TBCB as soon as the local approval process is completed.

Sub-contracts should include the name of the contract organization, the terms of the agreement, including the service period, as well as all of the following applicable information, including, but not limited to:

- Whether the sub-contractor is a community-based organization or a private agency
- Population and number of clients served by sub-contractor
- Maximum amount to be paid
- Basis upon which the payment is to be made under the terms of the agreement
- A list of the parties to the agreement
- Types and quantity of the product(s) to be delivered, including the delivery schedule
- Payment schedule based on the delivery of the product(s)

- Personnel detail: Position Title(s), Number of FTE, Total Pay, Fringe Benefits rate and cost
- Travel expenses and per diem rates
- Fee for service rate, when applicable
- Details regarding equipment and supplies purchases as described in Part 2, Section 1G

Summary Budget – Contractual line item category

List the total amount of all sub-contracts, e.g., purchase agreements and service contracts

Detailed Budget – Contractual line item category

Itemize each sub-contract on the detailed budget sheet. If the sub-contract does not show a detailed listing of the personnel, services, equipment and other costs, then prepare a separate detailed budget for each sub-contract. Provide the same details for personnel, benefits, travel, equipment and other costs covered under the sub-contract as is required for the Base Award detailed budget section.

Line Item Justification

Briefly describe the purpose of the sub-contract and how the sub-contract will enhance your program's ability to meet a stated program objective. If applicable, identify the dollar amount of Housing Award funds and how the sub-contract meets the criteria for the use of these funds (see Part 1, Section 5.3 for guidance on the use of former Housing Award funds).

J. Other Line Items

Use this line item for other direct costs that have not been listed elsewhere.

Summary Budget – Other line item category

Enter the total amount of Other category line items

Detailed Budget – Other line item category

Itemize each type of expenditure

Line Item Justification

Provide a brief justification for all items listed in the Detailed Budget - Other category. If applicable, identify the dollar amount of Housing Award funds and how the proposed item meets the criteria for the use of these funds (see Part 1, Section 5.3 for guidance on the use of former Housing Award funds).

K. Documentation of and Justification for the Use of Funds for Priority 3 Activities

Local health jurisdictions should prioritize TB control activities toward meeting and maintaining the Centers for Disease Control and Prevention's (CDC) Priorities 1 and 2 before directing local assistance funding toward Priority 3. (See Part 1, Section 5.1 of this manual)

In order to receive approval for Local Assistance Award dollars to be directed toward Priority 3, LHJs should ensure that:

- Patients evaluated as part of a designated target population who are identified with latent TB infection (LTBI) are appropriately treated, that a program is established to ensure completion of treatment for LBTI, and
- Demonstrate that the local health jurisdiction has met the CDC objectives for Priority 1 and 2, and can sustain these activities while implementing Priority 3.

Prepare a separate line item justification, entitled Priority 3, for all funds directed toward Priority 3 activities. The following information is required:

- For all applicable line items, identify the amount of the FTE budgeted that will be dedicated toward these activities
- A statement that the jurisdiction will continue to maintain Priority 1 and 2 activities
- A description of the population to be targeted for testing and to be treated for LTBI
- A description of the methods for collecting and analyzing testing and treatment data
- A description of the personnel resources available to ensure that the patients identified for treatment complete therapy

L. Designation of a Correctional Liaison

Ensuring the continuity of care of TB patients who transfer between correctional facilities and the community is a high priority for TB control in California. Each jurisdiction should identify its needs and determine those duties that are most appropriate for their Correctional Liaison. Use the CDPH-CTCA jointly approved duty statement for a Correctional Liaison[22] to determine these duties.

The designee may be your jurisdiction's Correctional Liaison identified in the CTCA Directory,[23] or you may choose to designate someone else.

To identify the designee in your application package:

- If this position is supported through local assistance subvention funds, then include the following statement in the line item justification: "Fulfills the Duties of a Correctional Liaison"
- If the Correctional Liaison is supported through other funds, then indicate in the cover letter included with the submission of your budget the name and position classification of the staff member responsible for fulfilling these duties.

2. Managing Your Base Award

2.1 Reimbursement Procedures for Base Award Expenditures

A. Submitting Base Award Invoices

Note: No invoices will be processed for the new fiscal year if there are outstanding invoices from the previous year or if there are unresolved stipulations from the Letter of Award. Also, a signed Acceptance of Award must be on file with the CDPH TBCB.

1. To facilitate timely reimbursement, use the sample invoice format and include:
   - Award period
   - Billing period
   - Total amount to be reimbursed

[22] The joint CTCA-CDPH Health Department Tuberculosis Correctional Liaison Duty Statement can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-Special%20Populations-Health%20Department%20Tuberculosis%20Correctional%20Liaison%20Duty%20Statement.pdf

[23] The CTCA Directory can be found at: http://www.ctca.org/programs/index.html

- Amount to be reimbursed by line item
- Contractual line item expenditures detailed on a separate page
- For equipment expenditures, attach evidence of payment purchase, e.g., official county purchase order, and a brief description of the item(s) purchased. When possible, include make and model number.
- In the Supplies line item, expenditures for anti-TB medications must be listed as a separate item (e.g., anti-TB medications $500)
- Personnel and other line item expenditures for Priority 3 activities must be listed separately

2. Submit a signed original invoice on the Contractor's letterhead. The official signature(s) must be in blue ink. Please ensure that the invoices reflect the Richmond mailing address for the State TB Branch.

3. Invoice Due Dates and Requests for Extensions

Quarter	Period Covered	Due Date
First	July 1 through September 30	November 15
Second	October 1 through December 31	February 15
Third	January 1 through March 31	May 16
Fourth	April 1 through June 30	August 15

Invoices must be postmarked by the quarterly due date. If an invoice will not be postmarked by the quarterly due date, the LHJ is required to contact the CDPH TBCB Fiscal Analyst to request an extension. Extensions may be granted for up to two weeks past the invoice due date by telephone. Requests for longer extensions must be submitted in writing (letter, fax or e-mail) by the invoice due date with an explanation of the barriers to timely submission. Requests for longer extensions may not be granted if fiscal closeout will be delayed. LHJs that are granted extensions must submit a "not to exceed" amount by the last business day in February and August. Fiscal closeout begins on the first business day of March and September of each fiscal year.

2.2 Budget Revisions

A. Budget Revision Process

1. General Policies

The CDPH TBCB must grant written approval of modified budget requests. No reimbursements can be made for revised budget expenses until approval has been granted.

The CDPH TBCB ***does not*** give verbal approval for budget revisions.

2. Requesting a Budget Revision

A. General Requirements

- Submit the Budget Revision Request form,[24] a revised Summary Budget, Detailed Budget, and line item justification to the CDPH TBCB Fiscal Analyst at least four weeks prior to the date of the proposed expenditure. Budget revision requests that are not submitted on the Budget Revision form will be returned. Additional information may be requested.

- Before preparing the budget revision, review the list of Allowable Expenditures (see Table 2).

B. Completing the Proposal

- Include a complete narrative justification for each revised line item. The justification should clearly describe how each proposed revision to the approved budget would enhance the TB program's ability to achieve stated Priority 1 and 2 goals.

- The following items, when appropriate, must be included when submitting revisions to the Personnel line item:

  - Itemized salary savings for each benefited and non-benefited personnel line item
  - For changes in employment status, include the employee's title, start date, and termination date (when applicable) in the justification section.
  - A revised Personnel Matrix
  - All required signatures

3. Notification of Action Taken on a Budget Revision Request

A copy of the approved or disapproved request will be e-mailed or faxed to the contact person listed on the budget revision form, or on the cover letter accompanying the request, if different than the contact person listed on the form.

[24] The Budget Revision Request form can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-PPMBud-Budget-Revision-Request.doc

2.3 Required Forms Submitted with Acceptance of Award

- Drug-Free Workplace Certification
- Certification Regarding Lobbying
- Disclosure of Lobbying Activities
- Darfur Contracting Act

2.4 Additional Required Forms

- Current Contract Year Equipment Purchased with State Funds – this form will be provided to those Contractors making approved equipment purchases. Submit with final invoice.
- Contractor's Release for All Contracts – This form is provided at the end of the fiscal year. Submit once the final payment has been received for all invoices.

3. Reimbursement for Food, Shelter, Incentives and Enablers (FSIE)

3.1 Submitting Invoices for Reimbursement from an FSIE Allotment

1. To facilitate timely reimbursement, use the FSIE sample invoice format[25] and include the following information:
   - Total amount to be reimbursed
   - Amount to be reimbursed by line item
   - Shelter: By patient, include the RVCT and/or suspect ID number, location, cost per day, number of days, and total cost. ***Please do not submit with patient identifiers, such as name, address, or birth date.***
   - If the patient received DOT during the time housing was provided
   - Food items, meals, incentives, enablers: Itemize and cross-foot, e.g., 20 personal hygiene kits @ $3.50, total $70; 100 bus vouchers @ $1.00, total $100; 50 McDonald's coupons @ $3.00, total $150.

   Note: It is not necessary to submit evidence of purchase for food, shelter, incentives and enablers; however, LHJs are required to maintain documentation of these expenditures. Please contact CDPH

[25] The FSIE sample invoice can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-PPMBud-Food-Shelter-Incentives-Enablers-Invoice.doc

TBCB Fiscal Analyst for more information regarding record retention requirements

2. Submit a signed original invoice on the Contractor's letterhead. The official signature(s) must be in blue ink

3. FSIE Invoice Due Dates and Requests for Extensions

Invoices should be submitted quarterly on the same schedule as Base Award invoices:

Quarter	Period Covered	Due Date
First	July 1 through September 30	November 15
Second	October 1 through December 31	February 15
Third	January 1 through March 31	May 16
Fourth	April 1 through June 30	August 15

Invoices must be postmarked by the quarterly due date. If an invoice will not be postmarked by the quarterly due date, the LHJ is required to contact the CDPH TBCB Fiscal Analyst , in advance, to request an extension. Extensions may be granted for up to two weeks past the invoice due date by telephone. Requests for longer extensions must be submitted in writing (letter, fax or e-mail) by the invoice due date with an explanation of the barriers to timely submission. Requests for longer extensions may not be granted if fiscal closeout will be delayed. LHJs that are granted an extension must submit a "not to exceed amount" by the last business day in February and August. Fiscal closeout begins on the first business day of March and September of each fiscal year.

Important: 4th quarter invoices are due 45 days following the end of the quarter (August 15 for the 4th quarter). Requests for extensions will be granted through the last business day in August. The CDPH TBCB Resources Planning and Management Section will review the balance of unexpended FSIE funds and re-distribute these funds to jurisdictions that have requested additional funds. By failing to contact the CDPH TBCB Fiscal Analyst to request an extension, and submitting an invoice after the last business day in August, jurisdictions may not receive full payment of the invoiced amount.

3.2 Process for Requesting and Invoicing for Reimbursement for FSIE Expenditures for Local Health Jurisdictions with no Designated Allotment

Funds for the provision of food, shelter, incentives and enablers in accordance with the criteria described in Part 1, Sections 6.2 and 6.4, are available with prior approval from the CDPH TBCB to local health jurisdictions that have not received an allotment. Follow this process to request funds:

1. Contact the CDPH TBCB Fiscal Analyst to discuss your request. The initial contact may be by telephone, but must be followed by a written request (letter or email).

2. Upon approval, the LHJ will receive written verification of the approved amount and be instructed to submit an invoice or invoices not to exceed that amount. Use the FSIE sample invoice[25] format and include the information described in Part 2, Section 3.1 of this manual, as appropriate. Or, request a sample invoice from the CDPH TBCB Fiscal Analyst.

3. Reimbursement is for expenditures made in arrears. Do not include projected expenses on your invoice.

Note: Reimbursement is contingent on availability of sufficient FSIE funds.

3.3 Process for Requesting and Invoicing Additional FSIE Funds – LHJs with Designated Allotments

- Requests for additional funds should be submitted in writing (by letter or e-mail) to the CDPH TBCB Fiscal Analyst as soon as the need has been identified.

- Requests must be in accordance with the use of these funds as described in Part I, Sections 6.2 and 6.3. .

- Invoices should be submitted on the same quarterly schedule and format as described in Part 2, Section 3.1 of this manual. Expenditures invoiced must have occurred within the invoicing period.

- Submit a separate invoice for expenditures exceeding the original allotment.

- Example: An LHJ's allotment is $20,000. In the 3rd quarter the LHJ exceeds the allotment and requests additional funds. Two invoices should be submitted for the 3rd quarter. One invoice should zero out

the balance of the allotment. The second invoice should include additional expenditures within the 3rd quarter.

- The closing date for submitting invoices with expenditures above a local health jurisdiction's FSIE allotment is August 31 of the fiscal year following the award period (e.g., August 31, 2011 for the award period of July 1, 2010 – June 30, 2011). Invoices postmarked after August 31 will not be considered for reimbursement unless the local health jurisdiction has received approval for an extension from the CDPH TBCB Fiscal Analyst.

4. Reimbursement for Civil Detention of Persistently Non-Adherent Tuberculosis Patients

4.1 Requesting Approval and Required Documentation for Reimbursement for Civil Detention

Refer to "Procedure for Requesting Reimbursement for Civil Detention for a Persistently Non-Adherent Tuberculosis Patient"[20] for a complete description of this process and required documentation.

For assistance in completing the required documentation, refer to the CDPH-CTCA "Joint Guidelines for the Civil Detention of Persistently Non-Adherent Tuberculosis Patients in California"[26]

Local health jurisdictions must use one of the following options in order to be eligible for reimbursement.

Option 1 (The CDPH TBCB recommends the use of this option)

1. Prior to the detention:
   - Contact your assigned CDPH TBCB Program Liaison
   - Submit a completed "Request for Reimbursement of Civil Detention of a Persistently Non-Adherent Tuberculosis Patient"[27] form along with the required documentation.
2. Requests for reimbursement will be approved or denied by the CDPH TBCB Civil Detention Coordinator and faxed back to the requesting local health jurisdiction.

[26] The "Joint Guidelines for the Civil Detention of Persistently Non-Adherent Tuberculosis Patients in California" can be found at: http://www.ctca.org/guidelines/IIB4cdetention.pdf
[27] The "Request for Reimbursement of Civil Detention of a Persistently Non-Adherent Tuberculosis Patient" form can be found at:

Option 2

1. Within 5 working days of the day the detention began, the local health jurisdiction must submit a completed "Request for Reimbursement of Civil Detention of a Persistently Non-Adherent Tuberculosis Patient"[27] form along with required documentation.

2. Requests for reimbursement will be approved or denied by the CDPH TBCB Civil Detention Coordinator and faxed back to the requesting local health jurisdiction within 5 working days of receipt of the request.

Please remember that if a request for reimbursement is denied by the CDPH TBCB, the local health jurisdiction is financially responsible for the detention.

4.2 Invoicing for Civil Detention

Prior to submitting an invoice to the CDPH TBCB, LHJs must seek third party payer reimbursement for all eligible services and expenses for all eligible detainees. Invoices may be submitted once the detention is approved and expenses have been incurred. Proof of denial of third party payer reimbursement or proof of denial of an application for health benefits must be submitted as soon as possible, but no later than 45 days past the end of the fiscal year (August 15).

Use the CDPH TBCB civil detention invoice template form[28] for invoicing. The invoice must include the authorized original signature(s) in blue ink. Final invoices for each fiscal year are due no later than 45 days past the end of the fiscal year (August 15).

4.3 Detention Release Date Information

Within 5 working days of the detention release date, the local health jurisdiction will fax the release date to the CDPH TBCB Civil Detention Coordinator.

4.4 CDPH TBCB Civil Detention Coordinator

Jan Young, R.N., M.S.N., Chief, Program Development Section may be reached at (510) 620-3029 or via e-mail at Jan.Young@cdph.ca.gov.

[28] The civil detention invoice template can be found at: http://www.cdph.ca.gov/programs/tb/Documents/TBCB-PPMBud-Civil-Detention-Program-Invoice.doc

Centers for Disease Control and Prevention
CDC 24/7: Saving Lives, Protecting People, Saving Money Through Prevention.

Menu of Suggested Provisions For State Tuberculosis Prevention and Control Laws

VI. Protection of Individual Rights

A. Due Process

Descriptive Note: The due process clause of the Fourteenth Amendment to the U.S. Constitution prohibits state governments from depriving individuals of life, liberty, or property without due process of law. Due process has both substantive and procedural components. "Substantive due process" generally requires the government to have adequate justification for implementing laws or taking other official actions that deprive individuals of life, liberty, or property. "Procedural due process" requires the government to use fair and reasonable procedures when restraining a person's liberty. Notice and an opportunity to be heard are among the most fundamental procedures that must be available. The disease control measures described above – examination, isolation, confinement, treatment, etc. – potentially implicate liberty interests protected by the due process clause. Due process is incorporated into many state laws relating to TB prevention and control, including those in this Menu, and states therefore may not have "separate" provisions addressing due process. This section contains examples of existing laws that address due process. The first bullet is a good example of substantive due process because the justification and due process measures that must be taken increase with the level of restriction – in this case, detention. The provision also accounts for procedural due process, with specific requirements on what must be provided in the notice to the patient, and hearing requirements. The second provision below is a concise summary of procedural due process requirements concerning hearings conducted pursuant to the state's TB control regulations. See Appendix A for more on due process as it relates to TB prevention and control.

- An order of the health officer pursuant to [regulation authorizing administrative order for disease control measures] shall set forth:
  - The legal authority under which the order is issued, including the particular sections of this Article or other law or regulation;
  - An individualized assessment of the person's circumstances and/or behavior constituting the basis for the issuance of such orders;
  - The less restrictive treatment alternatives that were attempted and were unsuccessful and/or the less restrictive treatment alternatives that were considered and rejected, and the reasons such alternatives were rejected.

  In addition, an order for the removal and detention of a person shall:

  - Include the purpose of the detention;
  - Advise the person being detained that he or she has the right to request release from detention by contacting a person designated on the health officer's order at a telephone number stated on such order, and that the detention shall not continue for more than five (5) business days after such request in the absence of a court order authorizing such detention;
  - Advise the person being detained that, whether or not he or she requests release from detention, the health officer must obtain a court order authorizing detention within sixty (60) days following the commencement of detention and thereafter must further

seek court review of the detention within ninety (90) days of such court order and within ninety (90) days of each subsequent court review;
- Advise the person being detained that he or she has the right to arrange to be represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, that such counsel will be notified that the person has requested legal representation;
- Be accompanied by a separate notice which shall include but not be limited to the following additional information: 1) that the person being detained has the right to request release from detention by contacting a person designated on the health officer's order at a telephone number stated on such order, and that the detention shall not continue for more than five (5) business days after such request in the absence of a court order authorizing such detention; 2) that he or she has the right to arrange to be advised and represented by counsel or to have counsel provided, and that if he or she chooses to have counsel provided, that such counsel will be notified that the person has requested legal representation; and 3) that he or she may supply the addresses and/or telephone numbers of friends and/or relatives to receive notification of the person's detention, and that the Department shall, at the patient's request, provide notice to a reasonable number of such people that the person is being detained. New York, N.Y., 24RCNY Health Code § 11.21 (2009).

- At any hearing conducted pursuant to [TB control regulations], a person shall have the following due process rights:
  - Written notice detailing the grounds and underlying facts of the matter;
  - The right to have counsel present at the hearing and, if indigent, the right to appointed counsel; and
  - The right to be present at a court hearing, to cross examine, and to present witnesses, which rights may be exercised through telecommunication technology. N.J. Admin. Code § 8:57-5.15 (2009).

B. Religious Exemptions

Descriptive Note: In addition to federal and state constitutional provisions and case law interpreting the First Amendment's free exercise clause, some states have enacted statutory religious exemptions to treatment, examination, or both to protect the religious interests of patients with TB. The statutory religious exemptions below allow patients with TB who rely on spiritual means or prayer for healing to do so while protecting the public's health because the patient is required to adhere to isolation. In practice, the burden is generally on the patient to demonstrate good faith belief in his/her particular religion, and the health department may require documentation in support of that belief.

- Any person who depends exclusively on prayer for healing in accordance with the teachings of any well-recognized religious sect, denomination, or organization, and claims exemptions on such grounds, shall nevertheless be subject to examination, and the provisions of [state TB control statutory provisions] regarding compulsory reporting of communicable diseases and isolations shall apply where there is probable cause to suspect that such person has active tuberculosis. Such person shall not be required to submit to any medical treatment or to go to or be confined in a hospital or other medical institution if the person can safely be isolated in the person's own home or other suitable place of the person's choice. Colo. Rev. Stat. § 25-4-506 (2009).

- The [health official] or a health officer may not require an individual to have a physical examination, other than a chest X ray and to render sputum samples. The [health official] or a health officer may not restrict the right of the individual to select a treatment method, if the individual: (1) In good faith relies on spiritual means through prayer for healing; and

(2) Complies with the laws, rules, and regulations that relate to sanitation for and isolation of infectious, contagious, and communicable diseases. Md. Code Ann., Health-Gen. § 18-324 (LexisNexis 2009).

- A [person who has or who based upon reasonable grounds is suspected of having active tuberculosis] is not required to undergo treatment under this article if that person depends exclusively on prayer or spiritual means for healing in accordance with the tenets and practices of a recognized church or religious denomination and claims an exemption on that ground. The requirements of this article regarding compulsory reporting of tuberculosis disease, exclusion from employment or school, monitoring, examination, and isolation apply if there is clear and convincing evidence that the person is a [person who has or who based upon reasonable grounds is suspected of having active tuberculosis] and is a substantial danger to another person or the community. Ariz. Rev. Stat. § 36-734 (LexisNexis 2009).

C. Confidentiality

Descriptive Note: Public health authorities that are also covered entities under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Public Law 104-191) must comply with the requirements of the Privacy Rule, but HIPAA does not apply to all situations that TB programs and their legal counsel may face concerning patient confidentiality. The provisions in this section are examples of laws that some states have enacted or promulgated to address confidentiality, from use of a pseudonym to allowing patient information to be used for research purposes.

- Except as otherwise provided by law, all records kept by the department and by local public health agencies and all records retained in a county coroner's office in accordance with [regulation concerning retention of death certificate in county coroner's office], as a result of the investigation of tuberculosis shall be kept strictly confidential and shall only be shared to the extent necessary for the investigation, treatment, control, and prevention of tuberculosis; except that every effort shall be made to limit disclosure of personal identifying information to the minimal amount necessary to accomplish the public health purpose. Colo. Rev. Stat. § 25-4-511 (2009).
- When requesting an order from a circuit court under the provisions of [state TB control provisions], the department shall substitute a pseudonym for the true name of the person to whom the order pertains. The actual name of the person shall be revealed to the court only in camera, and the court shall seal such name from further revelation. All court decisions, orders, petitions, and other formal documents shall be styled in a manner to protect the name of the person from public disclosure. The department, its authorized representatives, the court, and other parties to the lawsuit shall not reveal the name of any person subject to these proceedings except as permitted in [state confidentiality provision]. Such information is exempt from [state public records provision]. Fla. Stat. Ann. § 392.545 (LexisNexis 2009).
- Patient medical information or information concerning reportable events pursuant to any section of this subchapter shall not be disclosed except under the following circumstances:
  - For research purposes, provided that the study is reviewed and approved by the applicable Institutional Review Board, and is done in a manner that does not identify any person, either by name or other identifying data element;
  - With written consent of the person identified;
  - When the [public health official], or his or her designee, determines that such disclosure is necessary to enforce public health laws or to protect the life or health of a named party, in accordance with applicable State and Federal laws; or
  - Pursuant to a valid court order. N.J. Admin. Code § 8:57-5.17 (2009).
- Information regarding communicable or reportable disease confidential – Exceptions

- 1) Information collected pursuant to this chapter in the possession of the department or local health departments relating to an individual who has or is suspected of having a disease designated by the department as a communicable or reportable disease under this chapter shall be held by the department and local health departments as strictly confidential. The department and local health departments may not release or make public that information upon subpoena, search warrant, discovery proceedings, or otherwise, except as provided by this section.
- 2) The information described in Subsection 1) may be released by the department or local health departments only in accordance with the requirements of this chapter and as follows:
  - Specific medical or epidemiological information may be released with the written consent of the individual identified in that information or, if that individual is deceased, his next-of-kin;
  - Specific medical or epidemiological information may be released to medical personnel or peace officers in a medical emergency, as determined by the department in accordance with guidelines it has established, only to the extent necessary to protect the health or life of the individual identified in the information, or of the attending medical personnel or law enforcement or public safety officers;
  - Specific medical or epidemiological information may be released to authorized personnel within the department, local health departments, official health agencies in other states, the United States Public Health Service, the Centers for Disease Control and Prevention (CDC), or when necessary to continue patient services or to undertake public health efforts to interrupt the transmission of disease;
  - If the individual identified in the information is under the age of 18, the information may be released to the Division of Child and Family Services within the Department of Human Services in accordance with [state law]. If that information is required in a court proceeding involving child abuse or sexual abuse under [state law], the information shall be disclosed in camera and sealed by the court upon conclusion of the proceedings;
  - Specific medical or epidemiological information may be released to authorized personnel in the department or in local health departments, and to the courts, to carry out the provisions of this title, and rules adopted by the department in accordance with this title;
  - Specific medical or epidemiological information may be released to blood banks, organ and tissue banks, and similar institutions for the purpose of identifying individuals with communicable diseases. The department may, by rule, designate the diseases about which information may be disclosed under this subsection, and may choose to release the name of an infected individual to those organizations without disclosing the specific disease;
  - Specific medical or epidemiological information may be released in such a way that no individual is identifiable;
  - Specific medical or epidemiological information may be released to a "health care provider" as defined [under state law], health care personnel, and public health personnel who have a legitimate need to have access to the information in order to assist the patient, or to protect the health of others closely associated with the patient. This subsection does not create a duty to warn third parties, but is intended only to aid health care providers in their treatment and containment of infectious disease; and
  - Specific medical or epidemiological information regarding a health care provider, as defined [under state law], may be released to the department, the appropriate local health department, and the Division of Occupational and Professional Licensing within the Department of Commerce, if the identified health care

provider is endangering the safety or life of any individual by his continued practice of health care. Utah Code Ann. § 26-6-27 (LexisNexis 2009).

- In the event a [person with tuberculosis who] poses a health threat to others uses interstate or international flight to avoid treatment and/or isolation in [State], such individual shall be deemed to have waived confidentiality as to his health status, and [State] health authorities can contact health authorities in the jurisdiction to which the individual fled regarding the health threat presented by the [person with tuberculosis]. Tenn. Comp. R. & Regs. 1200-14-4-.03 (2009).

Page last reviewed: July 6, 2011
Page last updated: October 8, 2010
Content source: Division of Tuberculosis Elimination

Centers for Disease Control and Prevention 1600 Clifton Rd. Atlanta, GA 30333, USA
800-CDC-INFO (800-232-4636) TTY: (888) 232-6348, 24 Hours/Every Day - cdcinfo@cdc.gov

STATE OF CALIFORNIA

PETE WILSON, *Governor*

DEPARTMENT OF FINANCE
OFFICE OF THE DIRECTOR
STATE CAPITOL, ROOM 1145
SACRAMENTO, CA 95814-4998

AUG 2 3 1993

AUG 3 0 1993

Honorable Mike Gotch
Member of the Assembly
State Capitol, Room 3120
Sacramento, CA 95814

Dear Assemblyman Gotch:

Our office has reviewed AB 803, and on the basis of our attached analysis of available information, our position is currently "Neutral, note concerns." As discussed in the analysis, we do have some concern with provisions of your legislation which you may wish to consider.

If you have any questions, please call me at 445-9862 and we will arrange any assistance necessary.

Sincerely,

Duane M. Cummins

STEVEN A. OLSEN for
Deputy Director

Attachment

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: August 18, 1993
POSITION: NEUTRAL, NOTE CONCERNS
SPONSOR: Health Officers Association of CA

BILL NUMBER: AB 803
AUTHOR: Gotch

BILL SUMMARY

This measure would make various changes to the Health and Safety Code related to the control of tuberculosis (TB).

FISCAL SUMMARY

Code/Department Agency or Revenue Type	SO LA CO RV	PROP 98	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) FC 1993-94	FC 1994-95	FC 1995-96	Code Fund
4260/DHS	SO	No	----------No Fiscal Impact----------			001/GF
5240/Corrections	SO	No	----------Indeterminable----------			001/GF
5460/Yth Authority	SO	No	----------Indeterminable----------			001/GF

COMMENTS

While the intent of this measure has merit, we are concerned that this bill could result in substantial litigation costs (personal liberty claims) as well as increased inmate/ward housing costs to the Department of Corrections due to extended lengths-of-stay in state prison facilities.

SUMMARY OF CHANGES

Amendments to this bill since our last analysis of the April 15 version include the following significant amendment which partially addresses one of our prior concerns:

- appears to confront jurisdictional and/or technical problems concerning the Department of Health Services (DHS) and the Department of Corrections.

Analyst/Principal	Date	Program Budget Manager	Date
MA(546) Robin E. Baker	8/20	Diane M. Cummins for	8/20

Robin E. Baker Diane M. Cummins 8/20/93

Department Deputy Director Date

Diane M. Cummins for 8/20/93

Governor's Office: By: Date: Position Noted____ Position Approved____ Position Disapproved____

BILL ANALYSIS Form DF-43 (Rev 03/92 Buff)

AB803.MDA

BILL ANALYSIS/ENROLLED BILL REPORT--(CONTINUED) Form DF-43

AUTHOR	AMENDMENT DATE	BILL NUMBER
Gotch	August 18, 1993	AB 803

ANALYSIS

A. Specific Findings

Specifically, this bill would strengthen the control of TB by: 1) allowing the Director of Health Services or health officers to order examinations for TB of "high risk" individuals (as specified) for directing preventive measures; 2) ordering health or correctional facilities not to discharge individuals suspected of having active TB until a health officer approves a written treatment plan and the local health officer has been notified; 3) requiring health care providers to notify the local health officer that individuals are likely to have active TB, or that infected individuals have ceased treatment for TB; 4) directing providers to examine or refer household contacts for review; 5) allowing health officers to issue any orders, excluding involuntary medical treatment and subject to a court order and procedures (as stipulated), he or she deems necessary to protect the public health; 6) making it a misdemeanor for failing to comply with a health officer's order in the interest of protecting the public health; 7) designating the DHS as the lead agency for TB control and prevention activities at the state level; and 8) repealing current law which would be superseded by this proposal and specifies the duties of health officers.

This bill would require that an inmate who is suspected of having or known to have active TB be kept in an institution and not discharged or transferred to any other facility without prior notification and provision of an individualized treatment plan to the health officer of the jurisdiction where the inmate is to be transferred or released. While most such plans and notifications could presumably be completed in a timely manner, even a short delay in an inmate's release could result in significant litigation regarding constitutional issues.

B. Fiscal Analysis

The DHS advises (and we concur) that the bill would contain no fiscal impact on the department, even though the bill would designate the DHS as the lead agency (a role which the department currently has assumed) for TB issues.

The costs of this measure to the Department of Corrections and the California Youth Authority (CYA) are indeterminable but potentially significant because, this bill could result in substantial litigation costs as well as increased inmate/ward housing costs due to extended lengths-of-stay in state prison facilities. Further, the department advises that the potential costs (although indeterminable) to test staff and inmates, if required to do so at increased frequency by the Director of DHS or local health officers, could be significant.

Any local government costs resulting from the mandate in this measure would not be state-reimbursable, because the mandate only involves the definition of a crime or the penalty for conviction of a crime. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 4 (commencing with Section 17550) of the Government Code.

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: August 9, 1994
POSITION: NEUTRAL
SPONSOR: HEALTH OFFICERS ASSOCIATION OF CALIFORNIA

BILL NUMBER: AB 804
AUTHOR: Gotch

DMS

BILL SUMMARY

This bill would clarify existing law by: a) allowing the transfer of tuberculosis (TB) patients, without prior approval of treatment plans, to a general acute care hospital when an immediate need for higher care is required, or from any health facility to a state correctional institution, b) requiring that treatment plans for patients being discharged from a health facility be reviewed by the local health officer within 24 hours from the time of receipt, and c) clarifying the local health officers authority to define "any appropriate facility" for confinement of TB patients convicted of violating local health officer orders for therapy, medication, etc.

FISCAL SUMMARY

Code/Department Agency or Revenue Type	SO LA CO RV	PROP 98	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) FC 1994-95	FC 1995-96	FC 1996-97	Code Fund
4260/DHS			--------No/Minor Fiscal Impact----------			001/GF
5240/DOC			--------No/Minor Fiscal Impact----------			001/GF

COMMENTS

The Department of Health Services (DHS) advises that this measure provides technical clean-up to Chapter 676, Statutes of 1993 (AB 803, Gotch), which was intended to further the control of TB by making various procedural changes related to exposed individuals. Specifically, this bill would clarify and streamline responsibilities already being performed by local health officials.

The 1994 Budget Act contains a $17,418,000 Governor's Initiative to implement a strategic plan for the control and elimination of TB in California. This measure is consistent with the objectives of the Initiative.

The DHS and the Department of Corrections (DOC) advise, and we concur, that this bill would have no fiscal impact on either department.

This bill imposes a state-mandate by requiring local health officers to review treatment plans within 24 hours from the time they are received for TB patients being discharged from a health facility. California County of Local Health Officers (CCLHO) staff advises that this change would result in minor, if any, local costs since, under current law and practice, these treatment plans are reviewed in advance of all transfers, discharges and releases.

Analyst/Principal	Date	Program Budget Manager	Date
(541) Martin L. Ewing	8/12/94	Diane M. Cummins	8/12/94

Rwm

Martin L. Ewing Diane M. Cummins

Department Deputy Director — Date

Diane M. Cummins for 8/12/94

Governor's Office: By: Date: Position Noted____ Position Approved____ Position Disapproved____

BILL ANALYSIS — Form DF-43 (Rev 03/92 Buff)

AB804.RWM

SUMMARY OF CHANGES

Amendments to this bill since our analysis of June 30, 1994 version include the following significant amendments which do not change our position:

- Clarifies and makes specific the notification and review of treatment plan requirements for TB patients.

ANALYSIS

A. Specific Findings

Existing law requires that the local health officer be notified before TB patients are discharged or paroled from health or correctional facilities, and when therapy ceases. In addition, current law requires prior health officer approval if the release is from a health facility.

The 1994 Budget Act contains a $17,418,000 Governor's Initiative to implement a strategic plan for the control and elimination of TB in California. The goals of the TB Initiative are to improve identification and reporting of all patients with TB disease; ensure that TB patients receive and complete early and appropriate treatment; prevent persons with TB infection from developing TB disease; develop, implement and evaluate measures to control TB transmission in high-risk settings; and improve education of health service providers, policy makers and communities at risk. The intent of this measure is consistent with the objectives of the Initiative.

This measure would clarify and streamline specified services currently being provided by local health officers.

B. Fiscal Analysis

The DHS and the DOC advise, and we concur, that this bill would have no fiscal impact on either department.

This bill imposes a state-mandate by requiring local health officers to review treatment plans within 24 hours, from when they are received, for TB patients being discharged from a health facility. Current law requires local health officers to review treatment plans prior to the release or transfer of TB patients from/between health and/or correctional facilities. CCLHO staff advises that this change would impose minor additional costs, if any, on local governments since these plans are, under current law and practice, reviewed prior to all transfers, discharges and releases.

POMER & ASSOCIATES

Bruce Pomer
Legislative Advocate

Janelle Youngren, R.N.
Consultant

(916) 441-7405

1100 11th Street
Suite 210
Sacramento,
CA 95814

April 15, 1993

Honorable Burt Margolin, Chairman
Assembly Health Committee
State Capitol
Sacramento, CA 95814

Dear Mr. Margolin:

The Health Officers Association of California (HOAC) is sponsoring AB 804 (Gotch) which is designed to develop appropriate health facility resources for the treatment of tuberculosis. Specifically, this legislation would require a cooperative effort between state departments and other organizations and agencies to develop housing facilities for homeless tuberculosis patients and facilities for respiratory isolation of certain persons with infectious tuberculosis. In addition, facilities would be developed for in-patient and out-patient care including treatment facilities for individuals who require legal orders of detention and for patients with complicated tuberculosis.

This legislation would also require the State Department of Health Services to develop the means for reimbursement of the services provided in the facilities described above.

Your support of this important measure will be greatly appreciated.

Sincerely,

Bruce Pomer, Legislative Consultant
Health Officers Association of California

cc: Honorable Mike Gotch
Member of the Assembly

CALIFORNIA
HEALTHCARE
ASSOCIATION

Ms. Jeremy Kashian, Consultant
Senate Committee on Judiciary
State Capitol, Room 2205
Sacramento, CA 95814

March 12, 1997

The Honorable John Burton, Chair
Senate Judiciary Committee
State Capitol, Room 4074
Sacramento, CA 95814

Reference: **SB 362 (Maddy)**

CHA POSITION: **Support/Sponsor**

The California Healthcare Association is sponsoring SB 362 (Maddy), which would provide that no health facility that declines to discharge, release or transfer a person pursuant to existing law requiring that a person with active tuberculosis be detained, shall be civilly or criminally liable or subject to administrative sanction.

This measure is necessary to protect a health care facility from criminal or civil liability for detaining a person with active tuberculosis as required by existing law. Existing law prohibits a health facility from discharging, releasing or transferring anyone known to have TB unless notification and a written treatment plan have been received by the local health officer, and the health officer has approved this plan.

THE CHA RESPECTFULLY URGES AN AYE VOTE ON SB 362.

Sincerely,

George F. Cate
Legislative Advocate

GFC/dwh

cc: The Honorable Members of the Senate Judiciary Committee
The Honorable Senator Ken Maddy
Jeremy Kashian, Consultant, Senate Judiciary Committee
Steve Trout, Consultant, Senate Judiciary Committee

1201 K Street, Suite 800 Post Office Box 1100 Sacramento, CA 95812-1100 Telephone: 916-443-7401 Facsimile: 916-552-7596
Corporate Members: Healthcare Association of Southern California, Hospital Council of Northern and Central California, and Hospital Council of San Diego and Imperial Counties

HOAC

June 14, 2002

The Honorable Helen Thomson, Chair
Assembly Health Committee
State Capitol, Room 6005
Sacramento, CA 95814

Dear Assembly Member Thomson:

The Health Officers Association of California (HOAC), which represents the physician Health Officers in California's 58 counties, is a sponsor and strong supporter of SB 843 (Perata), also known as the Omnibus TB control Act of 2002, which will be heard in your Committee June 25.

The State Department of Health Services estimates that as many as 3.4 million Californians may now be infected (latent tuberculosis infection) with the bacteria that can cause active tuberculosis As many as 10 percent of these individuals (340,0000) could develop active tuberculosis, thus continuing the cycle of transmission.

Because persons who are infected have no symptoms, the only way to detect the infection is by a tuberculin skin test. To that end, SB 843 will allow any city or county health department to provide for the certification of tuberculin skin test technicians, who would be authorized (after successful completion of a local health department training program) to place and measure skin tests for tuberculosis for the local health department.

The current shortage of health professionals and budget constraints within local health departments limit the ability to reach and test significant portions of the population that may be infected with TB. The provisions of this bill will help to increase the number of persons qualified to administer these tests. This will enhance our ability to contact and treat more people thus preventing the spread of this disease to other sectors of the population.

Health Officers Association of California
1100 11th Street, Suite 321, Sacramento, CA 95814
Phone: (916) 441-7405 Fax: (916) 485-1532

It should be noted that the tuberculosis skin technician's role and function is extremely narrow and limited. It is authorized solely for public health tuberculosis workers assigned to local health departments and is not to be used in any other health care setting.

SB 843 also contains revisions to current statute that would require the local Health Officer to notify the assigned parole agent, when known, or the regional parole administrator when a person with active TB is released from a correctional institution. These provisions were added to SB 843 at the request of the State Department of Corrections and are supported by HOAC.

We appreciate your consideration of this important legislation which is designed to protect the health of California's citizenry by preventing the spread of such serious diseases as Tuberculosis.

Sincerely,

Bruce Pomer
Executive Director

Cc: Senator Don Perata

PUBLIC HEALTH INSTITUTE

TB and the Law Project

TB Control and the Law
Frequently Asked Questions on Civil Commitment

How does the law differentiate among active TB, infectious TB, and TB infection?	Health and Safety Code §120110:* Active TB occurs if either of the following occur: (a) A smear or culture taken from any source in the person's body has tested positive for TB and the person has not completed the appropriate prescribed course of medication for active TB; or (b) There is a radiographic, current clinical, or laboratory evidence sufficient to support a medical diagnosis of TB for which treatment is indicated. *Comment*: Active TB is not necessarily in an infectious state. §120115: Infectious TB means active or suspected active TB in an infectious state. §120115: Tuberculosis infection is the latent phase of TB during which the infected person cannot spread TB to others.
How does the law define directly observed therapy (DOT)?	§120115: Directly observed therapy means the appropriately prescribed course of medical treatment for TB in which the medications are administered to the person or taken by the person under direct observation of a health care provider or designee.
What are the mandatory duties of the California Department of Health Services (CDHS or the department) regarding communicable disease control?	§120125: CDHS shall examine into the cause of communicable diseases. §120130: CDHS shall establish a list of reportable diseases. The department may adopt and enforce regulations for isolation and quarantine. §121350: CDHS shall maintain a program for the control of TB. §121357: CDHS shall be the lead agency for all TB control and prevention activities at the state level. §121358(b): CDHS shall work with local health jurisdictions to identify

* All references are to the California Health and Safety Code unless otherwise specified.

	detention sites for persistently nonadherent TB patients. *Comment*: Mandatory duties are those that are *required* to be performed by the department.
What are the discretionary duties of the California Department of Health Services regarding communicable disease control?	§120135: CDHS may establish and maintain places of quarantine and isolation. §120140: When informed of a communicable disease, CDHS may take measures to ascertain the nature of the disease and to prevent its spread. The department may take possession of the body of a living person or corpse. §120142: The state director of CDHS may order examinations of persons in close contact with infectious TB patients and persons who are at heightened risk of TB. Orders of examination must be in writing. §120145: CDHS may quarantine, isolate, inspect, and disinfect persons, animals, houses, rooms, and other property whenever necessary to protect the public's health. §120150: CDHS may destroy property if disinfection is not safe and when the property is an imminent menace to public health. §121375: CDHS may have access to all records of all institutions and clinics. §121390: CDHS shall lease facilities it deems necessary to care for persons with active contagious TB who violate quarantine or detention orders as provided in §§120280 and 121365. §121450: CDHS may distribute an annual subvention to be used for TB control according to the standards and procedures set by the department. *Comment*: Discretionary duties are not *required* to be carried out by the health officer, but are performed using the best judgment of the health officer under the circumstances.
What are the mandatory duties of local health officers in TB control?	§121365: Local health officers must use every available means to ascertain the existence of, and immediately investigate, all reported or suspected cases of active TB in the jurisdiction, and to ascertain the sources of those infections. In carrying out investigations, health officers shall follow local rules and regulations, and those of the state health services department. *Comment*: The mandatory duty is to investigate suspected cases and to

	follow all rules as established by local or state law or CDHS. There is no mandatory duty to treat persons with TB (see below). §121365: If a health order has been violated, the health officer shall advise the district attorney in writing, and shall submit to the district attorney the information in his or her possession relating to the subject matter of the order and to the violation(s). *Comment*: Although a health officer is not required to issue health orders - even if a person is persistently nonadherent with examination or treatment guidelines (see below) - once a health order is issued, it becomes a mandatory duty of the health officer to report any violations of a health order to the district attorney.
What are the discretionary duties of local health officers in TB control?	§121365: The local health officer may issue any orders he or she deems necessary to protect the public health, and may make an application to a court to enforce those orders. *Comment*: Issuing health orders is a discretionary duty of health officers. Health officers enjoy broad authority to issue any order they deem necessary to protect public health. Health officers can ask courts to enforce health orders through injunctions (i.e., court orders to compel or desist action), fines, or other equitable relief. §121366: Health officers may detain a persistently nonadherent patient in a hospital or other appropriate place for examination or treatment.
What behaviors can health orders compel?	§121365: Health orders may include, but are not limited to: (a) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility for the examination of active TB for a person who is unable or unwilling to submit to examination. (b) An order requiring a person who has active TB to complete medical treatment and follow infection control precautions. This section does not allow involuntary administration of medications. (c) An order requiring a person with active TB who is unable or unwilling to complete medication to follow a course of directly observed therapy. This section does not allow involuntary administration of medications. (d) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility of a person if *both* are present: (1)The person has infectious TB or is substantially likely to have infectious TB; and (2) The local health officer finds that there is a substantial

	likelihood that the person may transmit TB because of the person's inadequate separation from others. (e) An order authorizing the removal to, detention in, or admission into, a health facility or other treatment facility of a person if *both* are present: (1)The person has active TB or has been reported to have active TB with no report that the person has completed prescribed medication; and (2) The local health officer finds that there is a substantial likelihood, based on the person's past or present behavior, that the person cannot be relied upon to participate in or complete medical treatment and follow infection control precautions. (f) An order for exclusion from the workplace or any other place the Health officer deems inadequate to protect against the spread of TB. (g) An order for the isolation of persons with infections TB to their home until they are no longer deemed infectious. *Comment*: Again, these are discretionary duties and the authority of the health officer to issue health orders is not limited to the orders enumerated above.
What behavior indicates that a person is unlikely to be relied upon to complete medical treatment?	§121365(e)(2): The behavior may include, but is not limited to: refusal or failure to take medication, to keep appointments, to complete treatment, or to regard the infection control precautions. *Comment*: These behaviors provide the evidence that a health officer will need in order to enforce health orders against a person. This specific, individualized type of evidence is a hallmark of procedural due process.
Is a court order needed for civil detention for examination or treatment?	§121366: Health officers may detain a person in a hospital or other appropriate location for examination or treatment *without* a prior court order *except* if the person requests release (see below).
How long can a person be detained for examination or treatment?	§121366: A local health officer may detain a person in a hospital or other appropriate location for examination or treatment up to 60 days without a court order. A court order must be obtained to hold the person longer than 60 days. *However*, if at any time during detention, the person who is detained pursuant to §121365 (a), (d) or (e) requests release, the local health officer must make an application for a court order within 72 hours of the request. If the 72-hour period ends on a Saturday, Sunday or legal holiday, the request must be made by the end of the next business day.

	After a person's request for release, detention shall not continue for more than 5 business days in the absence of a court order. If a court order authorizes continued detention, a health officer must seek further court review of the detention within 90 days following the initial or subsequent court order allowing detention. In addition, the following limits on detention apply: §121368 (a): If a person is detained solely for examination under §12165(a), the person shall be detained no longer than the minimum period of time to make a medical determination of whether the person has active or infectious TB. §121368(b): If a person is detained for treatment for infectious TB under §121368(d), the person may be detained only until he or she is no longer infectious or until the health officer ascertains that the person can be adequately separated from others to prevent the transmission of TB to others. §121368(c): If a person is detained for treatment for active TB under §121365(e), the person may be detained only until he or she has completed medical treatment. *Comment*: This section of the statute interlaces discretionary and mandatory duties. It is discretionary whether a person with TB should be detained. However, once a person is detained, a series of mandatory obligations are triggered (e.g., court approval requirements and timelines) in order to ensure that procedural due process standards are met.
What information must all health orders contain?	§121367(a): All health orders, including orders for examination, treatment, directly observed therapy, detention, exclusion from work, isolation, or any other order issued by a health officer must include all of the following: (1) The legal authority and particular sections of state law or regulations under which the order is issued; (2) An individualized assessment of the person's circumstances or behavior constituting the basis for the issuance of the order. (3) The less restrictive treatment alternatives that were attempted and were unsuccessful, or that were considered and rejected with the reasons the alternatives were rejected. (4) The orders must be in writing and include the person's name, the time period the order will be in effect, the location, the payer source if known, and other terms and conditions necessary to protect the public health. A copy of the order must be served upon the person.

	Comment: Again, while issuing a health order is a discretionary act, if it is issued, it is mandatory that the health order include certain information. These mandates safeguard the due process rights of the person by requiring the government (i.e., health officer) to provide justification for his or her actions that have the potential to infringe upon the person's constitutional rights to privacy, bodily integrity, travel, etc.
What additional information must a detention order contain?	121367(b): In addition to the requirements that apply to the contents of all §121365 health orders, an order for detention shall do all of the following: (1) Include the purpose of the detention; (2) Advise the person that he or she has the right to request release from detention by contacting the health officer or designee at the number provided, and that the detention shall not continue for more than 5 days after the request in the absence of a court order authorizing detention; (3) Advise that the local health officer can only detain the person up to 60 days without a court order; and that that further court review is required within every 90 days thereafter; (4) Advise the person that he or she has the right to retain or be appointed counsel, and that the counsel shall be notified if the person chooses to obtain counsel; (5) Provide a separate notice stating at least that the person has the right to: a. request release from detention; b. counsel; and c. supply the addresses of telephone numbers of not more than 2 individuals to receive notification of the person's detention. *Comment*: Detention is one of the actions a health officer can take that most intrudes on a person's constitutional right to liberty. This section of the statute serves to protect a person's procedural due process rights by providing, for example, that the person is notified of his or her right to legal counsel and right to a review of the merits of a detention order by an impartial decision-maker. This section applies only to detention orders. Non-detention health orders (e.g., orders for examination, treatment, directly observed therapy, exclusion from work, and isolation) need not comply with §121367(b).

What must an application to a court for continued detention contain?	§121366: The health officer must prove the particularized circumstances constituting the necessity for the detention. The application must provide "clear and convincing" evidence. The application must also request an expedited hearing. *Comment*: "Clear and convincing evidence" means that the evidence must show a high probability that the person is unable or unwilling to abide by examination or treatment orders. It is a tough evidentiary standard. A court must have a firm belief or conviction as to the truth of an allegation.
What constitutes a "local detention facility?"	The term "local detention facility" has the same meaning in Health and Safety Code §120115(h) as it does in Penal Code §6031.4. Penal Code defines "local detention facility" to mean any city or county or regional facility used for the confinement of persons, excluding those portions of the facility used to confine minors. Penal Code §6031.4. It may include a private detention facility under contract with a city or county if it is responsible for the custody and control of a prisoner. Penal Code §§6031.4(c) and 6031.6. A local detention facility may include a locked ward in a county hospital if the hospital has a contract with a city or county to provide for the custody and control of a prisoner. A home used pursuant to home isolation would not be considered a local detention facility, as the owner of the home is not under contract with a city or county to provide for the custody and control of a prisoner.
Does a person who is civilly detained have a right to legal counsel?	§121366: Any person who is subject to a detention order has a right to be represented by counsel. Upon request of the person, counsel must be provided. *Comment:* The right to counsel is a hallmark of procedural due process.
Do health orders have to be in a native language?	§121369(a): For the purpose of health orders (§§121365 and 121367) and detention orders (§121366), language, visual, or hearing interpreters must be provided when necessary to ensure the person's understanding of the health order. *Comment:* The law does not require health orders to be written in a native language, so long as translators are provided. However, it would be prudent to supply written translations both to assure the patient's comprehension and to have hard evidence that the patient was duly notified of the contents of the order.

Can patients be forced to take medications?	§121369(b): The forcible administration of medications cannot occur without a court order.
What religious rights do patients have to refuse examination or treatment?	§121370: No examination or inspection shall be required of any person who depends exclusively upon prayer for healing in accordance with the teachings of any well recognized religion. However, the compulsory reporting of TB, and isolation and quarantine shall apply if there is probable cause to suspect the person is infected with the disease in the communicable stage. So long as the person can be quarantined or isolated in his or her home or other suitable place of his or her choice, he or she will not have to submit to medical treatment or be confined in a medical institution. *Comment:* A health officer might avoid an equal protection or First Amendment challenge by applying the religious exemption to a genuinely religious person regardless of whether the person seeking the exemption belongs to a "well recognized" religion.
What happens after detention?	§121361(a)(1): A health facility, a local detention facility, or a state correctional institution may not release persons known or reasonably believed to have active TB until a notification and written treatment plan has been received by the local health officer. §121361(a)(2): A person known or reasonably believed to have active TB may be discharged from a health facility only after notice is given to, and a reasonable treatment plan is approved by, the local health officer.
Can persons with active or infectious TB be detained in a jail or other correctional facility?	§121358: Individuals detained through the TB program shall not reside in a correctional facility. In *Souvannarath v. Hadden,* 95 Cal. App. 4th 1115 (2002), the court interpreted §121358 to mean that *civil detention* may not occur in a correctional facility. However, §121358 explicitly states that the statute "shall not be interpreted to prohibit the institutionalization of *criminals* with tuberculosis in correctional facilities."
What is the difference between a "state correctional institution," a "local detention facility," and a "penal institution?"	§120115(g) defines a "state correctional institution" to mean a prison, institution, or other facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority. §120115(h) defines a "local detention facility" to mean the same thing as provided in Penal Code §6031.4 (i.e., any city or county or regional facility used for the confinement of persons, excluding those portions of the facility used to confine minors). §120115(i) defines "penal institution" to mean either a state correctional institution or a local detention facility.

	Comment: Confusion arises when the operative provisions of the TB control statute do not use these terms exactly as defined. For example, §121358 prohibits the detention of persistently nonadherent patients in "correctional facilities." Does this mean a "state correctional institution," a "local detention facility," both, or something else entirely? The court in *Souvannarath v. Hadden,* 95 Cal. App. 4th 1115 (2002), interpreted §121358 to mean that persistently nonadherent TB patients may not be detained in a "jail." While the court did not define the term "jail," the court used the term as if it were synonymous with "correctional facility." Therefore, it is prudent to assume that the term "correctional facility" means any place where people are confined awaiting trial or serving short sentences (i.e., all of the facilities defined in §120115(g) (h) and (i)).
What is the difference between civil and criminal detention?	Civil detention is a non-criminal action taken by a government against a private individual in order to protect the individual from him/herself or others. It is authorized by §121366, which allows for detention in a hospital or other appropriate place for examination or treatment of individuals who violate written health orders. According to *Souvannarath v. Hadden,* 95 Cal. App. 4th 1115 (2002), a jail or prison (i.e., a penal institution or correctional facility) may not be used for civil detention. *Comment:* Criminal detention is a punitive action taken by a government against someone who has engaged in illegal activity, such as the violation of a health order issued pursuant to §121365. Criminal detention for violation of a TB-related health order is authorized by §120280. It allows detention in any appropriate facility, penal institution, or dwelling approved by the local health officer.
Does civil detention include detention in an unlocked or unsecured facility?	§121365 authorizes a health officer to issue an order for removal to, detention in, or admission into a health facility or other treatment facility. It is silent regarding whether these facilities should be locked and secured. Because §121365 provides only *examples* of the types of health orders a health officer may issue, a health officer has the discretion to determine whether or not the detention should be in a locked and secured facility. Furthermore, §121366 provides a health officer with summary enforcement authority to detain a person in a hospital or other appropriate place for treatment. This means the health officer can detain a person without a prior court order. Again, the statute is silent regarding whether the facility must be secured.

	While civil detention theoretically may include a detention in an unlocked or unsecured facility, the usefulness of such a detention order is questionable for a patient who already has demonstrated an unwillingness or inability to comply with voluntary health directives or less restrictive health orders such as directly observed therapy.
Are federal correctional facilities required to notify a health officer pursuant to §§121361 and 121362?	From a practical point of view, public health protection cannot be attained if federal facilities do not cooperate with fundamental TB control provisions as laid out in §§121361 and 121362. It is prudent of a health officer to have a memorandum of understanding with any federal facility within the health jurisdiction ensuring that the federal facility will abide by §§121361 and 121362. The memorandum of understanding is a contract that is legally enforceable.
Does an emergency room have to develop a treatment plan prior to releasing a patient known to have or suspected of having TB?	§121361(a)(1) prohibits a health facility from *discharging*, *releasing*, or *transferring* a patient known to have, or suspected of having, active TB until a notification and written treatment plan has been *received* by the local health officer. (Note that this section requires receipt by, but not approval of, the local health officer.) For the purposes of §121361(a), "health facility" is defined as "any facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness . . . to which the patients are admitted for a 24-hour stay or longer . . ." See §§ 120115(j) and 1250. Therefore, so long as an emergency room is part of a "health facility" as defined in the statute, it would be prudent for the emergency room to follow the requirements set forth in §121361(a)(1) that the facility give notification and a written treatment plan to the local health officer. It is probably irrelevant that a given patient was never admitted to the hospital.
Does an emergency room have to obtain approval from a local health officer before releasing a patient known to have or suspected of having TB?	§121361(a)(2) prohibits a health facility from *discharging* a patient known to have, or suspected of having, active TB until a written treatment plan has been *approved* by a local health officer. The local health officer must review all treatment plans submitted for approval within 24 hours of receiving the plans. Presumably, this subsection would apply only to patients who have been admitted to a hospital, and not to patients simply treated in and released from an emergency room.

PUBLIC HEALTH INSTITUTE

TB and the Law Project

California Tuberculosis Control Law*

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Public health officials in California are re-examining their duties and responsibilities for tuberculosis (TB) control in light of recent litigation regarding the civil detention of a non-compliant TB patient in a county jail. The litigation concerned a monolingual Laotian immigrant, Hongkham Souvannarath, who was detained in a county jail due to noncompliance with TB-related health orders. Her incarceration involved a series of missteps by county officials who disregarded the state statutes governing civil detention and certain constitutional principles. Upon her release, Souvannarath filed two court cases. The first case cost the county $1.2 million in settlement funds,[1] and the second resulted in an appeals court opinion ordering the county to cease using the county jail as a civil detention site for persistently nonadherent TB patients.[2]

The Souvannarath litigation exemplifies the need for public health professionals to understand the statutory and constitutional limitations on their ability to manage individuals who decline to follow public health mandates. This paper responds to this need by summarizing the legal underpinnings of communicable disease control, describing California's statutory scheme for TB control, and pointing out some areas of uncertainty relating to the TB control statute. The intended audience is health officials and their legal counsel.

I. Legal basis for TB and other communicable disease control

Public health law rests on three basic concepts: the broad *powers* vested in public health officials, the *restraints* that the Constitution and other laws place on health officials, and the specific *duties* that public health officials are obliged to carry out.[3]

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[1] See John Roemer, Reclaiming a Soul, Daily Journal, Apr. 30, 2001.

[2] See *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115 (2002).

[3] See L. Gostin, Public Health Law: Power, Duty, Restraint (2000).

Public health police power

The authority enjoyed by public health agencies and officials is grounded in the "police power" of the fifty states. The police power is the natural prerogative of sovereign governments to enact laws, promulgate regulations, and take action to protect, preserve, and promote public health, safety, and welfare. In the words of the California Supreme Court, "The preservation of the public health is universally conceded to be one of the duties devolving upon the state as a sovereignty, and whatever reasonably tends to preserve the public health is a subject upon which the legislature, within its police power, may take action."[4]

As a legal principle, the police power comes from common law—the tradition of judicial lawmaking that spans from medieval England to the present day. In political theory, it describes the conditions under which a sovereign government can legitimately intrude upon a person's autonomy, privacy, liberty, or property. The police power is an inherent authority of the states, and the states may delegate the police power to local governments. The California Constitution does so by declaring that "a county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[5] Protecting the public from TB is an "archetypical expression of police power."[6] Police-power methods routinely used in TB control include compulsory testing, reporting, treatment, isolation, and detention.

Limits on the authority of public health officials

The police power does not give public health officials unlimited authority. The U.S. Constitution (and state constitutions) shield individuals from excessive government intrusion. The constitutional protections most frequently invoked to limit the exercise of the public health police power are described below.[7]

Constitutional right to substantive due process

The Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution prohibits federal and state governments from depriving individuals of "life, liberty, or property without due process of law." Life and liberty refer to individual self-determination, while property refers to an individual's economic interests. Due process has substantive and procedural components.

Substantive due process means an individual's right to demand that the government have an adequate justification for laws or other official actions that affect life, liberty, or property. In order to assess the adequacy of the government's justification, a court will evaluate the relative importance of the individual and governmental interests at stake. The criteria become more demanding as the individual interest at stake becomes more significant.

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[4] *Patrick v. Riley*, 209 Cal. 350, 354 (1930) (upholding bovine tuberculosis control law).
[5] Cal. Const., Article 11, § 7.
[6] *Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993).
[7] This section covers federal constitutional restraints. It does not address analogous restraints contained in the California Constitution.

Rational basis test

Courts use a "rational basis" test when the individual interest is considered routine. The rational basis test asks whether a law or other official action is "reasonably related to a legitimate government interest." This inquiry into means and ends is deferential to the judgment of public officials. It requires that the basis for legislative or other official action be plausible, but not necessarily persuasive. It further requires that there be a reasonable, but not necessarily close, relationship between the government's objective and the means chosen to accomplish it. In the public health field, the rational basis test is most often used to evaluate regulatory schemes that affect property rights, like health inspection and licensure laws. However, it has also been applied to communicable disease control measures in California.

> A convicted prostitute argued that a California law requiring that she undergo HIV testing violated substantive due process. The court applied the rational basis test on the grounds that drawing blood is a routine and minimal intrusion. The court held that the statute bore a reasonable relationship to the government's legitimate interest in preventing the spread of disease, since convicted prostitutes are at a high risk of contracting and spreading HIV. *April Love v. Superior Court.*[8]

Strict scrutiny test

At the opposite end of the spectrum from the rational basis test, a "strict scrutiny" test is used when "fundamental rights" are at stake. Fundamental rights include the right to freedom from physical confinement and to privacy in matters relating to marriage, procreation, contraception, family relationships and child rearing.[9] Under the strict scrutiny test, the court evaluates whether the government's action advances a "compelling state interest," and whether it is "narrowly tailored" in a way that represents the "least restrictive alternative." The strict scrutiny test ensures that a given law or government action is precisely targeted at a very serious problem and has a minimal impact on an individual's fundamental rights.

Courts generally apply strict scrutiny to public health measures that affect the right to freedom from confinement, such as isolation or quarantine. Courts are readily persuaded that the government has a compelling interest in controlling disease. In the words of one court, "The claim of 'disease' in a domestic setting has the same kind of power as the claim of 'national security' in matters relating to foreign policy. Both claims are very powerful arguments for executive action."[10] So, the key issue in these cases is usually whether the government has taken a sufficiently tailored approach and has selected the least restrictive alternative.

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[8] 226 Cal. App. 3d 736 (1991); see also *Application of Halko*, 246 Cal. App. 2d 553 (1966) (upholding the isolation of TB patients).

[9] See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (addressing the right to travel); *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 926 (1992) (addressing reproductive rights).

[10] *Newark v. J.S.*, 652 A.2d 265, 271 (N.J. Super. Ct. Law Div. 1993).

A New Jersey court used the strict scrutiny test in upholding a city's decision to seek the involuntary hospitalization of a persistently nonadherent active TB patient who was homeless. The city had a compelling interest ("hardly any state interest is higher than protecting its citizenry from disease"), and the patient's fundamental liberty interest was at stake ("hardly any individual interest is higher than the liberty interest of being free from confinement"). The court concluded that since the patient was homeless, involuntary hospitalization was the least restrictive alternative available to ensure that he would not spread TB. *Newark v. J.S.*[11]

Some courts have identified heightened liberty interests that may not be labeled fundamental but that call for something like strict scrutiny. Examples include the right to refuse medical care and to non-disclosure of personal medical information. When these rights are implicated, courts take a very close look at the law or government action.

In 1905, the U.S. Supreme Court ruled for the government after balancing a compulsory smallpox vaccination law against an individual's claim that the law was "hostile to the inherent right of every free man to care for his own body and health in such way as to him seems best." *Jacobson v. Massachusetts.*[12]

In 1900, the San Francisco Board of Health confined residents of Chinese descent to the city unless they submitted to a bubonic plague vaccination. A resident of Chinese descent sued in part on substantive due process grounds. The court recognized that the city had a strong interest in preventing the spread of disease. However, it struck down the vaccination order in part because the order was not appropriately tailored to solve the problem. The order applied widely to unexposed persons, rather than narrowly to persons quarantined on suspicion of disease. *Wong Wai v. Williamson.*[13]

A New York law required physicians to report to a computerized database the identities of patients who received prescriptions for schedule III drugs. The U.S. Supreme Court upheld the law, ruling that the state's interest in using the database to prevent illegal drug use justified the privacy intrusion, since disclosure of private medical information is "part of modern medical practice" and there were safeguards against redisclosure. *Whalen v. Roe.*[14]

Health officials do not have to remember all the details of substantive due process. However, they should be aware that they need a strong justification to intrude on a patient's freedom of movement, bodily integrity, or privacy, and they should make every effort to minimize the impact on personal liberty.

[11] 652 A.2d 265 (N.J. Super. Ct. Law Div. 1993).
[12] 197 U.S. 11, 26 (1905).
[13] 103 F. 10 (C.C. Cal. 1900).
[14] 429 U.S. 589 (1977).

Constitutional right to procedural due process

"Procedural due process" has to do with the fairness of the procedures the government uses before depriving someone of life, liberty, or property. The basic concepts of procedural due process are prior notice of impending government action and a means to register objections. The specific procedures required in any given situation depend upon the individual interest at stake, the safeguards needed to avoid erroneous decisions, and the government's interest in efficient decisionmaking.[15]

Procedural due process jurisprudence underwent a revolution in the late twentieth century, when the judiciary was confronted with a flood of economic and social welfare regulation. The courts were generally deferential to the substantive policy determinations of the government. However, the courts remained mindful of their role as guarantors of individual rights, so they became increasingly rigorous in their evaluations of the procedures used by the government to implement policy. The involuntary detention of mentally ill persons was ground zero for the procedural due process revolution. In a series of decisions, the U.S. Supreme Court held that before mentally-ill persons can be civilly committed, they are entitled to a range of procedural due process guarantees, including legal representation and a hearing before an impartial decision-maker. Elements of procedural due process from mental health law have found their way into TB control law by both court decision and legislation.[16]

> A persistently nonadherent TB patient petitioned for release from involuntary detention. The West Virginia Supreme Court held that an infectious patient facing detention is entitled to similar procedural due process safeguards as someone with mental illness, including: (1) adequate written notice detailing the grounds and underlying facts on which commitment is sought; (2) the right to counsel; (3) the right to a hearing where they can cross-examine and present their own witnesses; (4) a standard of proof by clear, cogent, and convincing evidence; and (5) the right to a verbatim transcript of the proceedings for purposes of appeal. *Green v. Edwards.*[17]

A key issue in procedural due process jurisprudence is whether the government can restrict a person's life, liberty, or property before that person has an opportunity to be heard. Courts generally prohibit pre-hearing deprivations except under emergency conditions involving immediate danger to public health or safety.[18] However, the courts have been sympathetic to mental health and communicable disease control laws that provide for "summary confinement" (i.e., the involuntary confinement prior to receiving a court order) of persons considered dangerous to themselves or the community, as long as such persons are entitled to post-confinement hearings within a reasonable time.[19]

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[15] See *Mathews v. Eldridge*, 424 U.S. 319 (1976); see also, *Machado v. State Water Resources Control Board*, 90 Cal. App. 4th 720 (2001) (finding that procedural due process did not require a hearing before the issuance of a wastewater abatement order).

[16] Arguably, disease control measures need not be as procedurally intensive, because mental health intervention carries a greater stigma, and communicable disease presents a more immediate risk to the community.

[17] 263 S.E.2d 661 (W.Va. 1980).

[18] See, e.g., *Phillips v. San Luis Obispo County Dept of Animal Regulation,* 183 Cal. App. 3d 372 (1986) (holding that an ordinance providing for the destruction of a dog without a prior hearing was unconstitutional, since there was no imminent risk to public safety).

[19] See, e.g., *Green v. Edwards,* 263 S.E.2d 661 (W.Va. 1980).

Another major issue is whether hearings must take place before a judge, or whether they may take place in an administrative hearing with the opportunity for subsequent judicial review. Although the courts have upheld administrative hearings in a variety of settings, mental health and communicable disease control laws usually provide for judicial proceedings.

Constitutional right to equal protection

The Equal Protection Clause of the Fifth and Fourteenth Amendments guarantees that similarly situated classes of people will be treated similarly by the government. In other words, equal protection means that the government cannot arbitrarily discriminate against a group of people just because they fall into a particular category. While due process focuses on individual rights, equal protection focuses on the rights of groups.

The tests used in the equal protection context are similar to those used in the substantive due process context. The rational basis test is applied when the government is not targeting a suspicious category (known in legal parlance as a "suspect classification").[20]

> A nineteen year old challenged a statute outlawing the purchase of alcoholic beverages by minors. The court applied the rational basis test since age is not a suspect classification. The court ruled that the statute did not deny minors equal protection because it was reasonably related to the state's legitimate interest in controlling youth alcohol abuse. *Gabree v. King.*[21]

Courts apply the strict scrutiny test when "suspect classifications" of race, national origin, or ethnicity are involved because "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[22] Strict scrutiny in equal protection cases is basically the same as strict scrutiny in substantive due process cases. A court will examine whether a law or government action that discriminates on the basis race, national origin, or ethnicity is "narrowly tailored" to further a "compelling" state interest, or is the "least restrictive alternative" to achieving a "compelling" state interest. In the equal protection context, another way of assessing whether a law or government action is "narrowly tailored" or is the "least restrictive alternative" is to look at whether it is underinclusive (i.e., it singles out an ethnic or racial group when it should be targeting a more diverse group).

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[20] An intermediate test, which considers whether the government's action is "substantially related to an important state interest," is used for classifications based on gender or legitimacy. See, e.g., *Mississippi University for Women v. Hogan*, 458, U.S. 718 (1982) (finding that a nursing school no-male admissions policy denied equal protection because it was not substantially related to an important state interest).

[21] 614 F.2d 1 (1st Cir. 1980).

[22] *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

The San Francisco Board of Health quarantined the Chinatown district in response to reports that nine residents in one block had died of bubonic plague. Residents of Chinese descent were subject to the quarantine but others within the district were free to come and go. The court struck down the quarantine as a violation of equal protection. The quarantine was underinclusive in treating similarly situated people differently for no other reason than race. *Jew Ho v. Williamson.*[23]

Constitutional right to religious freedom

The "Free Exercise Clause" of the First Amendment (which applies to the states through the Fourteenth Amendment) provides that the federal and state governments shall make no laws that prohibit the free exercise of religion. The free exercise of religion means "the right to believe and profess whatever religious doctrine one desires" without government interference; however, the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[24] In other words, a law does not infringe on an individual's right of free exercise if the law does not specifically target religious conduct, but it happens to have an impact on the individual's ability to practice the tenants of her religion. In the communicable disease field, individuals have invoked the Free Exercise Clause in protesting compulsory testing, vaccination, and treatment laws. Although many states grant limited religious exemptions from such laws, forcing individuals to follow the laws despite their religious beliefs would probably not violate the First Amendment.[25]

The state charged a mother with violating public-health oriented child labor laws by using her children to distribute religious literature. The U.S. Supreme Court ruled that the state had not infringed upon the mother's right of free exercise because the child labor laws were generally applicable and were not targeted at her religion. Analogizing to mandatory vaccination, the Court declared: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts.* [26]

Constitutional right to freedom from cruel and unusual punishment

The Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishment." Some courts have indicated that the Eighth Amendment applies to civil detention as well as criminal confinement.[27]

There have been numerous Eighth Amendment challenges to the adequacy of TB control efforts in correctional facilities. The courts have ruled that although prison authorities can be

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[23] 103 F. 10 (C.C. Cal. 1900).
[24] *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 484 U.S. 872, 877 (1990).
[25] See Larry Gostin, Public Health Law: Power, Duty, Restraint 182 (2000).
[26] 321 U.S. 158, 166-67 (1944).
[27] See, e.g., *People v. Feagley*, 14 Cal.3d 338, 376 (1975) (finding that the confinement of a civilly committed, mentally disordered sex offender for an indefinite period in a prison setting violated the "cruel and unusual punishment" clauses of the California and U.S. Constitutions).

liable for failing to provide adequate medical care or a healthful, disease-free environment for prisoners, the standard of care demanded by the Eighth Amendment is minimal. Specifically, the government will be liable only if prison officials are "deliberately indifferent to serious medical needs."[28] Under this standard, a single instance of medical malpractice is not an Eighth Amendment violation, but a consistent pattern of negligent or reckless conduct may constitute a violation.[29] Several courts have also assessed whether compulsory TB testing and treatment in prisons violates the Eight Amendment. Inmates generally lose these cases.[30] It is worth noting that these cases are not directly relevant to the constitutionality of compulsory TB control measures for the general population, since prisoners have diminished liberty interests.

Constitutional right to freedom from unreasonable search and seizure

The Fourth Amendment prohibits the "unreasonable" search or seizure of a person's body, house, paper, or personal effects. Courts evaluate the reasonableness of a search by weighing the intrusion into individual privacy against the government's need for information. The courts have held that medical screening and testing programs involve searches subject to the Fourth Amendment's reasonableness requirement.[31] For example, taking a sputum sample pursuant to a compulsory examination order or requiring a skin test as a condition of public employment probably are considered searches.[32] That said, public health-related searches are almost always upheld.[33] Due to the relatively unobtrusive nature of TB testing and the importance of preventing the spread of a highly communicable disease, it is unlikely that TB testing would be found to violate the Fourth Amendment.

The Fourth Amendment also contains a set of requirements that officials must satisfy to obtain a warrant to search or seize property or persons. A reasonable search is allowed without a warrant if there is a special government need and a reasonable degree of individualized suspicion.[34] Warrantless arrests are permissible when there is both probable cause and exigent circumstances.[35]

Duties of public health officials

The police power gives public health officials the authority but not the duty to protect public health. Their affirmative obligations are set forth in statutes. From the time of statehood,

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[28] *Estelle v. Gamble*, 429 U.S. 97 (1976).
[29] See, e.g. *Degido v. Pong*, 920 F.2d 525 (8th Cir. 1990) (finding an Eighth Amendment violation because of the prison officials' failure to allocate organizational resources to develop and implement a communicable disease policy, the lack of a written protocol for TB testing, the failure to monitor prisoner medication compliance, and the inadequate investigation of a prison TB outbreak by the state health department).
[30] See, e.g., *McCormick v. State*, 105 F.3d 1059 (5th Cir. 1997) (upholding compulsory TB treatment in prison); *Hasenmeier-McCarthy v. Rose*, 986 F. Supp. 464 (S.D. Ohio 1998) (upholding compulsory TB testing in prison).
[31] See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (finding that a city hospital's tests of obstetrical patients' urine for cocaine was a search under the Fourth Amendment).
[32] See *Washington v. Canbra*, 165 Fed. 3d 920 (9th Cir. 1998) (unpublished opinion) (holding that a TST test can be considered a search).
[33] See, e.g., *April Love v. Superior Court*, 226 Cal. App. 3d 736 (1991) (holding that an HIV test of a convicted prostitute for purposes of AIDS prevention did not violate the Fourth Amendment).
[34] See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001).
[35] See *People v. Ramey*, 16 Cal. 2d 263 (1976). See also Cal. Penal Code § 836 (permitting a warrantless arrest if the criminal activity is committed in the presence of a peace officer). Section 836 would apply to a refusal to abide by a health order in a peace officer's presence.

California law has assigned counties (and cities) front-line responsibility for communicable disease control. Currently, county boards of supervisors have an all-purpose duty to "take measures as may be necessary to preserve and protect the public health in the unincorporated areas of the county."[36] County and city health officers must enforce state, county, and city statutes, regulations, and orders pertaining to public health.[37] Health officers must also take the necessary steps to prevent the spread of reportable communicable diseases.[38] In addition to their general duties in the area of communicable disease control, local public health officials have particular duties regarding certain public health hazards (e.g., domestic and wild animals) and diseases (e.g., STDs, HIV, AIDS, and TB). The TB control duties of health officials are enumerated in a special part of the Communicable Disease Prevention and Control division of the Health and Safety Code,[39] discussed in detail below.

Liability for failure to carry out disease control duties

Federal and state civil rights laws provide individuals with legal remedies for violations of their constitutional rights by public entities and public employees. Public entities and their employees were traditionally immune from liability for nonperformance or negligence in fulfilling their statutory responsibilities. However, in the late twentieth century, most states reversed course and adopted government tort liability statutes. California's Tort Claims Act allows private individuals to sue public entities and their employees for certain wrongful acts or omissions.[40] The Act makes public entities liable for breach of so-called "mandatory duties." A mandatory duty is one that is *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken.[41] It makes public employees liable for all wrongful acts and omissions, but gives them immunity for "discretionary" acts or omissions.[42]

Discretionary duties are those that include "planning and policy making" and "basic policy decisions."[43] To qualify for immunity based on discretionary duties, a local health department must demonstrate that it made a conscious, specific policy decision, deliberately balancing risks and advantages to the patient.[44] Because the majority of duties regarding the examination, treatment, and detention of TB patients are discretionary in nature, health departments and their employees are generally immune from liability for injuries that occur in

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[36] Cal. Health & Safety Code § 101025. Governing bodies of cities have a similar duty. Cal. Health & Safety Code § 101450.

[37] Cal. Health & Safety Code §§ 101030, 101470.

[38] Cal. Health & Safety Code § 120175.

[39] Specifically, part 5 of Division 105 of the Health and Safety Code (Cal. Health & Safety Code §§ 121350–121555). Chapter 1 deals with TB control, chapter 2 with pupil testing, and chapter 3 with public employee testing. This paper refers to chapter 1 as the "TB control statute."

[40] See generally, Simpson, "In Time of Emergency: Liability Issues for Public Health Practitioners," (presentation at CPHA-N 2003 annual meeting), available from the authors.

[41] *Haggis v. City of Los Angeles*, 22 Cal. 4th 490 (2000) (emphasis in original). The courts have construed mandatory duty liability narrowly. The statutory or regulatory mandate must oblige the public entity to perform a specific action designed to prevent a specific injury, and the entity's misfeasance must directly cause the plaintiff's injury.

[42] See *Johnson v. State*, 69 Cal. 3d 782 (1968) (finding that planning, policymaking and other basic policy decisions are discretionary).

[43] *Johnson v. State*, 69 Cal. 3d 782 (1968).

[44] Note the similarity between this standard of care and the "individualized assessments" of a patient's circumstances as required by California Health and Safety Code section 121367.

the performance of TB control duties. Since the statutes describe the communicable disease control duties of public health agencies and their employees in broad, permissive terms (e.g., "use every available means to investigate disease, and issue any orders deemed necessary to protect public health"), the courts seldom find agencies and employees liable for decisions about the best way to prevent or control disease.

> Jones contracted TB, allegedly from Czapky, in 1957. He sued county and state health officials under government liability statutes claiming that they failed to conduct adequate monitoring to ensure Czapky's compliance with a quarantine order confining him to his residence. The court ruled against Jones, holding that is a discretionary duty to set the terms of a quarantine. The court found that the officials had made a reasonable policy decision, so they could not be held liable even if the terms of the quarantine may have turned out to be lacking. *Jones v. Czapky.*[45]

Government Code section 855.4 provides immunity from liability for "injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease." Section 855.6 provides immunity for injury caused by failure to make an examination for the purpose to determine whether a person has a disease that would "constitute a hazard to the health or safety of himself or others." The California Law Revision Commission's comments on these sections indicate that 855.4 was intended to provide immunity for quarantine and 855.6 was intended to immunize public health examinations such as TB examinations. Despite these immunity statutes, the courts have allowed cases to proceed where public officials were not engaged in discretionary planning and policymaking, but were alleged to have been negligent in performing an operational function, such as a medical procedure.

> A police officer asked a county medical center to perform an HIV test on the blood of a mentally-disturbed person with self-inflicted stab wounds. The officer was exposed while assisting in the person's civil commitment. The county erroneously tested for hepatitis instead of HIV, discarded the sample, and released the patient. The court held that the officer could bring a lawsuit against the county for damages under the Tort Claims Act caused by anguish due to uncertainty about his HIV status, because the performance of the test was not an immune exercise of discretion. *Smith v. County of Kern.*[46]

II. Federal role in TB control

Although TB control falls mainly under state and local jurisdiction, the Constitution gives the federal government certain powers in this area. First, under its exclusive authority over immigration and naturalization, the federal government serves as the gatekeeper for aliens with active TB seeking to enter the United States.[47] It can exclude an alien with active TB from

[45] 182 Cal. App. 2d 192 (1960).
[46] 20 Cal. App. 4th 1826 (1993).
[47] See U.S. Const., Article I, § 8.

immigration or entry on a non-immigrant visa.[48] Aliens suspected of active TB can be detained at the border, repatriated, or deported.[49] The federal government requires applicants for immigration to have a medical examination that includes a chest x-ray. Consular officials may require medical examinations for non-immigrant visa applicants suspected of being medically ineligible.[50] Second, the federal government is the sole regulator of foreign and interstate commerce, and can use this authority for communicable disease control. For example, CDC can inspect, detain, quarantine, or take other measures at U.S. ports to prevent the importation of communicable diseases, including active TB.[51] CDC can also take whatever measures it deems necessary to prevent the interstate spread of TB and other communicable diseases if it finds that state and local officials are not doing enough.[52] Lastly, CDC provides support to state and local TB control authorities under the federal government's constitutional power to tax and spend for the public welfare.[53]

III. Current California TB control statute

The California TB control statute recognizes that the power to control TB rests within three levels of the public health infrastructure: CDHS, local health departments, and local health care facilities. It delegates mandatory and discretionary duties to each level.

Powers and duties of CDHS

CDHS has a range of responsibilities for communicable disease, including TB control. Mandatory duties include examining the causes of communicable diseases, establishing a list of reportable diseases (of which TB is one), acting as the lead agency for TB response, working with local health departments to identify detention sites, and maintaining a program for the control of TB.[54] CDHS also has discretion to advise local health officers, adopt regulations about isolation and quarantine, and require inspection, disinfection, isolation, or quarantine when necessary to protect the public health.[55] The TB control statute places CDHS in an administrative, supervisory, and support role, leaving the bulk of the on-the-ground work to local health departments. Specifically, it provides for CDHS to maintain a TB control program and states that CDHS is the "lead agency" for all TB control and prevention activities at the state level.[56] It authorizes CDHS to provide an annual subvention to health departments that maintain local TB control programs consistent with state standards.[57]

Powers and duties of local health officers

Local health officers bear primary responsibility for TB control in California. They are charged with both mandatory and discretionary duties. Section 121365 obliges local health officers to use every available means to investigate reported or suspected cases of active TB in

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[48] 8 U.S.C.A. § 1182; see also, 42 C.F.R. § 34.2.
[49] See 8 U.S.C.A. § 1222.
[50] See 22 C.F.R. § 41.108.
[51] See 42 C.F.R. pt. 71.
[52] See 42 C.F.R. pt. 70.
[53] See U.S. Const., Article I, § 8.
[54] Cal. Health & Safety Code §§ 120125, 120130, 121357, 121358(b), 121350.
[55] Cal. Health & Safety Code §§ 100180, 120130, 120145.
[56] Cal. Health & Safety Code §§ 121350, 121357.
[57] Cal. Health & Safety Code §§ 121450-121460.

their jurisdiction. Under section 121364, they have discretion to perform a compulsory examination of persons they have reasonable grounds to believe are at heightened risk of TB exposure. Moreover, under section 121365 they have broad discretionary duty to issue orders deemed necessary to protect the public health or the health of any individual, such as:

- order of detention for purposes of examination;
- order to complete a prescribed course of medication and if necessary, to follow infection control precautions;
- order to follow a course of directly observed therapy (DOT) (if an active TB patient is unable or unwilling to complete a prescribed course of medication);
- order of detention in a health or other treatment facility if a person is substantially likely to have infectious TB and to transmit the disease;
- order of detention in a health or other treatment facility if (1) a person has active TB and shows no evidence of having completed treatment and (2) there is a substantial likelihood, based on past or present behavior, that the patient cannot be relied upon to complete treatment and follow infection control precautions;
- order for the exclusion from attendance at the workplace; and
- order for home isolation.

Powers and duties of health care providers and facilities

Private health care providers and facilities are also on the front line of TB control. Health care providers have a mandatory duty to report to the local health officer (1) when they encounter a suspected or actual active TB patient and (2) when the patient ceases treatment for TB.[58] They have a mandatory duty to maintain written documentation of an active TB patient's adherence to an individual treatment plan.[59] In addition, a health care provider who treats an active TB patient is required either to examine all household contacts or refer them to the local health officer for examination.[60] Finally, health facilities have a mandatory duty not to discharge or release a suspected or actual active TB patient until a written treatment plan has been approved by the health officer.[61]

Statutory limits on the powers and duties of TB control professionals

The powers and duties of TB control professionals in California can significantly interfere with constitutional rights. For example, an isolation or detention order would seriously impede an individual's movement. An order to complete a prescribed course of medication might offend a patient's right to religious freedom. To protect the rights of patients, the California legislature built checks and balances into the TB control statute, breaking the constitutional principles down into a set of action steps for TB control professionals to follow.

Contents of health orders

Since TB control related health orders often implicate heightened or fundamental liberty interests (including the rights to bodily integrity, privacy, and travel), these health orders must

[58] Cal. Health & Safety Code § 121362.
[59] Cal. Health & Safety Code § 121362.
[60] Cal. Health & Safety Code § 121363.
[61] Cal. Health & Safety Code § 121361.

incorporate basic due process principles. Any TB control related health order must state the legal authority on which the order was based.[62] In addition, it must include an individualized assessment of the person's situation or behavior that justifies the order and either (1) the less restrictive alternatives that were attempted and were unsuccessful or (2) the less restrictive alternatives that were considered and rejected, and why they were rejected.[63] By making health officers walk through the individualized assessment and the less restrictive alternatives, the TB control statute basically guides health officers through the most rigorous type of substantive due process analysis (i.e., the strict scrutiny test).

Special civil detention procedures

Because civil detention entails an extreme deprivation of liberty, the civil detention process in the TB control statute involves extra procedural due process measures. A local health officer can detain without prior court authorization under section 121365, but sections 121366 and 121367(b) gives detainees the following rights:

- Upon a detainee's request, the local health officer must apply for a court order authorizing continued detention within 72 hours of the request.
- Whether or not a detainee makes a request, a court order is required for detentions of more than 60 days.
- The health officer must seek further court review of a detention within 90 days of the initial court order and within 90 days of each subsequent court review.
- The health officer must prove the necessity of the detention by "clear and convincing" evidence.
- A person subject to detention has the right to counsel and to have counsel provided.
- Each health order must advise the detainee of his or her rights regarding release requests, court orders, court review, and legal representation.
- Each health order must be accompanied by a separate notice that explains the detainee's right to request release; that lists the phone number the detainee may call to request release; that explains the detainee's right to counsel; and that informs the detainee that, at the detainee's request, the health officer will notify two individuals of the detention.[64]
- A detainee may only be detained for the amount of time necessary to fulfill the purpose of the detention.

This checklist represents a legislative effort to promulgate standard operating procedures for detention that meet or exceed constitutional requirements.

Location of detention

Section 121358(a) of the TB control statute provides that "individuals detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities." The court in *Souvannarath v. Hadden* interpreted this to mean that civil detention pursuant to the TB control statute cannot take place in a correctional facility.[65] This holding is binding on all lower courts in California. The court in that case did not consider the

[62] Cal. Health & Safety Code § 121367(a).
[63] Cal. Health & Safety Code § 121367.
[64] Cal. Health & Safety Code §§ 121366, 121367.
[65] See *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115 (2002). The case is discussed at length in Section V below.

constitutionality of Souvannarath's incarceration, but due process and Eighth Amendment issues were raised in another case that ended in the county's payment of $1.2 million in settlement funds.[66]

Interpreters

The TB control statute mandates that "language interpreters and persons skilled in communicating with vision and hearing impaired individuals shall be provided" for the purposes of executing TB related investigations and orders.[67] As such, TB control workers who interact with the public ought to try to make sure that they are understood. In addition, it would prudent to translate health orders (either verbally or in writing) for non-English speakers.[68]

Involuntary treatment

The TB control statute has several prohibitions relating to compulsory testing and treatment. Section 121369(b) provides that nothing in sections 121365, 121366 or 121367 "shall be construed to permit or require the forcible administration of any medication without a prior court order." Section 121365(b) and (c) authorize orders requiring active TB patients to complete a course of medication or undergo DOT, with the caveat that the section "does not allow the forcible or involuntary administration of medication." Section 121365(a) authorizes health officers to order the detention of patients for examination, but the section explicitly "does not authorize the local health officer to mandate involuntary anergy testing."

Religious exemption

With limited exception, "no examination or inspection shall be required of any person who depends exclusively on prayer for healing in accordance with the teachings of any well recognized religious sect, denomination, or organization and claims exemption on that ground."[69] Moreover, such person "shall not be required to submit to any medical treatment, or to go to or be confined in a hospital or other medical institution; provided, he or she can be safely quarantined and/or isolated in his or her own home or other suitable place of his or her choice."[70]

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[66] See *Souvannarath v. County of Fresno*, Civ. F-99-6655 (E.D. Cal. 1999) (second amended complaint).

[67] Cal. Health & Safety Code § 121369(a).

[68] The law does not require health orders to be written in a native language, so long as translators are provided. However, it would be sensible to supply written translations both to assure the patient's comprehension and to have hard evidence that the patient was duly notified of the contents of the order.

[69] Cal. Health & Safety Code § 121370.

[70] Cal. Health & Safety Code § 121370. Courts have ruled that states are not constitutionally obliged to offer religious exemptions. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Boone v. Boozman*, 217 F. Supp. 2d 938 (E.D. Ark. 2002). Nonetheless, the California legislature decided to provide the exemption to those belonging to "well recognized" religions. It is worth noting that the religious exemption may be subject to challenge by sincerely religious individuals who do not belong to a "well recognized" religion. In order to avoid a constitutional challenge, a health officer might consider applying the religious exemption to a genuinely religious person regardless of whether the person seeking the exemption belongs to a "well recognized" religion.

Criminal sanctions for failure to comply with TB related health orders

A health order issued under the TB control statute has teeth because failure to comply is a misdemeanor under Health and Safety Code section 120280.[71] A misdemeanor is a non-felony crime punishable by a fine and/or imprisonment in the county jail for a period of up to six months, unless otherwise specified by a particular law.[72] Anyone who violates a TB related health order may be prosecuted. Once charged, the person leaves the civil system. This is important because civil and criminal detainees are subject to different standards of due process and different types of confinement.

The TB control statute has special rules for violations of health orders issued under section 121365. The health officer is required to report violations of section 121365 orders to the district attorney.[73] Upon receipt of a report, the district attorney is supposed to prosecute the violation.[74] If a persistently nonadherent active TB patient is convicted of a misdemeanor for failing to comply with a section 121365 order, the court may order the offender to be confined for up to one year.[75] Section 120280 states that the confinement may take place in "any appropriate facility, penal institution, or dwelling approved for the specific case by the local health officer." As an alternative to confinement, the court may place the offender on probation for up to two years upon condition that the offender comply with the 121365 order.[76] The court can terminate probation and order the confinement of an offender who violates the terms of probation.[77]

IV. Legislative history of the California TB control statute

Early TB control laws

California has had a TB control statute since the early 1900s. The version adopted in 1957 gave local health departments lead responsibility for TB control.[78] It required local health officers to investigate suspected TB cases and authorized them to examine persons reasonably suspected of active TB and isolate or quarantine active cases if necessary. The procedure for doing so was to serve a written examination, quarantine or isolation order on the person.[79] Unlike the current TB control law, there was no statutory provision for the health officer to apply to court for civil enforcement of an order.[80] However, if a person violated a quarantine or isolation order, the health officer was required to notify the local district attorney.[81] Violation of an examination or isolation order was a misdemeanor, punishable by confinement until

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[71] Section 120280 cross-references the TB control statute, but it is located in a different part of the California Code.
[72] Cal. Penal Code §§ 17, 19.
[73] Cal. Health & Safety Code § 121365.
[74] Cal. Health & Safety Code § 120300.
[75] Cal. Health & Safety Code § 120280.
[76] Cal. Health & Safety Code § 120280.
[77] Cal. Health & Safety Code § 120280.
[78] Cal. Health & Safety Code § 3285 (1957).
[79] Cal. Health & Safety Code § 3285 (1957 & 1993).
[80] Compare Cal. Health & Safety Code § 3285(f) (1957 & 1993) with § 121365 (2003).
[81] Cal. Health & Safety Code § 3285(f) (1957).

compliance with the order but no longer than six months.[82] The district attorney was required to prosecute if requested by the health officer.[83]

California law appears to have authorized state funding to counties for treatment of TB patients since 1915.[84] The 1957 law provided for the state health department to lease "any facilities it deems necessary to care for persons afflicted with active contagious tuberculosis who violate the quarantine or isolation orders of the health officer," with the cost of care in state-leased facilities deducted from the county subsidy.[85]

1975 amendments

In 1975, the legislature adopted a provision authorizing CDHS to distribute an annual subvention to local health departments that maintain a TB control program consistent with standards and procedures established by the department. This provision remains in the TB control law to this day.[86]

1993 reforms: AB 803 (Gotch)

The intent of the Gotch bill was to modernize the California TB control statute. TB incidence had increased significantly in the United States in the 1980s, and there was a prevailing sense that California needed to redouble its TB control efforts. Additionally, it was recognized that the society expected and the courts would eventually require that TB patients receive procedural due process protections not unlike those afforded mentally ill persons.

In 1992, a California TB Elimination Task Force (CTETF) was convened by CDHS, CCLHO, the California Tuberculosis Controllers Association, and the American Lung Association of California. In 1994, CTETF released a Strategic Plan for Tuberculosis Control and Elimination with a number of recommendations for improving TB control in California. AB 803 was introduced as a direct consequence of CTETF. The Health Officers Association of California (HOAC) sponsored the bill, and supporters included CCLHO and ALAC. The resulting law comprises the bulk of the current TB control statute.

From the early stages of the legislative process, AB 803 included the procedural due process provisions relating to TB orders and detention that, with minor modifications, are a key feature of the current statute.[87] While authorizing health officers to detain persons without a court order, the bill also included a provision, new to California TB control law, authorizing local health officers to apply to court for civil enforcement of TB orders. It deleted the requirement in existing law that local health officers notify the district attorney of violations of TB orders, but kept the existing provision making it a misdemeanor to violate a TB order and

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[82] Cal. Health & Safety Code § 3351 (1957 & 1993).
[83] Cal. Health & Safety Code § 3355 (1957 & 1993).
[84] See *County of Sacramento v. Chambers*, 33 Cal. App. 142 (1917) (finding that a state subsidy to counties for TB treatment was not an unconstitutional transfer of a state function to a local government or a gift of public funds).
[85] Cal. Health & Safety Code § 3295 (1957). The current law appears to provide for CDHS to lease the facilities it deems necessary for persons convicted of a § 120280 misdemeanor. See Cal. Health& Safety Code § 121390 (2003).
[86] Cal. Health & Safety Code § 121450 (2003).
[87] AB 803 was introduced as a spot bill. It was replaced on April 15, 1993 with the procedural due process provisions. This paper refers to the April 15th version as the original Gotch bill.

requiring prosecution if requested by the health officer.[88] Thus, AB 803 appears to have originally been intended to give health officers a range of enforcement options. The Assembly Committee on Health report on AB 803 indicated that Assemblyman Gotch intended to establish a procedure "more in tune with current civil rights expectations that allow for gradually more restrictive measures for persistently nonadherent patients who threaten to spread infection because they do not respond to specific treatment orders. . . ." The Assembly Ways and Means Committee analysis stated that the new procedures for enforcement would generate savings by "preventing the use of misdemeanor penalties and incarceration in jail."

However, after AB 803 passed the Assembly, the Senate deleted the procedural due process provisions and the mandatory referral for prosecution provision was put back in.[89] The ACLU objected and the procedural due process provisions were reinstated, but mandatory referral for prosecution was not taken out.[90] Assemblyman Gotch apparently continued to prefer civil proceedings. The final Senate committee report on the bill quoted him as stating, "Isolation of an infectious TB patient is not an accusation, but rather to be used by medical professionals to treat TB and preserve the public's health."[91]

There were many other amendments during the legislative process, particularly relating to the reporting obligations of health facilities and the authority and responsibility of CDHS, local health officers, and the state Department of Corrections with respect to prisoners with TB.

1994 clean-up legislation: AB 804 (Gotch)

AB 804 was introduced at the same time as AB 803. HOAC sponsored and CCLHO supported it. AB 804 originally addressed financing and reimbursement issues. Early versions required CDHS to develop a plan for housing and treatment facilities for TB patients, since a key CTETF concern was prolonged acute care hospitalization of TB patients due to the lack of community-based housing facilities. There were also provisions for CDHS to create a plan for regional detention facilities. However, this language was watered down during the course of the legislative process and eventually removed altogether. After AB 803 was enacted, the legislature used AB 804 to make minor wording changes in the new statute. AB 804 was enacted in September 1994.

Funding for housing and detention of TB patients

Numerous efforts were made over the next several years to pass legislation authorizing CDHS to provide funding for local health departments for facilities to house homeless TB patients. In the 1995–1996 session, housing and detention facility provisions similar to the early versions of AB 804 were proposed in AB 476 (Escutia). At the same time, AB 553 (Escutia) proposed a CDHS contingency fund for secured housing for persistently nonadherent TB patients. One purpose was to keep patients needing detention out of local jails. Both bills died at the end of 1996, apparently because legislators concluded that CDHS already had the authority to fund local TB control efforts, and funds for housing homeless and persistently nonadherent TB patients had been appropriated in annual budget acts during this period. In 1997, SB 274

[88] See AB 803, as amended April 15, 1993.
[89] See AB 803, as amended July 12, 1993.
[90] See AB 803, as amended July 17, 1993.
[91] Senate Rules Committee, Committee Report for 1993 California Assembly Bill No. 803 (September 9, 1993).

(Watson) proposed authorizing CDHS to provide funds to local health departments for secured housing for persistently nonadherent TB patients, so that the local agencies could implement their civil detention orders. Once again, the legislation did not pass. However, the 1997–1998 budget trailer bill, SB 391 (Solis), included a provision setting a deadline of January 1, 1998 for CDHS to identify sites throughout the state where each local health department should send persistently nonadherent TB patients.[92]

Prohibition on detaining TB patients in correctional facilities

SB 391 also provided that individuals detained through "the tuberculosis control, housing, and detention program" could not reside in correctional facilities, nor could funds under that program be disbursed to correctional facilities. However, this prohibition "should not be interpreted to prohibit the institutionalization of criminals with tuberculosis in correctional facilities."[93] The SB 391 Assembly and Senate Committee Reports stated that the effect of this provision was to "stipulate that individuals housed through a specified tuberculosis control program shall not reside in correctional facilities, while not precluding the incarceration of criminals under law." The meaning of this language, codified in section 121358, was considered by the Fifth District Court of Appeal in the *Souvannarath* case.

V. The Souvannarath Case

The *Souvannarath* decision has generated considerable attention in the public health community. The underlying factual situation is troubling, and the mistakes made by the health department are sobering. Moreover, the court's interpretation of the statutory prohibition on detaining TB patients in jail facilities has been controversial.

Factual background

The Court of Appeal found the facts to be as follows: Hongkham Souvannarath was a monolingual Laotian immigrant with multi-drug-resistant TB. In January 1998, she was diagnosed with TB and ordered by the Fresno County health officer to undergo treatment at a local chest clinic. In July 1998, the health officer concluded that she was not complying with the treatment program. He served her with an examination order requiring appearance at the chest clinic. When Souvannarath failed to appear, the health officer issued another order directing that she be detained in county jail until completion of a prescribed course of treatment (for up to two years). The order did not contain the findings and notices required by the TB control statute for detention orders. The next day, Souvannarath was served with the order and simultaneously removed at gun point to the county jail. There, she was strip-searched and was placed in a safety cell for three days because a Hmong officer interpreted her statement that she was afraid to die as a suicide threat. The safety cell had no water, heat, light, bed, or toilet. Thereafter, Souvannarath was housed in the infirmary where she was expected to clean up after other inmates. Souvannarath was eventually placed in the general inmate population where she was subject to the same treatment as the other inmates. She had limited visiting hours with her family, she could make only collect calls, and she was shackled whenever she was taken from the jail to outside treatment facilities. Although the TB control statute requires a post-detention

[92] Cal. Health and Safety Code § 121358.
[93] Cal. Health and Safety Code § 121358.

judicial proceeding within at least sixty days, the health officer did not apply for court review for ten months. The costs of Souvannarath's detention in county jail were paid from funds other than the state TB control subvention. When the health officer finally applied for judicial review, the parties negotiated an agreement for Souvannarath's unconditional release.

Upon her release, Souvannarath brought two separate court cases. The first was an action for monetary damages for various alleged civil rights and constitutional violations in connection with her treatment and detention. That case settled before trial for $1.2 million.[94] In the second case, Souvannarath asked the court to order the county to stop using the county jail as a civil detention site for persistently nonadherent TB patients. The trial court ruled in Souvannarath's favor,[95] and the Fifth District California Court of Appeal affirmed.[96] The Fifth District's holding is binding on all lower state courts.

Jail prohibition issue

The Court of Appeal analyzed California Health and Safety Code section 121358, which provides:

> (a) Notwithstanding any other provision of law, individuals housed or detained through the tuberculosis control, housing, and detention program shall not reside in correctional facilities, and the funds available under that program with regard to those individuals shall not be disbursed to, or used by, correctional facilities. This section shall not be interpreted to prohibit the institutionalization of criminals with tuberculosis in correctional facilities.
>
> (b) The department shall work with local health jurisdictions to identify a detention site for persistently nonadherent tuberculosis patients appropriate for each local health jurisdiction in the state. The department shall notify all counties of their designated site by January 1, 1998.

The court concluded that the statute prohibits the use of the county jail as a civil detention site for patients like Souvannarath. The court began its analysis by deciding that the word "program" in Section 121358(a) refers to a two-level, statewide program for TB control which the legislature enacted in the TB control statute. In the court's view, civil detention by local health officers is part of this "program," and is therefore subject to the jail prohibition. Stated differently, the jail prohibition limits the discretion that section 121366 previously gave local health officers to detain TB patients in "a hospital or other appropriate place," which could include a jail.

Second, the court determined that the legislative history supported its interpretation. The Legislative Counsel's Digest accompanying SB 391 (the legislation that enacted section 121358) stated that: "[E]xisting law requires the department and each county to administer a tuberculosis control, prevention, and detention program. This bill would prohibit individuals housed under this program, other than criminal offenders, from residing in correctional facilities." The court

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[94] See John Roemer, "Reclaiming a Soul," Daily Journal, Apr. 30, 2001.
[95] *Souvannarath v. Hadden*, No. 633425-4 (Cal. Super. Ct. June 10, 1999).
[96] *Souvannarath v. Hadden*, 95 Cal. App. 4th 1115 (2002).

read the phrase "this program" in the second sentence to include detentions authorized under the TB control statute.

Fresno County countered that the proponents of section 121358 merely intended to prevent counties from using CDHS funds for detention in correctional facilities. The court rejected this argument by closely scrutinizing the wording and sentence structure of the statute. It found that the jail prohibition and the funding prohibition in 121358(a) were separate prohibitions with equal dignity. The county's interpretation would edit out the jail prohibition language. Moreover, it concluded that the last sentence of 121358(a), which saves the institutionalization of criminals in correctional facilities from the jail prohibition, would be unnecessary if the statute only contained a funding prohibition. Undeterred, the county argued that statements in the Department of Finance and CDHS Enrolled Bill Reports (internal administration reports on SB 391), which cited health officers' objections to including a jail prohibition in the bill, could indicate that the administration saw the final version of the bill as exclusively a funding prohibition. The court rejected this approach too, concluding that the statements were inconsistent with the balance of the legislative history and the health officers' concerns were most likely disregarded by the legislature.

Procedural due process issue

One part of the Court of Appeal decision is "unpublished," which means that it cannot be used as precedent in any California court. This part of the decision addresses the county's future compliance with the TB control statute. After Souvannarath filed her lawsuit, the county developed new forms and documents to bring itself into compliance. It claimed in court that these actions made a judicial order requiring compliance unnecessary. The Court of Appeal disagreed. It expressed doubt that the county's actions were anything more than paper compliance, since there was minimal evidence that the health department had changed its standard operating procedures to implement the new forms. The court's suspicion was aroused by testimony from health department officials demonstrating ignorance of the TB control statute and the basic concepts of procedural due process. The court said that public health officials "must be held to know the basic provisions of the laws which empower them and govern the exercise of their particular offices and duties."[97]

VI. Questions about the California TB control statute

By and large, California's TB control statute represents a coherent and comprehensive scheme. However, there are some areas where the statutory language is unclear. In addition some parts of the statutory scheme have been thrown into question in the *Souvannarath* decision.

Multiple enforcement mechanisms

There are three enforcement mechanisms that a health department may be able to use to ensure that a patient complies with a TB-related order: administrative, civil, and criminal. The language and history of the statute leave it unclear whether administrative enforcement actually

[97] *Souvannarath v. Hadden*, No. F035228, at 14 (Cal. Ct. App. Jan. 3, 2002) (reprinted at http://www.court.info.ca.gov/opinions/documents/F035228.PDF).

exists, and whether the three mechanisms are alternatives with equal status or whether each is intended to be used in different circumstances. The discussion of enforcement mechanisms that follows uses the example of a section 121365(e) order for detention of a persistently non-adherent patient with active tuberculosis disease.

Administrative Enforcement: Section 121366 states that a health officer may detain a persistently nonadherent patient in a health or other treatment facility without first obtaining a court order. It is possible that this statement means that the legislature has granted the health officer the coercive power of the state (i.e., the power to forcibly compel an individual's behavior against their will). When administrative agencies are granted such a power, they have what is called "summary enforcement power."[98] Administrative agencies usually do not have summary enforcement powers. Instead, they generally must apply to a court to enforce their administrative orders.

Civil Enforcement: Section 121365 provides that the local health officer may "make application to a court for enforcement" of any orders issued by that officer.[99] In other words, if a patient violates a detention order, the health officer can "borrow" the enforcement authority of a civil court by asking it to issue a ruling requiring that the patient follow the order. If the patient were violate the court ruling, the patient would be guilty of contempt of court, which is a misdemeanor in California.[100]

Criminal Enforcement: The criminal enforcement mechanism is outlined in sections 121365, 120280, and 120300. Section 121365 requires the health officer to notify the district attorney upon receiving information that an order has been violated.[101] Section 120280 makes the violation of an order a misdemeanor. Section 120300 requires the district attorney to prosecute violations. If convicted, the individual may be if sentenced for up to two years in a penal institution.

There are at least two problems generated by the statutory language regarding enforcement. First, the statutory scheme does not make it clear whether health officers possess summary TB control enforcement powers. [102] The statement in section 121366 that health

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[98] Since public health officials are not peace officers, the actual exercise of summary enforcement power would require the cooperation of local law enforcement, most likely the sheriff's department.

[99] Cal. Health & Safety Code § 121365.

[100] See Cal. Penal Code § 166(a)(4).

[101] See Cal. Health & Safety Code § 121365 ("Upon the receipt of information that any order has been violated, the health officer shall advise the district attorney of the county in which the violation has occurred, in writing, as shall submit to the district attorney the information in his or her possession relating to the subject matter of the order, and of the violation or violations.").

[102] There are some California court decisions and Attorney General opinions stating that public health officials can initiate summary enforcement proceedings without a court order. A 1919 Court of Appeal decision stated that summary quarantine by a health officer without a prior judicial order was not improper. (*In re Johnson*, 40 Cal. App. 242 (1919)). It was apparently common practice in California during the first half of the twentieth century for health officials to summarily enforce quarantine and treatment orders with the help of law enforcement personnel, and even when they doubted the wisdom of such orders, the courts do not appear to have questioned the summary enforcement process. (See, e.g., *In re Martin*, 83 Cal. App. 2d 164 (1948) and cases cited therein.) In a 1957 opinion dealing primarily with the appropriateness of isolating persistently nonadherent TB patients in jail, the California Attorney General said that "it has long been established that health officers have the power to quarantine and isolate afflicted persons without resort to court procedures." (30 Atty. Gen. Ops. 229 (1957)). In *Application of Halko*, 246 Cal. App. 2d 553 (1966), a patient detained at Mira Loma Hospital pursuant to an isolation order escaped. He was

officers may detain a patient without a prior court order implies the existence of summary enforcement power. However, the presence of explicit civil and criminal enforcement mechanisms in section 121365 could be interpreted to signify that no other enforcement mechanisms exist.[103]

Second, the statute does not indicate when civil or criminal judicial enforcement mechanisms should be pursued. The choice between proceeding on the civil or criminal side is not trivial. A criminal conviction carries a lifelong stigma. The initiation of criminal prosecution redirects the government's interaction with the TB patient away from the humane goals of individual treatment and community protection and toward punishment. A patient who is convicted of a misdemeanor becomes a criminal detainee, and thus loses some of the due process protections that the TB control statute provides to civil detainees (including the 90-day judicial review of continued detention under section 121366, the limits on duration of detention under section 121368, and the involuntary treatment prohibitions in sections 121365 and 121369).

Additionally, it is conceivable that the constitutionality of criminal prosecution for violation of a TB order could be challenged. In *People v. Lockheed Shipbuilding and Construction Company*, the Court of Appeal held unconstitutional a statutory scheme under which noncompliance with an administrative order regarding industrial injuries was made a misdemeanor.[104] The statute did not provide an opportunity for administrative or judicial review

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captured, convicted of a misdemeanor, and returned to Mira Loma. The health officer began serving successive six-month isolation orders. The patient filed a habeas corpus petition alleging that continuous detention without judicial review denied due process. The court denied the petition on the grounds that the statutory provision for isolation was reasonable and necessary to protect public health. The health officer's administrative enforcement authority was not addressed directly, but the holding is consistent with the decisions cited above in downplaying the judicial role in issuance of TB orders. On the other hand, in 1960, the Attorney General was asked whether a local health officer could initiate civil proceedings to enforce a TB order. (36 Atty. Gen. Ops. 28 (1960)). Without referring to the 1957 opinion, the Attorney General's office said health officers had two enforcement options. They could initiate civil proceedings in court to obtain an injunction against violating the order. (An injunction is a court order directing a party to do or refrain from doing a particular act.) If the individual failed to comply, they could return to court to obtain a civil contempt order. Alternatively, if the person failed to comply with the health order, the health officer could ask the district attorney to prosecute the person for a misdemeanor violation. (If convicted and confined, the person could dispute the validity of the order in a habeas corpus proceeding, which is a special court proceeding to determine the validity of a confinement.) According to the Attorney General, the second option was preferable because less expensive and time-consuming (presumably because only one court proceeding was needed to confine a persistently nonadherent person). Although the opinion does not say so, one could infer that between 1957 and 1960, the Attorney General changed his mind and concluded that health officials could not enforce their orders administratively.

[103] Uncertainty about administrative enforcement is not unique to California. A commentator has noted similar questions raised by health officers about Washington state's TB statute. See Vincler & Gordon, *Legislative Reform of Washington's Tuberculosis Control Law: the Tension between Due Process and Protecting Public Health*, 71 Washington Law Review 989 (1996). The Washington Attorney General specifically declined to offer an opinion as to whether Washington law authorized administrative enforcement. He concluded that the TB statute probably did so, but he could not predict whether the courts would uphold it. See 20 Ops Wash. Atty. Gen. 5 (1993).

[104] 35 Cal. App. 776 (1973). The California Labor Code authorized the Division of Industrial Safety to make just and reasonable orders respecting the cause of industrial injuries. There was no provision for notifying the employer or for a prior or subsequent hearing. Lockheed was prosecuted for violating an order. The court ruled that the absence of a pre-or post-order hearing denied due process. In doing so, it said that a criminal proceeding would not be an adequate substitute for a due process hearing. What seems to have troubled the court was the possibility that Lockheed would not have any opportunity in the criminal proceeding to present evidence rebutting the findings in

of the validity of the administrative order. The court held the scheme unconstitutional on due process and equal protection grounds. To be sure, the statutory scheme for TB control is different from the industrial injury scheme in *Lockheed Shipbuilding* because it provides greater due process safeguards. However, it bears some similarity in that a criminal prosecution can follow immediately on the heels of the service of the order and can short-circuit a civil hearing process. *Lockheed Shipbuilding* suggests potential vulnerability in a statutory scheme under which a civil proceeding can abruptly shift into a criminal prosecution.

The legislative history is murky as to whether civil or criminal enforcement is preferred. However, it is possible to infer a legislative preference for criminal prosecution from the fact that health officers *may* apply to court for civil enforcement of an order but *must* set the criminal process in motion by notifying the district attorney when an order is violated. If this preference for criminal enforcement is an accurate reading of the statutory scheme, it is ironic that the legislature would have enacted extensive procedural due process provisions with an intent to protect the rights of TB patients in a way that is "more in tune with current civil rights expectations" while simultaneously creating an easy way for local officials to opt out of these provisions.

It might be possible to reconcile these provisions through creative interpretation. For example, one might read section 121365 as requiring a health officer to bring violations of *court* orders (rather than *health* orders) to the attention of the district attorney. This would enable the health officer to keep proceedings on the civil side up to the point where a patient has defied a court order. In addition, one might interpret the summary enforcement language in section 121366 as creating an administrative enforcement scheme that is only available when a patient has violated an existing detention order. A health officer would have to follow the civil or criminal route for violations of all other TB-related health orders (such as isolation, direct observed therapy, and exclusion from work.) Unfortunately, while interpretations like these might lead to outcomes somewhat more consistent with the apparent legislative intent, they struggle for consistency with the literal wording of the statute.

It may be worth considering whether to modify the TB control statute to clarify the intent of these provisions. For example, the local health officer's summary enforcement power with respect to detention could be clearly indicated by adding a provision to section 121366 to the effect that, "Local law-enforcement agencies shall, if requested by the local health officer, carry out the local health officer's detention order." The local health officer could be given discretion to choose between civil and criminal enforcement if section 121365 were modified to provide that, "The local health officer may, in his or her discretion, make application to a court for enforcement of the orders or, upon receipt of information than any order has been violated, advise the district attorney of the county in which the violation has occurred."

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the administrative order. (Citing *In re Halko*, 246 Cal. App. 2d 553 (1966), the court analogized Lockheed's predicament to that of a TB patient facing detention. According to the court, the TB patient at least had the right to obtain an examination by a physician of his own choosing as a way to contest the order.) The court also concluded that the statutory scheme denied equal protection because it authorized the Division of Industrial Safety to create "special legislation" defining the actions of a single employer as a crime.

Placing persistently nonadherent TB patients in correctional facilities

The appropriateness of using jails to detain persistently nonadherent patients has long been debated in California.[105] However, the *Souvannarath* case represents the first time the courts have blocked health officers from doing so. The case might not have a great deal of practical significance if non-correctional facilities were available in every county for detention of persistently nonadherent TB patients. However, it appears that non-correctional facilities are only readily available in Los Angeles County.[106]

Regardless of the public policy debate surrounding the use of jails to detain persistently nonadherent patients, the Court of Appeal's interpretation of section 121358 is open to criticism. The interpretation turns on the notion that the word "program" in the jail prohibition refers to all the state and local TB control activities authorized by the TB control statute. Actually, the TB control statute contains separate references to the state program for the control of TB and to local TB programs.[107] The fact that CDHS is named the "lead agency" does not merge the two.[108] Arguably, section 121358's reference to the "program" in the singular is a reference only to the state program. If the legislature had meant that all local TB control activities would be covered by 121358, it might more logically have referred to "programs." If accepted by the courts, this alternate interpretation would collapse the jail prohibition into the funding prohibition.

Since Souvannarath was civilly detained, the Court of Appeal only decided whether the jail prohibition applied to civil detention. However, the jail prohibition could be interpreted to apply to *any* detention arising out of an order authorized under the TB control statute, including criminal detention. In other words, the "program" could be viewed as embracing criminal prosecution as well as civil detention. The phrase "notwithstanding any other provision of law" in section 121358 could be read as superseding the provision in section 120280 allowing confinement of the convicted person in a penal institution. Convicted TB patients would not be released from detention because section 120280 also allows their confinement in other appropriate facilities or dwellings approved by the health officer.[109] If this interpretation of the statute were adopted by the courts, it would prompt a crisis in counties that do not have non-correctional facilities available for detention. The risk of such an outcome could be forestalled by amending the final sentence of section 121358(a) to provide that: "This section shall not be interpreted to prohibit the institutionalization in correctional facilities of persons convicted of a violation of section 120280."

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[105] The Attorney General's 1957 TB opinion said that local health officers could quarantine individuals with active TB in a local jail facility if "no better suitable facility" is available for such purpose. For judicial opinions approving quarantine of persons with venereal disease in jail facilities, see *In re Martin,* 83 Cal. App. 2d 164 (1948), and cases cited therein; see also 4 Ops. Atty. Gen. 146 (1944).

[106] Two facilities in California accept TB patients for long-term detention and treatment-Los Angeles County's High Desert Hospital and Cordilleras Mental Health Center, a privately-operated facility in San Mateo County primarily serving mental health patients. In preparing this article, the authors received mixed information about the practical and financial impact on counties in other parts of California of transporting TB patients to these facilities for detention.

[107] Compare § 121350 with 121455.

[108] In fact, § 121357 makes CDHS the lead agency only at the state level.

[109] The savings clause for institutionalization of criminals would be interpreted only to apply to persons who are criminals first and TB patients second, that is to clarify that § 121358 does not require that prisoners be released to non-correctional settings if they contract TB.

Involuntary testing and treatment

The involuntary testing and treatment prohibitions in the TB control statute were added to the Gotch bill at different points in the legislative process, and perhaps as a result, they do not quite fit with one another. Section 121369(b), which was in the original version of the Gotch bill, states that nothing in sections 121365, 121366, and 121367 "shall be construed to permit or require the forcible administration of any medication without a court order." However, sections 121365 (b) and (c) (relating to health orders to complete treatment and to follow a course of DOT) prohibit health departments from the "forcible or involuntary administration of medication." These provisions were inserted into the Gotch bill when it was amended to address the ACLU's concerns.

The provisions relating to involuntary treatment are legally problematic. If the purpose of section 121369(b) is to *authorize* civil courts to issue or enforce involuntary treatment orders, the law should be explicit. As it stands, the language of section 121369(b) only *implies* that civil courts have the authority to issue and/or enforce involuntary treatment orders. The statute provides no mechanism for a health officer or other interested party to petition a court to issue an involuntary treatment order, nor does it provide a mechanism for a health officer to issue an involuntary treatment order that might be reviewed by a court, nor does it provide a mechanism for anyone to implement an involuntary treatment order once it has been issued. Sections 121365(b) and (c) provide an added complication. These sections expressly prohibit involuntary treatment under health orders to complete treatment or to follow a course of DOT, and it is not clear whether section 121369(b) is meant to override these prohibitions. Because the statute is unclear as to the status of and procedures for compelled treatment, the most viable way to force someone to take his or her medications would be to convict the patient of a misdemeanor in criminal court. Because prisoners have diminished constitutional liberty interests, correctional facilities are generally able to administer involuntary treatment.[110]

One solution to this problem would be to amend sections 121365(b) and (c) to conform with section 121369(b) by prohibiting involuntary treatment "without a prior court order." An amendment could include detailed procedures for obtaining such a court order.

Another concern regarding involuntary treatment relates to anergy testing.[111] Section 121365(a) which was added by the Gotch cleanup bill AB 804, states that the local health officer may not "mandate involuntary anergy testing." Although it is apparently no longer a recommended diagnostic tool, anergy testing is no more intrusive than other skin tests that the health officer has the authority to perform. Generally, the legislature defers to the professional judgment of health professionals regarding the use of diagnostic procedures. It is troubling to have the legislature dictate to health officers specific diagnostic tools that may or may not be used.

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[110] See the discussion of the Eighth Amendment in Section I above.

[111] Individuals with suppressed immune systems may not respond normally to conventional tuberculin skin tests. Anergy testing is a way of gauging their responsiveness to antigen skin tests by administering standard skin tests for childhood diseases.

Procedural due process for non-detention orders

A curious feature of the TB control statute is the limited procedural due process provisions for non-detention orders, such as examination, treatment, DOT, workplace exclusion, and isolation orders. For example, the notice of legal rights and subsequent hearing provisions of sections 121367 and 121366 only apply to detention orders. Although the statute provides for notice,[112] it lacks a mechanism for individuals to obtain an administrative or judicial hearing as well. This absence may create a constitutional vulnerability.

VII. Conclusion

TB control officials should make every effort to secure voluntary compliance with their requests. Doing so respects individual self-determination, maximizes resources, and maintains good community relations. Incentives and warnings can be used to cajole persistently nonadherent individuals. However, there will always be some patients who are unable or unwilling to obey requests made by TB officials. In addition, the highly infectious character of active TB means that immediate enforcement mechanisms may sometimes be needed for individuals who, if enough time were available, could be persuaded to submit voluntarily.

As long as tuberculosis remains at current levels in California, the TB control statute should provide local health officials with an effective tool kit to achieve the foregoing purposes in a manner consistent with individual rights. However, if the overall incidence or number of serious outbreaks increased dramatically, weakness in the statutory scheme could adversely affect the public health community's response capability. Uncertainty about statutory interpretation, heavy reliance on judicial review and enforcement, and legal restrictions on detention facilities could bog down the program. While such an increase is unlikely, events like the unfolding SARS outbreak are a reminder that communicable diseases do not stand still for human institutions.

[112] See § 121364(b) (mandating notice of examination order) and 121367(a) (mandating notice of 121365 orders).

(4) names of personnel who treat, prescribe, and/or issue medication; and,
(5) location where treated.

(b) The physician/patient confidentiality privilege applies to the medical/psychiatric record. Access to the medical/psychiatric record shall be controlled by the responsible physician or the medical administrator.

The responsible physician shall insure the confidentiality of each prisoner's medical record file and such file shall be maintained separately from and in no way be part of the prisoner's other jail records. The responsible physician or medical staff designated by him/her shall communicate information obtained in the course of medical screening and care to jail authorities when necessary for the protection of the welfare of the prisoner, of other prisoners, management of the jail, or maintenance of jail security and order.

(c) Written authorization by the inmate is necessary for transfer of medical/psychiatric record information unless otherwide provided by law or administrative regulations having the force and effect of law.

(d) Prisoners shall not be used for medical recordkeeping.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Amendment filed 9-30-82; effective thirtieth day thereafter (Register 82, No. 40).

1206. Medical Procedures Manual.

Every facility health administrator/physician shall, in cooperation with the facility administrator, set forth in writing policy and procedures which include but are not limited to:

(a) summoning and application of proper medical aid;
(b) contact and consultation with private physicians;
(c) emergency and non-emergency medical and dental services, including transportation;
(d) provision for medically required dental and medical prostheses and eyeglasses;
(e) notification of next of kin or legal guardian in case of serious illness;
(f) provision for care of pregnant women;
(g) screening, referral and care of mentally ill and retarded inmates;
(h) implementation of special medical programs;
(i) pharmaceuticals and a protocol for over-the-counter (non-prescription) medication; and
(j) use of non-physician personnel.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1207. Pre-Screening.

According to procedures established by the responsible physician and the facility administrator, a pre-screen is performed on all inmates prior to housing in a living area. The pre-screening shall be performed by a medically licensed person or trained non-medical staff per the written order of the physician responsible for health care at the facility.

There shall be a written plan to provide medical care for any inmate who appears at pre-screening to be in need of medical treatment or who requests medical treatment.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1208. Pre-Screening for Mental Disorders.

Any inmate who appears to be in need of psychiatric attention or who is suspected of suffering any type of mental disorder shall be brought to the attention of an appropriate medical professional.

Jails with an average daily population of 51 or more shall have a plan for identifying, screening, treatment and/or referral of the mentally disordered inmate which is developed in consultation with the local mental health director or his designee.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1209. Transfer to Treatment Facility.

A mentally disordered inmate who appears to be a danger to himself or others, or to be gravely disabled, shall be transferred to a treatment facility designated by the county and approved by the State Department of Health Services for diagnosis and treatment of such apparent mental disorder pursuant to Penal Code 4011.6 and/or Welfare and Institutions Code 5150 unless appropriate facilities and personnel, as determined by the local mental health director, are present in the jail for this purpose. Inmates found unable to be cared for adequately within any jail shall be transferred to a designated treatment facility as soon as possible.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1210. Individualized Treatment Plan.

For each inmate treated by a mental health service, in a jail, the service shall develop a written treatment plan which shall be shared with staff responsible for ongoing care of the inmate and which shall include referral to continuing mental health treatment after release.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1211. Sick Call.

There shall be a written plan implementing daily sick call conducted for all inmates or provision made that any inmate requesting medical attention be given such attention.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

1212. Vermin Control.

Each facility health administrator/physician shall develop a written plan for the prophylaxis, control and treatment of vermin-infested inmates. There shall be written, medical protocols, signed by the facility physician, if any prophylactic treatment is used for persons suspected of being infested or having contact with a vermin-infested inmate.

NOTE: Authority cited: Section 6030, Penal Code. Reference: Section 6030, Penal Code.

HISTORY:

1. Editorial correction of NOTE filed 9-30-82 (Register 82, No. 40).

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